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THE REVISED UNIFORM ARBITRATION ACT: MODERNIZING,
REVISING, AND CLARIFYING ARBITRATION LAW

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I. Background

The Uniform Arbitration Act (“UAA”), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). Of the forty-nine jurisdictions with arbitration statutes, thirty-five of these have adopted the UAA and fourteen have based their statutes in some form upon the UAA.¹ The Federal Arbitration Act (“FAA”),² which Congress passed in 1925, served as the precursor and model of the UAA.³

A primary purpose of the 1955 UAA was to insure the enforceability of agreements to arbitrate and the finality of arbitration awards in the face of often hostile state law. Like the FAA, the UAA is a succinct procedural framework governing enforcement of arbitration awards, appointment of arbitrators, method of arbitration hearing, means of compelling testimony and evidence at the hearing, and reviewability of arbitral awards.

The intent of the UAA to overcome courts' adverse common-law attitudes has been accomplished. Today arbitration is a prime mechanism favored by courts and *2 parties to resolve disputes in many areas of the law.⁴ This growth in arbitration caused NCCUSL to appoint a Study Committee in 1994 to determine whether the UAA should be revised. In 1996, the Study Committee concluded that changes were necessary in a number of areas because of the increased use of arbitration, the greater complexity of many disputes submitted to arbitration, and intervening developments in the arbitration law. That same year NCCUSL appointed a Drafting Committee to revise the UAA.

The first meeting of the Drafting Committee was in May of 1997. A total of eight meetings from 1997 to 2000⁵ were attended (1) by liaisons of American Bar Association committees, including the Committee on Alternative Dispute Resolution of the Section of Litigation, the Section of Dispute Resolution, the Torts and Insurance Practice Section, and the Senior Lawyers Division; (2) by many arbitration organizations, including the American Arbitration Association, JAMS, CPR, and the National Arbitration Forum; and (3) by observers from interested groups, including securities, construction, labor-management relations, consumers, insurance, and domestic relations.

The Drafting Committee presented the Revised Uniform Arbitration Act (“RUAA”)⁶ to NCCUSL for a final reading at its annual meeting in August 2000.⁷ NCCUSL unanimously passed RUAA on August 3, 2000.⁸

The Drafting Committee sought to achieve a number of goals in the RUAA. Some critics complain that arbitration, as it evolves, becomes more like litigation, but arbitrators decide many more involved and difficult issues than when the UAA was

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promulgated more than forty-five years ago. The Drafting Committee attempted to maintain the UAA's relatively basic format and the statute's recognition that many users of the arbitration process are non-attorneys or seek to resolve relatively minor disputes; at the same time, however, the Drafting Committee incorporated provisions that acknowledge arbitration as a means for settling extremely complicated matters. In the RUAA, the Drafting Committee modernized outdated UAA provisions, added entirely new sections, resolved issues ambiguous or unanswered under the old statute, and codified case law developments.

The RUAA includes provisions on such matters as utilizing new means of electronic communications in arbitration;⁹ whether courts or arbitrators decide arbitrability;¹⁰ provisional remedies;¹¹ arbitrator disclosure of interests and *3 relationships;¹² immunity of arbitrators and arbitration organizations;¹³ the arbitrator's power to order prehearing conferences and decide dispositive motions;¹⁴ discovery;¹⁵ court enforcement of pre-award rulings by arbitrators;¹⁶ punitive damages, attorney's fees, and other remedies;¹⁷ court awards of attorney's fees to arbitrators, arbitration organizations and prevailing parties in litigation involving an arbitration matter;¹⁸ which sections of the RUAA are waivable;¹⁹ and a phased-in effective date for when the RUAA will apply to all arbitration agreements.²⁰

The Drafting Committee sought to accomplish three main goals in the RUAA²¹:

1. Because arbitration is at heart a consensual process, the RUAA gives party autonomy primary consideration, provided the arbitration agreement conforms to basic notions of fundamental fairness. In many instances the RUAA acts as a default statute applicable only in the absence of the parties' agreement.²² This approach allows the parties to shape their own arbitration mechanism in an effort to insure that it is best suited to their particular type of transaction.
2. Many parties choose arbitration because of its relative speed, lower cost, and greater efficiency. The RUAA intends to give these factors sufficient weight whenever possible.
3. In most cases, parties intend the arbitrators' decisions to be final with little or no court involvement unless there is clear unfairness or denial of justice. The RUAA recognizes this contractual nature of arbitration by limiting the grounds on which a court may review an arbitrator's award.

From the outset of the Drafting Committee's deliberations, two issues came to the fore: federal preemption and adhesion contracts.²³ The complexity of both matters presented substantial challenges to the Drafting Committee. The Drafting Committee needed to reach early agreement on an approach to preemption and adhesion, which affect so many areas covered by state arbitration law.

A. Preemption

In the past two decades, the United States Supreme Court has developed a strong pro-arbitration stance under the FAA concerning the enforceability of arbitration clauses that override contrary state law.²⁴ Although the FAA itself does not confer *4 subject-matter jurisdiction on federal courts, the FAA's reach is broad, covering all transactions affecting interstate commerce.²⁵ This coverage creates a wide sphere in which the FAA operates, and the Supreme Court has held that it usually preempts state law that runs contrary to the federal statute's pro-arbitration policies.²⁶ However, state arbitration statutes are still effective and apply in many arbitration cases, especially where parties choose to apply a particular jurisdiction's arbitration law in their agreements and where these state arbitration laws are not inimical to the FAA's pro-arbitration position developed by the Supreme Court.²⁷

*5 The preemption doctrine also requires that the enforceability of arbitration agreements under state law must be determined by the same standards applied to other contracts. Thus, the Supreme Court struck down a state statute mandating that arbitration agreements be in a format not required of other contracts, holding that the state law failed to place agreements to arbitrate on “equal footing” with other contracts.²⁸ Treating arbitration agreements differently from other contracts under state law places a burden on such agreements that the Court has found inconsistent with fostering arbitration as a dispute-resolution mechanism.

Because the policies of most states, in particular those which have adopted the UAA, support the arbitration process, state law should apply where parties specifically choose state arbitration statutes as the means to resolve disputes. Like the FAA, these state arbitration statutes foster arbitration by making agreements to arbitrate broadly enforceable.²⁹ As a result, courts have decided numerous cases under the UAA³⁰ and should continue to do so with state adoptions of the RUAA.

However, the strong policy of federal preemption under the FAA acted as a backdrop to all the discussions of the Drafting Committee while it deliberated the RUAA. To avoid federal preemption problems for the RUAA, the Drafting Committee worked diligently to write provisions consistent with the FAA's pro-arbitration policy and not to treat law regarding state arbitration statutes different from the general state law of contracts.³¹

***6 B. Adhesion and Consumer Issues**

Encouraged by recent Supreme Court and federal appellate court opinions broadening federal arbitration law under the FAA,³² many businesses have incorporated arbitration provisions in customer, employment, and franchise contracts on this issue.³³ Binding arbitration clauses are now a common feature of agreements involving employment, consumer transactions, banking, credit cards, finances, securities, health care, insurance, franchise and telecommunication.³⁴ Such agreements often do not involve arm's-length negotiation but consist of terms presented on a take-it-or-leave-it basis--a classic indicium of a contract of adhesion. Boilerplate arbitration provisions raise serious fairness concerns because they replace a person's right to sue in court with a private adjudication system of which many individuals, such as consumers or employees, may be unaware until a dispute arises.

