LOUISIANA STATE LAW INSTITUTE

ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

Select Sections from the RUAA

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Meeting of the Committee

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Baton Rouge

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REVISED UNIFORM ARBITRATION ACT (2000)

Select Sections

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§ 4. Effect of agreement to arbitrate; nonwaivable provisions

A. Except as otherwise provided in Subsections B and C, a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this Chapter to the extent permitted by law.

B. Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of Section 5(A), 6(A), 8, 17(A), 17(B), 26, or 28;

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

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

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

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

Notes

RUAA Comments

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
26 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.

USCA 9:2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

C.C. Art. 3118. Appointment of umpire

Whenever the umpire has not been appointed by the submission, the arbitrators have the power to appoint him, though such power is not mentioned in the submission. But if the arbitrators cannot agree on this election, the umpire shall be appointed *ex officio* by the judge.

R.S. 9:4201. Validity of arbitration agreements

A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

R.S. 9:4203. Remedy in case of default; petition and notice; hearing and proceedings

A. The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' written notice of the application shall be served upon the party in default. Service shall be made in the manner provided by law for the service of a summons.

B. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure or refusal to perform is an issue, the court shall proceed summarily to the trial thereof.

C. If no jury trial is demanded, the court shall hear and determine the issue. Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of the issue, and upon such demand the court shall issue an order referring the issue or issues to a jury called and empanelled in the manner provided by law.

D. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall issue an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

E. Failure to pay within ten business days any deposit, fee, or expense required under the arbitration process shall constitute default in the arbitration proceeding. A party aggrieved by the default shall be entitled to remove the matter under arbitration in its entirety to a court of competent jurisdiction and shall be entitled to attorney fees and costs in addition to other remedies as provided in this Section.

§ 5. [APPLICATION] for judicial relief

A. Except as otherwise provided in Section 28, an application for judicial relief under this Chapter must be made by contradictory motion to the court and heard in the manner provided by law ~~or rule of court for making and hearing [motions] for summary proceedings~~.

B. 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.

Notes

RUAA Comments

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.

Staff Note

The changes to Paragraph A are designed to make it clear that summary proceedings are available to litigate matters relevant to an arbitration agreement. Summary proceedings may be initiated by contradictory motion or rule to show cause. C.C.P. art. 2593. The exception reference in Section 28 is to appeals. The change to Paragraph B clearly requires service of the motion by the sheriff. C.C.P. art. 2594

requires service on the defendant but does not specify the manner of service. After a petition is filed, subsequent motions may be served by registered or certified mail. C.C.P. art. 1313. Should Paragraph B be deleted as unnecessary and confusing?

USCA 9:6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

C.C. Art. 3112. Presentation and proof of claims by parties

The parties, who have submitted their differences to arbitrators, must make known their claims, and prove them, in the same manner as in a court of justice, by producing written or verbal evidence in the order agreed on between them or fixed by the arbitrators.

C.C. Art. 3120. Time for decision of arbitrators

The arbitrators who have consented to act as such, ought to determine the suit or the difference which is submitted to them, as soon as possible and within the time fixed by the submission.

R.S. 9:4205. Application heard as motion

Any application to the court under this Chapter shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. [MOTION] to compel or stay arbitration

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

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

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

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

C. If the court finds that there is no enforceable agreement, it may not pursuant to Subsection A or B order the parties to arbitrate.

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

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

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

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

Notes

RUAA Comments

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 Piship, Ltd.*, 7 S.W.3d 918 (Tex. Ct. App. 1999). The term is also used in Section 4 of the FAA.

USCA 9:3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

USCA 9:4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue,

and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 8. Provisional remedies

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

B. After an arbitrator is appointed and is authorized and able to act:

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

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

C. A party does not waive a right of arbitration by making a [motion] under Subsection A or B.

Notes

RUAA Comments

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) (staring 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.*, 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. Aim. § 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).

§ 10. Consolidation of separate arbitrations proceedings

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

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

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

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

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

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

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

Notes

RUAA Comments

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 (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.*, 558P.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. Aim. § 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 AL4 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 It 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 rime 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.

§ 12. Disclosure by arbitrator

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

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

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

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

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

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

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

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

Notes

RUAA Comments

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 Dinane v. State Farm Mut. Auto Ins. Co.*, 153 Ill. 2d 207, 212, 606 N.E.2d 1181, 1183, 180 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 Lisp. 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(0 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).

C.C. Art. 3111. Oath of arbitrators

Before examining the difference to them submitted, the arbitrators ought to take an oath before a judge or justice of the peace, to render their award with integrity and impartiality in the cause which is laid before them. **(Committee Suggested Repeal of this Article)**

§ 17. Witnesses; subpoenas; depositions; discovery

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

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

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

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

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

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

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

Notes

RUAA Comments

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.

USCA 9:7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

C.C. Art. 3114. Attendance of parties and witnesses

The parties must attend the arbitrators either in person, or by their attorney, with their witnesses and documents. If one or both of them should not appear, the arbitrators may proceed and inquire into the affair in their absence.

C.C. Art. 3115. Attendance and swearing in of witnesses

Arbitrators have no authority to compel witnesses to appear before them or to administer an oath; but, at the request of arbitrators, it will be the duty of justices of the peace to compel witnesses to appear and to administer the oath to them. **(Committee Suggested Repeal of this Article)**

R.S. 9:4206. Witnesses; summoning; compelling attendance; evidence

A. When more than one arbitrator is agreed to, all the arbitrators shall sit at the hearing of the case unless, by consent in writing, all parties agree to proceed with the hearing with a less number. The arbitrators, selected either as prescribed in this Chapter or otherwise, or a majority of them, may, at the request of a party or independently, summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for attendance shall be the same as the fees of witnesses in courts of general jurisdiction.

B. The summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator, arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to appear and testify before the court. If any person or persons summoned to testify refuses or neglects to obey the summons, upon petition, the court in and for the parish in which the arbitrators are sitting may compel the attendance or punish the person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of this state.

C. (1) The parties to the arbitration may offer evidence as is relevant and material to the dispute and shall produce evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Strict conformity to the Code of Evidence shall not be required, except for laws pertaining to testimonial privileges.

(2) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered, including the admissibility of expert evidence, and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

R.S. 9:4207. Depositions

Upon petition, approved by the arbitrators or by a majority of them, any court of record in and for the parish in which the arbitrators are sitting may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons provided by law for the taking of depositions in suits or proceedings pending in the courts of record in this state.

§ 23. Vacating award

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

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

(2) There was:

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

(b) Corruption by an arbitrator; or

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

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

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

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

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

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

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

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

Notes

RUAA Comments

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 s upport 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 "antiarbitration." 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.

USCA 9:10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

C.C. Art. 3121. Arbitrators acting in excess of power, effect

Arbitrators can not exceed the power which is given to them; and if they exceed it, their award is null for so much.

R.S. 9:4210. Motion to vacate award; grounds; rehearing

In any of the following cases the court in and for the parish wherein the award was made shall issue an order vacating the award upon the application of any party to the arbitration.

A. Where the award was procured by corruption, fraud, or undue means.

B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.

C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

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

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

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

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

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Notes

RUAA Comments

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.

R.S. 9:4212. Judgment upon award

Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith in the court wherein the order was granted.