*7 Traditionally, courts have been reluctant to find arbitration agreements unconscionable, even in adhesion situations.³⁵ However, some recent decisions have indicated a greater willingness to scrutinize more closely the equity and enforceability of arbitration agreements, particularly in adhesion situations involving employees and consumers.³⁶ There also has been a growing trend by arbitration organizations and broad-based groups of persons involved in employment, consumer, and health-care arbitration to create consensual, fundamental due-process standards to insure the fairness of arbitration in these areas.³⁷

The Drafting Committee was very concerned with arbitration agreements in adhesion contracts, but it determined to leave this issue to developing law rather than to propose special provisions for consumers, employees, franchisees, or others in a state arbitration statute. A primary reason for this decision was to avoid the significant FAA preemption problems raised by singling out some arbitration agreements for particular treatment different from other contract law.³⁸ The Drafting Committee concluded that Congress may best develop appropriate statutory provisions for arbitration in adhesion contexts by amending the FAA.

Additionally, the Drafting Committee believed that the doctrine of unconscionability principally reflects the substantive law of contracts. State statutes dealing with relationships involving consumers, employees, franchisees, and others may better handle

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these adhesion situations and run less risk of preemption. However, if an arbitration agreement or its application is contrary to general contract law requirements, such as the requirement that terms not be so procedurally and substantively overbearing as to be unconscionable, then section 6(a) of the RUAA³⁹ *8 would invalidate the arbitration provision, especially in light of rapidly developing case law.⁴⁰

Section 4 of the RUAA makes a number of provisions nonwaivable.⁴¹ A key reason why the Drafting Committee included section 4 was to address the adhesion situation and to put some limits on the one-sidedness of arbitration agreements.⁴² For instance, section 4 requires a party, before a dispute arises, to waive the right to representation by an attorney at an arbitration proceeding.⁴³ This section has specific limits on a party's ability to unreasonably restrict notice of the initiation of an arbitration proceeding, to unreasonably prevent disclosure by a neutral arbitrator, to limit arbitrators' subpoena power, or to prevent applications to a court to aid the arbitration process.⁴⁴ Even the general provision in section 4(a) that parties may waive or vary the RUAA's effects is subject to the condition that waiver or variance is appropriate only "to the extent permitted by law."⁴⁵ This phrase seeks to underscore the principle that in adhesion situations, parties may not bind others to unconscionable arbitration provisions.⁴⁶

Because of substantial concerns over federal preemption and the difficulty of tailoring an appropriate statutory standard for unconscionability in the myriad of adhesion circumstances, the RUAA does not have a specific section on adhesion and unconscionability. However, a number of provisions, such as section 6(a) and section 4, indirectly address these issues and prohibit unconscionable arbitration clauses. Moreover, the Official Comments make clear that courts should refuse to enforce unconscionable arbitration agreements, especially in adhesion situations.⁴⁷

II. New Provisions

The RUAA includes a number of new concepts not addressed in the UAA. Because it has been almost fifty years since the UAA has been amended and seventy-five years since major changes were last made to the FAA, the Drafting Committee attempted not only to update the uniform arbitration statute to reflect modern practice, but also to address issues that are likely to arise as arbitration continues to develop as a major source of resolving disputes.

*9 A. Electronic Arbitration (E-arbitration)

The UAA and the FAA were enacted at times when commerce was conducted primarily through paper transactions. For instance, both arbitration statutes require that an arbitration agreement is enforceable only if it is "written."⁴⁸ The UAA also requires a "hearing"⁴⁹ and mandates that an arbitrator's award be "in writing and signed."⁵⁰ Understandably, the drafters of these statutes did not foresee the revolutionary changes that have occurred in commercial transactions in the age of computer technology and electronic and digital communications.

In this time of e-commerce, businesses and consumers will conduct more and more transactions by electronic means, and this changed technology will transform the manner in which parties arbitrate disputes that arise from such transactions. For instance, at least one arbitration provider, the National Arbitration Forum, already has rules for on-line arbitration.⁵¹ The RUAA takes account of this shift in business operations in a number of ways and seeks to accommodate even electronic arbitration (e-arbitration).

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The RUAA changes the requirement that an arbitration agreement be in writing⁵² to one that the accord be contained in a “record.” The term “record” is defined to mean not only a written document in a “tangible medium,” but also “information . . . that is stored in an electronic or other medium and is retrievable in perceivable form.”⁵³ Thus, the RUAA enforces arbitration agreements in electronic documents.

Concerning the UAA requirement that the arbitrator's award be “in writing and signed,”⁵⁴ the RUAA also allows the award to be a “record,” i.e., in electronic format. As to the signature requirement, the RUAA states that the arbitrator's award “must be signed or otherwise authenticated.”⁵⁵ The Comments make clear that an arbitrator may execute an award by e-signature, which means “by attaching to or logically associating with the record, an electronic sound, symbol or process with the intent to sign the record.”⁵⁶ This language was adopted from the Electronic *10 Signatures in Global and National Commerce Act,⁵⁷ which the Drafting Committee specifically incorporated into the RUAA.⁵⁸ The reason for incorporating this federal statute is to insure that the RUAA conforms to the federal legislation that allows a state law to use e-signatures.⁵⁹ As a result, the RUAA permits an arbitrator to submit a valid on-line arbitration award with an electronic signature.

The only provision in the RUAA that would require a paper transaction is section 9 regarding the initiation of arbitration. This new provision requires formal notice before a party commences an arbitration.⁶⁰ Section 9(a) states that such notice be sent “by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.”⁶¹ These methods of notice, either by certified or registered mail or by service as in a civil lawsuit, would require written documents. The Drafting Committee included section 9 to insure that parties would know when a person commenced an arbitration proceeding against them. The Drafting Committee specifically rejected suggestions that parties could send this initial notice by electronic means such as fax or electronic mail because the members were concerned that such electronic communications do not always reach the affected party or give notice on their own that a matter may involve important rights in an adjudication.

However, section 9 is a default provision and parties may give an initial notice of arbitration not only formally by registered or certified mail or by service of process, but also “in the agreed manner between the parties.”⁶² Many arbitration organizations allow parties to initiate arbitration by regular mail without registered mail or service as in a civil action.⁶³ Particularly in light of the increase in e-commerce, parties may decide to arbitrate disputes arising between them and to provide notice of the initiation of the arbitration process through electronic means. If electronic notification comports with section 4(b)(2), which allows the parties to agree to any means of giving notice provided there are no unreasonable restrictions,⁶⁴ *11 this more informal method of giving electronic notice would be appropriate under section 9.

Finally, the “hearing” requirement in section 15(d) should not be an impediment to those who desire to conduct an on-line, e-arbitration proceeding. The UAA allowed vacatur of an award when the arbitrator's refusal to “hear” evidence material to the controversy substantially prejudiced the rights of a party.⁶⁵ Even under the UAA, courts did not require that the arbitrator physically listen to testimony to render a valid award.⁶⁶ Nevertheless, the RUAA's vacatur section has restated the requirement that the arbitrator must “consider” such material evidence.⁶⁷ This change was intended to insure that an arbitrator need not listen to live testimony before making a determination. Moreover, RUAA section 15(b), allowing for summary disposition, makes clear that an arbitrator may determine a case based solely on documentation, including information submitted to the arbitrator in an electronic format. If an arbitrator decides to hold a hearing, the use of video communications under today's technology should satisfy any rights to a hearing, presentation of evidence and cross-examination of witnesses required by section 15.⁶⁸

Also, because section 15 is a waivable provision,⁶⁹ the parties may agree not to hold a live hearing before the arbitrator, but instead to submit videotape presentations of witnesses' testimony or simply to provide only documents to the arbitrator.

If the parties so desire, they should be able to conduct an e-arbitration proceeding--from commencement, through hearing and to award--by electronic, digital and other modern means of communication. These provisions allowing for e-arbitration indicate the Drafting Committee's modernization of the RUAA to meet the challenges of a new century.

B. Consolidation

Section 10 is a new provision allowing courts to consolidate arbitration proceedings in appropriate circumstances.⁷⁰ It is one of the RUAA's major changes, not only because the UAA had no consolidation provision but also because section 10's approach is contrary to FAA holdings on consolidation. Section 10 seeks to address the situation where persons are parties to multiple contracts with similar arbitration agreements and where their disputes concern essentially the same matter. Such situations are particularly common in construction, insurance, maritime, and consumer transactions.⁷¹ For instance, typically a manufacturer that sells computers *12 either over the Internet or by mail will include an arbitration clause in the sales agreement with customers.⁷² If a defect occurs in the computer, thousands of purchasers may have identical claims and be bound by the same arbitration provision with the manufacturer but in separate sales agreements. Without a means to consolidate these claims in a single proceeding, it is likely that common issues of law or fact will be resolved in multiple fora. Such a result substantially increases the overall expense of resolving the conflict and invites inconsistent and conflicting outcomes.⁷³

The UAA, the FAA, and most state arbitration statutes⁷⁴ do not specifically address consolidation of arbitration proceedings. Some state courts have interpreted their arbitration statutes to grant courts authority to order consolidation in appropriate circumstances to promote adjudicative efficiency and avoid contradictory holdings,⁷⁵ but other courts have refused to order consolidation of separate arbitrations without a specific agreement that provides for consolidation.⁷⁶ The present case law under the FAA follows this latter line of judicial decisions denying consolidation where an arbitration agreement is silent on the matter, on the ground that consolidation could infringe party autonomy.⁷⁷

*13 The Drafting Committee decided to empower courts in appropriate instances to order consolidation of arbitration cases. The Drafting Committee believed that because efficiency is a primary reason many parties enter into arbitration agreements, consolidation would encourage better use of the arbitration mechanism. The Drafting Committee also wanted to insure that parties with similar claims do not receive inconsistent determinations, an outcome which lessens participants' faith in the adjudicative process. Moreover, it is likely in many instances that when they enter into the agreement, one or more of the parties, often the non-drafting parties, do not consider the possible effects of the arbitration clause on multiparty disputes. Only when a dispute arises do most persons seriously consider the need to resolve multiple claims involving the same or similar matters in a single proceeding. The party that believes consolidation is not in its best interest will almost certainly object, making the chances of consolidation remote. Moreover, if the parties had litigated, rather than arbitrated their claims, a court invariably would have ordered the claims consolidated, joined or resolved in a class-action proceeding.⁷⁸ Indeed, there is empirical evidence that persons involved in multiple-party arbitrations overwhelmingly prefer that courts have the power to determine whether similar claims should be consolidated.⁷⁹ This is strong indication that consolidation not only benefits the process of deciding arbitral disputes more effectively, but also follows the likely intent of those who agreed to arbitration.

Section 10 is a default provision, leaving the parties free to determine in their arbitration agreements whether to allow consolidation.⁸⁰ By establishing a rule that in the absence of an agreement prohibiting consolidation, courts may order joinder,

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section 10 encourages parties to arbitration provisions to expressly address consolidation in their agreements; such an outcome enhances the probability that all parties will be on notice regarding whether a contract provides for consolidation.

Section 10 authorizes courts, not arbitrators, to order consolidation.⁸¹ The section carefully defines the criteria to conform as much as possible to the likely intent of the contracting parties and to insure fairness to all involved. Courts have discretion to order consolidation if (1) there is a multiparty situation where all *14 involved have arbitration agreements,⁸² (2) the claims arise out of essentially the same or related transactions,⁸³ (3) common issues of law or fact create the possibility of conflicting decisions if the cases were arbitrated in separate proceedings,⁸⁴ and (4) the prejudice from failure to consolidate is not outweighed by delay or prejudice to parties opposing consolidation.⁸⁵ Moreover, the court may decide to consolidate some of the claims and allow others to be resolved in separate arbitration proceedings if that would be a more appropriate result.⁸⁶ However, a court is precluded from ordering consolidation of arbitral proceedings where the parties' arbitration agreement prohibits consolidation.⁸⁷

The four criteria established in section 10(a) seek to allow a court sufficient discretion to ascertain the parties' legitimate expectations about whether they intended consolidated arbitration proceedings. A court under section 10(a)(4) should carefully balance the interests of all parties by determining whether the prejudice from denying a motion to consolidate is outweighed by the prejudice, delay, or hardship to the party opposing arbitration.⁸⁸ For instance, absent express prohibitions on consolidation, a number of decisions have recognized the right of parties to prove that consolidation would undermine their intent to arbitrate all claims separately, especially when the procedures for selecting arbitrators differ significantly.⁸⁹ However, other decisions have taken a more liberal view that a court should not require a party requesting consolidation to demonstrate that the parties clearly meant such a result but should apply a standard of whether it is more likely than not that the parties intended consolidation.⁹⁰ This latter position is the approach of section 10(a)(4). Thus, where imposition on contractual expectations will not be substantial, a court should order consolidation.⁹¹

*15 Section 10(a)(4) also requires courts determining whether to grant consolidation to consider prejudice due to alleged "undue delay" or "hardship."⁹² Such undue delay or hardship might result where, for instance, one or more separate arbitration proceedings have already progressed to the hearing stage before a party moves to consolidate. However, the decisions indicate that the mere desire to have one's dispute heard in a separate arbitration proceeding is not sufficient to prevent consolidation.⁹³

Under section 28,⁹⁴ a party cannot appeal a lower court order either granting or denying a motion to consolidate under section 10. This approach is consistent with the policy behind section 28, which does not allow parties to appeal lower court orders that result in delaying the arbitration process.⁹⁵ Whether a court grants or denies a motion to consolidate, the arbitrations likely will continue--either separately or in a consolidated proceeding--and to allow an appeal of the lower court order would detain the arbitration process.

Section 10 does not address the hotly debated issue of class-action arbitrations.⁹⁶ Consolidation enables parties who have filed claims against another to combine their disputes into a single arbitration proceeding; in a class-action arbitration, one or more parties bring an action pressing not only their own claims but also those of unrepresented persons who are similarly situated but who have not filed a challenge to the dispute.⁹⁷ Section 10(c) recognizes that consolidation of a party's claims should not be ordered in contravention of provisions in arbitration agreements *16 prohibiting consolidation,⁹⁸ but this section is not meant to address the validity of arbitration clauses in the context of class-wide disputes. The issues of class-action arbitration and the validity of arbitration clauses prohibiting class-action litigation and requiring arbitration of claims only in individual

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proceedings are the subject of much litigation.⁹⁹ The Drafting Committee reached no conclusion about class-action arbitration and this matter is not intended to be covered in section 10.

Section 10 should make it more likely that courts will consolidate arbitration proceedings between parties with similar claims and that parties will address consolidation in their arbitration agreements. As a result, these RUAA provisions should foster both the goals of providing a more efficient and fair arbitration process and of respecting party autonomy.

*17 C. Disclosure

Disclosure by arbitrators is an inherently difficult issue because, although parties rightly expect arbitrators to be impartial, they choose arbitrators because of the arbiters' expertise in a particular area. That expertise often involves business interests, professional relationships, and an arbitrator's own biases and beliefs. The UAA has no section regarding disclosure by arbitrators. The Drafting Committee believed that this important subject should be included in the RUAA to insure procedural fairness, to provide guidance for those involved in the process, and to avoid vacatur challenges to awards on the grounds of evident partiality or impropriety.

The standard for disclosure in section 12 is an objective one: an arbitrator must disclose facts that a reasonable person would consider likely to affect the arbitrator's impartiality in deciding the case.¹⁰⁰ The statute requires that before an individual accepts an appointment as an arbitrator, the person will make a reasonable inquiry and disclose to the parties and to other arbitrators known facts, particularly interests in the outcome or relationships with others involved in the arbitration proceeding, that would likely affect impartiality as viewed from the perspective of a reasonable person.¹⁰¹ The obligation to disclose continues throughout the proceeding.¹⁰² Either *18 an arbitrator's failure to disclose facts giving rise to a conflict of interest or an arbitrator's continuing to serve after such disclosure to which a party timely objects may be grounds for vacatur under section 23(a)(2).¹⁰³

The disclosure standards in section 12 apply to neutral and non-neutral arbitrators but with different effects. The section's application to party arbitrators was intended to insure the integrity of the process when panels of arbitrators, including non-neutrals, decide an arbitration case. The Drafting Committee concluded that it was important for all involved, particularly the neutral arbitrators, to know the specific interests of arbitrators who were selected by the parties and who may or may not be expected to be neutral in determining some or all of the issues.¹⁰⁴ However, unlike the situation with neutral arbitrators, the parties may agree to waive all disclosure requirements by non-neutrals.¹⁰⁵ Moreover, the grounds for vacatur under section 23(a)(2) for a party arbitrator are corruption or prejudicial misconduct and not the ground of evident partiality that applies only to neutrals.¹⁰⁶

Even if a neutral arbitrator has failed to disclose an interest or relationship, it is often difficult for parties to vacate an award under section 23(a)(2) for evident partiality.¹⁰⁷ Without lowering the barrier of the finality of arbitration awards, the *19 Drafting Committee concluded that when a neutral arbitrator fails to disclose "a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party," a court should presume that the arbiter acted with evident partiality.¹⁰⁸ The shifting of the burden of proof in this limited and somewhat extreme situation will require the neutral, who is in the best position to know the exact nature and extent of the interest or relationship, to explain the matter.

A Commissioner made a last-minute motion from the floor during the final reading of the RUAA at the 2000 meeting of Committee of the Whole of NCCUSL. The Drafting Committee reluctantly accepted the amendment, section 11(b), which provides that a person with "a known, direct, and material interest in the outcome of the arbitration proceeding or a known,

existing, and substantial relationship with a party” should not serve as a neutral arbitrator.¹⁰⁹ The Drafting Committee hesitated to accept the motion because it believed that professional arbitrators would not accept appointment where they had such an interest or relationship. Moreover, the presumption of vacatur in section 12(e) would apply to an award by an arbitrator who failed to disclose such an interest in the outcome or relationship with a party.¹¹⁰

Section 11(b) has two other problems. First, assume an arbitrator discloses what the claimant in the arbitration considers “a known, existing, and substantial relationship” with the respondent and the claimant objects under section 11(b) to the arbitrator’s continued appointment. The arbitrator disagrees and overrules the claimant’s objection. The Drafting Committee intended to allow a duly appointed arbitrator, and not the parties, to ultimately decide whether the arbitrator will continue to serve in the face of objection by one of the parties.¹¹¹ Where an arbitrator discloses what one party believes is “a known, existing, and substantial relationship with a party” but continues to serve, section 12(c) applies so the *20 challenging party’s remedy is not a pre-award motion to a court to remove the arbitrator but rather a motion, after the arbitrator’s decision, to vacate an adverse award without the presumption of vacatur in section 12(e). Thus, the precatory language of section 11(b) serves little purpose other than an admonition that most arbitrators would heed regardless of this provision.

Second, the language in section 11(b) intimates that where a person has a conflicting interest or relationship that is less than “a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party,” the person may serve as a neutral arbitrator. Such an interpretation is not the intent of the standard carefully outlined in section 12. Section 11(b) will do a disservice if courts interpret it to allow individuals to serve as neutral arbitrators despite a conflict that might not rise to the level of “a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party,” but that would still cause a reasonable person to question the arbiter’s impartiality under section 12(a).

Finally, it should be noted that, to some extent, the parties may agree to change the standard of disclosure by a neutral arbitrator. Section 12’s disclosure requirements conform to those generally found in the case law,¹¹² but the rules of some arbitration organizations and the norms in certain fields of arbitration¹¹³ may provide higher or lower guidelines. The RUAA provides that before a claim arises, parties may vary the disclosure requirements provided they do not unreasonably restrict the right under section 12 to disclosure of any facts by a neutral arbitrator.¹¹⁴ This limited right to waive disclosure requirements recognizes that the parties may fashion provisions suitable to their situation if they do not unreasonably impinge upon the right to arbitrator disclosure of important information.

The disclosure provisions of section 12 are critically important to insure both party choice and fairness in the arbitration process. They establish consistent standards so arbitrators, parties, and their attorneys or representatives will know what information the arbiters must provide. The primary intent of section 12 is to insure access to information that might reasonably affect arbitrator impartiality. If persons know that arbitrators have a duty to disclose such information, they will have faith in arbitration as a just decision-making process.

***21 D. Remedies**

The RUAA treats remedies in section 8, concerning provisional remedies, and section 21, concerning final remedies. In arbitration, as in litigation, parties sometimes need provisional relief to insure the fairness of the process. Under present case law arbitrators clearly have broad authority to order provisional measures that are the equivalent of civil remedies, such as attachment, replevin, and sequestration to preserve assets, or to make preliminary rulings requiring parties to undertake certain acts that affect the subject matter of the arbitration proceeding.¹¹⁵

The primary issue regarding authority to order provisional remedies during arbitration is whether a judge or an arbitrator is the appropriate authority to issue the remedy. One difficulty raised by allowing a court to grant interim relief is that judicial action may preempt the arbitrator's authority to decide a case because the judge would be required to assess the probability of success on the merits even though in their arbitration agreement, the parties authorized the arbitrator to decide the merits of their dispute. Additionally, by granting a court jurisdiction to award preliminary remedies, the parties become entangled in the cost, delay, and complexities of litigation that they sought to avoid by agreeing to arbitration in the first place.

On the other hand, there are problems with giving only arbitrators the authority to grant provisional remedies. A major concern is that arbitrators' orders are not self-enforcing.¹¹⁶ As such, parties may disregard arbitral orders to preserve assets or take other provisional actions necessary to insure that the subject matter of the arbitration is protected for a final determination.

The basic approach of section 8 is that before an arbitrator is appointed to consider a dispute, a court may order provisional remedies to protect the *22 effectiveness of the arbitration proceeding.¹¹⁷ After the arbitrator is appointed, the arbitrator issues any necessary provisional remedies.¹¹⁸ However, after appointment of an arbitrator when a matter is "urgent" and the arbitrator does not have the time or power to act, a party may seek provisional relief from a court.¹¹⁹

Section 18 is intended to overcome the concern that arbitrators' orders are not self-enforcing.¹²⁰ If an arbitrator grants a provisional remedy or makes a pre-award ruling with which a party refuses to comply, section 18 allows the other party to seek from an appropriate court "an expedited order" to confirm the arbitrator's determination.¹²¹ The court must act on the arbitrator's ruling as expeditiously as possible to avoid dissipation of assets or loss of the subject matter of the arbitration proceeding. Nor should the court become entangled in a substantive appraisal of the merits of the arbitrator's decision on preliminary relief because a court may review the arbitral order only under the limited standards of section 23 for vacatur and section 24 for modification.¹²²

Section 21 of the RUAA deals with final remedies.¹²³ This provision demonstrates both the breadth and the limit of arbitrators' power to grant relief and of parties' autonomy to shape their agreement about remedies. Section 21(c)¹²⁴ preserves arbitrators' traditional, broad right under the UAA, FAA and case law to *23 fashion relief.¹²⁵ This section continues to sanction arbitrators' remedial creativity, even exceeding the authority of courts, which are circumscribed by principles of law and equity. An arbitrator is not bound by standards of law, but "may order such remedies as the arbitrator considers just and appropriate under the circumstances."¹²⁶ To insure comprehensive authority to award relief, the Drafting Committee retained the UAA's similar language that "(t)he fact that such a remedy could not or would not be granted by the court" is not a ground for a court to refuse to confirm or to vacate an award.¹²⁷ Thus, section 21(c) maintains the principle of allowing arbitrators freedom to craft appropriate remedies for the particular situation that arises in arbitration. This remedial discretion remains one of the hallmarks of arbitration.

However, two areas in section 21, attorney's fees and punitive damages, are quite different from the traditional, broad powers of arbitrators to order remedies and provide examples of limits on the policy of party autonomy. Under the UAA arbitrators could not award fees of counsel unless the parties' agreement specifically allowed for them.¹²⁸ The RUAA changes this prohibition so that arbitrators may now award attorney's fees and other reasonable expenses of arbitration.¹²⁹ Most jurisdictions presently recognize the authority of arbitrators to award punitive damages.¹³⁰ The RUAA has adopted this majority view, but subsections 21(a) and 21(b) limit arbitrators to making awards of punitive damages and attorney's fees only if "authorized by law in a civil action."¹³¹ This restriction is not applicable to other remedies under section 21(c).¹³² It should be noted that, although section

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21(b) requires a legal basis for awarding attorney's fees, this language was not intended to authorize courts to review these awards on the ground of inappropriate application of the law.¹³³ The general rule that a reviewing court should not vacate or refuse to confirm an arbitral award of attorney's fees on this ground still applies.¹³⁴

***24** The RUAA places even further limits on arbitrators' authority to award punitive damages. Section 21(a) permits arbitrators to award punitive or other exemplary remedies only when the evidence would permit a court to award such relief.¹³⁵ Thus, unlike an award of attorney's fees or other remedies, a reviewing court could pass upon the legal propriety of a punitive damages award. To insure an arbitrator uses the appropriate evidentiary and legal standards, section 21(e) mandates that the arbitrator must separately state the amount of punitive damages or other exemplary relief and provide the basis in fact and in law for authorizing such award.¹³⁶ The requirement of an arbiter's statement as to the factual and legal basis for punitive damages is an exception to the general rule that arbitrators need not write an opinion or give rationales for their awards.¹³⁷

The requirements in section 21(a), that there must be evidence sufficient to prove punitive damages the same as in a civil action, and section 21(e), that arbitrators must state the basis in law for punitive awards,¹³⁸ went beyond the recommendations of the Drafting Committee,¹³⁹ but the Committee of the Whole of the Uniform Law Commissioners adopted these requirements upon a Commissioner's motion made during the second reading of the RUAA in August 2000. The Committee of the Whole approved these provisions because some Commissioners raised concerns about the nature of punitive relief and the limited scope of judicial review of arbitral punitive damages awards. However, the consequences of these additional limitations on arbitrators' authority to award punitive remedies could be detrimental to the arbitration process. These mandates in sections 21(a) and (e) will likely guarantee a court challenge by the losing party to vacate any punitive damages award by claiming insufficient evidence or improper application by the arbitrator of the law of punitive damages to the facts of the case.¹⁴⁰

***25** Such court actions will add significantly to the time and cost of the arbitration process, thereby adversely impacting the important goals of cost savings and efficiency which most parties desire when they voluntarily agree to arbitration.¹⁴¹ This result of more legal requirements and greater possibility of court action likely will reinforce the existing hesitancy of arbitrators to award punitive relief.¹⁴²

There is another difference in the statute between the remedies of punitive damages and attorney's fees. Unlike an award of attorney's fees,¹⁴³ the parties cannot by agreement confer authority on an arbitrator to grant punitive damages. The statute draws this distinction because punitive damages entail the power to punish for a public injury beyond that of the immediate parties to the dispute.¹⁴⁴ The statute does not confer on the parties the power by private agreement to authorize an arbitrator to grant punitive relief when that remedy would otherwise not be available under law.

Section 21 is a waivable provision.¹⁴⁵ Thus, the parties' agreement may limit or eliminate the authority of arbitrators to grant some types of final remedies.¹⁴⁶ For instance, parties may determine that in their situation an arbitrator should not have authority to award monetary relief or to order specified actions, such as reinstatement of a terminated worker in an employment dispute. The Drafting Committee intended to allow parties autonomy to shape the remedial provisions of their arbitration agreement in a manner best suited to their circumstances.

However, a caveat is in order about limitations on remedies, particularly in regard to attorney's fees and punitive damages. Section 4(a) allows waiver of certain RUAA provisions but "only to the extent permitted by law."¹⁴⁷ The Drafting Committee intended this language to incorporate developing theories of adhesion ***26** and unconscionability into the arbitration process under the RUAA.¹⁴⁸ Today many arbitrations involve statutory rights that would have authorized a judge or jury under the

applicable statute to order attorney's fees or punitive damages to a prevailing party if the matter had been in a court.¹⁴⁹ For example, an employer may require an employee to arbitrate all disputes arising from the employment relationship and may further eliminate the arbitrator's authority to award punitive damages or attorney's fees. The RUAA would seem to allow this waiver.¹⁵⁰ However, a growing body of case law holds that where an employer or other person with superior bargaining power requires employees or persons in adhesion situations to arbitrate statutory rights, such as those under anti-discrimination laws that grant remedies of punitive damages or attorney's fees, the person with the greater power cannot force the weaker party to forgo remedies in arbitration that would otherwise be available in court.¹⁵¹ These holdings cast doubt upon the validity of waivers or limitations of some remedies in arbitrations dealing with statutory rights.

Section 21(c) gives arbitrators wide discretion to fashion remedies to meet the needs of a particular case, but sections 21(a) and (b) concerning punitive damages and attorney's fees have special limits on arbitrators' remedial authority. Similarly, section 4(a) recognizes the parties' autonomy in their arbitration agreement to shape the remedies an arbitrator may award. However, in some instances, particularly those involving issues of statutory rights, the law may limit the parties' ability to eliminate or circumscribe some remedies.

E. Vacatur

Sometimes the importance of a revision is not in what is changed but in what is not. This is the case with vacatur. There was a minor addition to the grounds on which a court must vacate an arbitrator's award. Section 23(a)(6) is a new basis for *27 vacatur relating to the requirement by a person under section 9¹⁵² to give proper notice to initiate an arbitration proceeding.¹⁵³ The Drafting Committee did not intend notice of commencement of an arbitration to be a formal pleading requirement.¹⁵⁴ Thus, a party waives the objection by failing to protest the lack or insufficiency of initial notice before the arbitration hearing begins.¹⁵⁵ Additionally, before vacating an award on the ground of improper notice of initiation, a court must find that the objecting party suffered substantial prejudice because of this failure.¹⁵⁶

A more fundamental matter concerning vacatur is what was not added to section 23. One of the issues most debated by the Drafting Committee was whether to include a provision authorizing parties by contract to "opt-in" to judicial review of arbitration awards for errors of law.¹⁵⁷ In other words, it was proposed that the RUAA should sanction agreements to have a court review an arbitrator's decision where the arbitrator failed to follow the law on a particular matter. The Drafting Committee recognized strong policy considerations both for and against this proposal. Proponents argued that freedom to choose an opt-in provision is a fundamental element of party autonomy to determine the type of arbitration system and review of arbitral awards. By adding a section sanctioning the opt-in approach, they contended that more parties would know of this right to have a court review an arbitrator's errors of law and would be more likely to include review clauses. Additionally, the statute would establish a single standard for an opt-in provision that would be the basis for review in all cases.¹⁵⁸ Further, proponents believed that parties who were otherwise hesitant to use arbitration would be more likely to choose this process if they could insure a more liberal standard of judicial review than the narrow grounds in the UAA or FAA.¹⁵⁹ In other words, advocates for the opt-in approach expressed fear that under existing law a "bonehead" award by an arbitrator cannot be challenged in the absence of fraud, evident partiality, or exceeding of powers.¹⁶⁰

The opponents to the opt-in provision believed the proposal carried a number of hazards. A significant concern was that such a provision would encourage attorneys to include opt-in clauses in arbitration agreements to insure appeal from an adverse decision. The resulting routine inclusion of opt-in clauses would *28 effectively undermine the finality of arbitral awards. Opponents also asserted that to assure meaningful review of an arbitrator's decision, parties would find it necessary to require

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transcripts and have an arbitrator make detailed findings of fact and law. These requirements, the opponents argued, would add significantly to the cost of arbitration. They asserted that if parties distrust arbitration or have a dispute requiring broadened judicial review and more costly procedures, these parties should forgo arbitration and should instead rely on litigation.

Opponents of the opt-in provision also raised two legal questions about the advisability of including an opt-in section in the RUAA. The first was whether a state arbitration law providing for a particular standard of judicial review for arbitral errors of law might conflict with future Supreme Court holdings about whether and to what extent parties may choose a standard other than the four grounds in section 10(a) of the FAA¹⁶¹ for judicial vacatur of arbitration awards. Standards in a state arbitration statute differing from those which might evolve under the FAA would create a substantial risk of federal preemption.¹⁶² The second legal issue was whether parties by contract could expand upon the four vacatur grounds in either the UAA¹⁶³ or the FAA¹⁶⁴ by conferring jurisdiction on a court to review for errors of law or fact. The contention was that parties cannot contractually “create” subject-matter jurisdiction in the courts that does not otherwise exist under the statute.¹⁶⁵

Like the members of the Drafting Committee, the courts have disagreed on the propriety of opt-in clauses in arbitration agreements. Two federal courts of appeal have approved such provisions and two have not. In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,¹⁶⁶ the Fifth Circuit upheld the validity of an arbitration agreement that allowed judicial review for errors of law. The court concluded that the parties had the power to contract for such review based upon Supreme Court precedent favoring party autonomy in arbitration agreements.¹⁶⁷ Similarly, the Ninth Circuit in a split decision, *LaPine Technology Corp. v. Kyocera Corp.*¹⁶⁸ held that parties were not limited to the FAA's four vacatur grounds¹⁶⁹ but may contract for a court to set aside an arbitrator's award for errors of fact or law. *29 According to the majority opinion, the Supreme Court has made it clear that courts must enforce the FAA in accordance with the parties' agreement.¹⁷⁰

To the contrary of *Gateway Technologies* and *LaPine* are *Chicago Typographical Union v. Chicago Sun-Times*¹⁷¹ and *UHC Mgmt. Co. v. Computer Sciences Corp.*¹⁷² In *Chicago Typographical Union* the Seventh Circuit noted that although parties may contract for an appellate arbitration panel to review an arbitrator's award, they cannot contract for judicial review beyond the four FAA grounds for vacatur.¹⁷³ The court reasoned that to allow such a contract would enable the parties impermissibly to “create” federal jurisdiction.¹⁷⁴ In *UHC* the Eighth Circuit cautioned against the holdings in *Gateway Technologies* and *LaPine* and expressed considerable doubt about whether parties may agree that a court may set aside an arbitrator's award on a ground other than those stated in the FAA.¹⁷⁵

Unanimity has also eluded the few state courts that have addressed the authority of parties to include opt-in provisions in their arbitration agreements. Some have allowed an opt-in provision while others have found improper any change in or additions to the statutory vacatur grounds.¹⁷⁶ A review of both the federal and state case law indicates no definite trend concerning the legitimacy of a contractual opt-in provision for expanded judicial review of arbitral awards.

A majority of the Drafting Committee ultimately determined that a vacatur ground for an opt-in provision was unwarranted, and a vote of the Committee of the Whole of NCCUSL at the 1999 annual meeting during the first reading of the RUAA confirmed this decision. The Drafting Committee and NCCUSL agreed that the policy of autonomy of contract advanced by the proponents of an opt-in section was important, but general concern remained about the effect of enhanced judicial review on the conclusiveness of arbitral awards. Even more important, the present uncertainty in federal and state law concerning the propriety of additional grounds for judicial review of arbitral decisions, such as contractual agreements to reverse for errors of law or fact, militated against inclusion. In particular, neither the Drafting *30 Committee nor NCCUSL wanted to risk preemption of the important section on vacatur because an opt-in provision would run contrary to future federal law.

As the Official Comments make clear, however, the decision not to include an opt-in section in the RUA was not intended to prohibit parties from agreeing to such review where appropriate.¹⁷⁷ Until state and federal courts finally determine the propriety of opt-in clauses, parties remain free to agree to whatever standards of judicial scrutiny that they desire to challenge arbitration awards.¹⁷⁸

Another provision the Drafting Committee considered but rejected in section 23 would have authorized parties to include an internal, appellate review mechanism in their arbitration agreements. Under such mechanisms parties agree that they may appeal to an appellate tribunal the award of the arbitrator who initially hears and decides the case.¹⁷⁹ Such an internal, appellate review does not raise the issue of creating jurisdiction, as is the case with an opt-in clause, because the procedure does not entangle courts in the arbitral decision-making process. For this same reason, there is no risk of federal preemption under the FAA. However, the Drafting Committee determined that there was no need to include specific authorization in the statute because parties presently have the contractual power and in some cases do provide for appeals within their arbitration systems.¹⁸⁰ Moreover, the thrust of section 23 is to validate the power of courts and not private bodies, such as an arbitral appellate panel, to vacate improper decisions by arbitrators on the narrow, statutory grounds outlined in this provision.

The Drafting Committee weighed two other grounds for vacatur--where a particular award either violates public policy¹⁸¹ or involves manifest disregard of the law.¹⁸² For many years, federal appellate courts and most state courts have recognized these nonstatutory grounds as a basis to review arbitral awards.¹⁸³

***31** The genesis for setting aside particular arbitration awards that violate public policy is the United States Supreme Court decision in *W.R. Grace & Co. v. Rubber Workers*.¹⁸⁴ There the Court upheld the validity of a collective-bargaining agreement against an employer's challenge that the contract violated public policy because it required the lay off of employees by seniority. The employer claimed that the labor contract ran counter to its agreement with a governmental agency that the employer would maintain a certain percentage of minority and female employees regardless of their seniority. The employer argued that it could not meet its obligations under the accord with the federal agency unless the labor contract was voided on public-policy grounds. The Court noted the general doctrine, rooted in common law, that a judicial body may refuse to enforce contracts that violate law or public policy.¹⁸⁵ However, the Court stated that before voiding an arbitration award on this rationale "(s)uch a public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" ¹⁸⁶ The Court concluded that the collective-bargaining agreement did not violate public policy because the employer could meet its contractual obligations both to the union and to the federal government either by rescinding the lay off of employees or by paying damages to those improperly laid off under either agreement.

The Supreme Court reiterated this stringent application of the public-policy doctrine to vacate arbitration awards in *Paperworkers v. Misco, Inc.*,¹⁸⁷ which refused to overturn an arbitrator's award reinstating an employee discharged for violating employer rules regarding drugs. As in *W.R. Grace*, the Court determined that the public policy invoked by the party seeking vacatur must be "explicit," "well defined" and "dominant," and then concluded that a court could overturn an arbitral award only if it created an "explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'" ¹⁸⁸ The Court found no violation of a specific public policy by the arbitrator's reinstatement order.

Although the *W.R. Grace* and *Misco* standards are rigorous on their face, parties seeking to overturn an arbitrator's decision have broadly asserted their application. Public policy is a general concept and arbitration cases often involve issues connected to statutes, case law, regulations, and other legal standards.¹⁸⁹ The loser ***32** of an arbitration award often alleges the arbitrator

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violated a public-policy that is explicit, well defined, and dominant. Moreover, courts have often intervened where they believe arbitrators have issued a decision contrary to judicial determination of public policy.¹⁹⁰

Federal appellate courts have taken two distinctly separate approaches in determining whether they should vacate an arbitration award for violation of public policy. Some courts review the merits of a particular arbitration award to determine whether there is an explicit conflict with laws and legal precedents.¹⁹¹ This approach causes significant court involvement in the arbitration process and a much greater likelihood of a court's overturning an arbitration decision. Scrutinizing the substance of arbitration decisions also encourages losing parties to seek judicial review, thus undermining the finality of arbitral awards.¹⁹²

The second approach by federal appellate courts in applying *W.R. Grace and Misco* considers whether implementation of the arbitrator's award requires a party to violate an explicit, well-defined, and dominant public policy.¹⁹³ To determine whether vacatur for violation of public policy is appropriate under this standard, a court need look only at the remedy--what the arbitrator orders the parties to do--and not at the merits of the award. Courts following this approach engage in a more limited review of arbitration awards.

State courts are likewise split over vacating arbitrations for violations of public policy. Some favor a broader scrutiny of arbitration opinions to determine whether the award implicates important public-policy concerns.¹⁹⁴ Others focus more *33 narrowly on what the arbitrator orders and whether the remedy causes an act contrary to an explicit statute, precedent or other law.¹⁹⁵

The Drafting Committee decided against including public-policy violations as an additional ground for vacatur in section 23(a).¹⁹⁶ The judiciary, and not the legislature, originated the public-policy ground to set aside arbitration awards based on the common-law doctrine that courts will not enforce illegal agreements. The evolving case law has been unsettled and conflicting. Thus, it would be difficult to formulate specific, statutory language to guide parties concerning when public policy should be a ground for vacatur.

Additionally, because violation of public policy is not an FAA ground for vacatur, the Drafting Committee was concerned that if Congress should confirm only the FAA's four present statutory grounds for vacatur,¹⁹⁷ addition of a public-policy basis in state arbitration law could raise federal preemption concerns.¹⁹⁸ Preemption issues would also arise if the Supreme Court defines the law of vacatur for public-policy violations differently from that developed by a RUAA provision.¹⁹⁹ The Drafting Committee concluded that whether a court should vacate an arbitration award for violation of public policy should remain a judicially developed doctrine.

The Drafting Committee reached a similar conclusion about vacating an arbitrator's award for "manifest disregard of the law." Although the basis for this doctrine also originated in the Supreme Court, it was rooted in dicta rather than *34 holding.²⁰⁰ Subsequent federal and state courts have concluded that a party's mere showing that the result of an arbitration was incorrect or was not in accord with applicable rules of law is insufficient to demonstrate the prerequisites necessary for the manifest-disregard standard.²⁰¹ The claimant must establish two criteria. First, the arbitration award must clearly violate controlling law. On its face the award must indicate a serious misapplication of the law that amounts to an improper act by the arbitrator. Second, the arbitrator must have known the law but consciously decided not to follow it.²⁰² This ground requires a court to evaluate the arbitrator's subjective understanding of the controlling legal principle and of its applicability to the case.²⁰³ Losing parties often cite the doctrine of manifest disregard of the law, but courts rarely apply it to overturn arbitration decisions.²⁰⁴

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Because arbitration awards often involve legal ground, too loose an application of the manifest-disregard doctrine could result in courts becoming enmeshed in reviewing the merits of arbitrator decisions.

The Drafting Committee decided not to include a “manifest disregard of the law” ground in section 23(a) for reasons similar to its determination regarding “public policy.”²⁰⁵ It is uncertain how courts will develop the manifest-disregard doctrine. If the RUAA had included a provision to vacate awards for manifest disregard and Congress or the Supreme Court eventually defines this ground in a *35 different way, serious federal preemption problems would arise. Moreover, it is difficult to formulate a bright-line test for vacatur based on manifest disregard of the law because of its objective and subjective elements. The Drafting Committee also was concerned that codification of the manifest-disregard standard would encourage appeals of arbitration awards to the courts on this ground, thus impairing the finality of arbitral awards.

The issue of manifest disregard was a topic of debate at the NCCUSL 2000 annual meeting during the final reading of the RUAA. The Committee of the Whole of NCCUSL endorsed the Drafting Committee position and voted to reject an amendment proposed by a Commissioner from the floor to incorporate manifest disregard as a basis for vacating arbitration awards.²⁰⁶

Although NCCUSL and the Drafting Committee did not include in section 23(a) provisions for “opt-in” review for errors of law, internal appellate arbitral review, public policy, or manifest disregard of the law,²⁰⁷ the RUAA does not prohibit parties from challenging the legality of awards on one or more of these grounds. Because these bases for vacating arbitral awards have traditionally been nonstatutory, courts may still use these standards in appropriate cases. By limiting the provisions of vacatur essentially to the narrow grounds presently in the UAA and FAA,²⁰⁸ the RUAA preserves the integrity of the arbitration process and the finality of awards.

F. Attorney's Fees and Finality of Award

A major concern of the Drafting Committee was the increasing court challenges that losing parties make to arbitration awards. One of the strengths of arbitration is the finality it brings to the resolution of a dispute.²⁰⁹ This is a primary reason why the UAA, FAA, and RUAA²¹⁰ state very limited grounds on which a person may file an action to vacate or modify an arbitrator's decision. Often parties include clauses in their arbitration agreements that the decision of the arbitrator will be “final and binding.”²¹¹ These clauses underscore the intent that when persons agree to arbitrate, they seek this means of decision making rather than other methods, particularly litigation.

If one party subsequently challenges an arbitrator's decision by moving to vacate²¹² or modify²¹³ an award, or by causing the other party to move to confirm²¹⁴ *36 an award, the challenge undermines the conclusiveness the disputants intended to give to the arbitration process. Indeed, a challenged arbitration award may cause more cost and delay than if the parties had initially litigated the difference because litigation over the arbitration award's validity is in addition to the arbitration itself. As a result of the restrictive standards by which courts may review arbitration awards, attacks on arbitration decisions are usually unsuccessful.²¹⁵ Indeed, some persons may move to modify or vacate for reasons other than the merits of a challenge. A disgruntled party may seek to delay implementation of the arbitrator's award and to add to the cost of the winning party's claim by additional litigation. The challenger both devalues the successful party's favorable result and clogs the court system with vacatur or modification motions that have little chance of success. Such spurious suits harm the public interest by adding to court dockets and by delaying judicial resolution of more meritorious claims. In this way, dubious challenges to arbitration awards have the exact opposite effect of one of the primary purposes of arbitration, to channel disputes away from the court system.

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As a result of these concerns regarding unwarranted assaults on arbitral determinations, the Drafting Committee included section 25(c), which grants a court discretion to award “reasonable attorney’s fees and other reasonable expenses of litigation” to a prevailing party in any contested judicial proceeding to confirm, vacate, or modify an arbitration award.²¹⁶ This provision should discourage challenges to arbitration decisions except those with a significant likelihood of being meritorious.

Because a court under section 25(c) may award attorney’s fees to “a prevailing party,”²¹⁷ this provision’s deterrent effect will not impact only the loser of an arbitration case. Where an arbitrator has very likely made an error sufficient to undermine the award, the winning party in the arbitration should have second thoughts on whether to litigate an action to confirm the award or to defend against a motion to vacate or modify filed by the loser because of possible liability to the arbitration loser who may become the “prevailing party” in the litigation. Section 25(c) should cause both sides to weigh carefully the consequences before resorting to litigation after arbitration.

However, section 25(c) is not intended to discourage close cases where the law may be unclear, for example whether a nonstatutory standard such as “a violation of public policy” or “a manifest disregard of the law” could apply.²¹⁸ Section 25(c) is unlike section 14(e), which requires a court to award attorney’s fees and costs of litigation when someone unsuccessfully sues an arbitrator or arbitration organization.²¹⁹ Rather section 25(c) gives a court discretion to decide whether to *37 add attorney’s fees or other costs of litigation. The Drafting Committee in section 25(c) meant for a court to use its discretion, as it has under other statutes with similar fee-shifting language,²²⁰ to take into account equitable considerations. Where the appropriateness of an arbitrator’s decision is a close question or the public interest is enhanced by making the law clearer in the area of vacatur, a court should not hesitate to withhold attorney’s fees and other costs if that would better serve the interests of justice.

There is another special situation that the Drafting Committee considered inappropriate for an award of attorney’s fees and litigation costs even though a party files a judicial action after an arbitration award. In some instances, a losing party in an arbitration simply may not have the means to comply with the award, and the winning party may want to convert the arbitral award into a judgment by an action to confirm under section 22. Section 25(c) allows a court to impose attorney’s fees and costs only where the judicial proceeding is “contested.” Thus, provided the losing party does not resist the confirmation action, the court may not tack on attorney’s fees and costs of litigation.²²¹

Section 25(c) is a waivable provision under section 4.²²² If the parties know at the outset of an arbitration proceeding that the loser will likely appeal an award, they may agree that a court under section 25(c) cannot award attorney’s fees and costs in a subsequent judicial action.

In adding section 25(c) to the RUAA, the Drafting Committee sought to strengthen the conclusiveness of arbitration awards. In light of the high costs associated with litigation that a court may award to the prevailing party under section 25(c), this provision should discourage parties from pursuing tenuous claims in post-arbitral judicial proceedings. On the other hand, the statute gives a court leeway in determining whether to assess attorney’s fees and related costs when a party appropriately challenges or defends an arbitration. Section 25(c) should be an important feature that benefits the arbitration process by reinforcing the finality of arbitral decisions.

G. Effective Date and Application of Act

A final change worth noting is one that, although technical, is important. Many arbitration agreements are included in contracts between parties who have a longstanding or continuous relationship. For instance, a producer and a supplier may work from a contract the basic terms of which do not change and which includes an arbitration clause. An arbitral dispute might not arise

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until years after they entered into their contract. If the parties drafted their agreement under the UAA but the dispute did not arise until after the effective date a state passed the RUAA, they likely would be bound to arbitrate under the provisions of the UAA.²²³ This *38 approach creates two sets of laws that state courts and arbitrators would apply in interpreting arbitration agreements--laws developed under the UAA for arbitration agreements entered into prior to the effective date of the RUAA and laws under the RUAA for arbitration agreements entered into afterwards. In contracts of long duration duplicate legal rules would last a significant period of time.

To minimize the problem of applying the UAA to some arbitration disputes and the RUAA to others, the Drafting Committee adopted an approach that would effectively phase out the UAA.²²⁴ Section 31²²⁵ is a standard provision establishing the RUAA's effective date and section 33²²⁶ is a savings clause that the RUAA will not affect actions commenced or rights accrued before that date. However, these two sections are subject to sections 3²²⁷ and 32.²²⁸ Section 3 not only requires that the RUAA apply to arbitration agreements entered into after the effective date of the statute,²²⁹ but also gives parties to arbitration agreements that were entered into under the UAA the option, if they all agree in a record,²³⁰ that the RUAA will govern their arbitration agreement and arbitration proceeding.²³¹ Sections 3 and 32 also require that a state set a "delayed" date when the UAA will be repealed²³² and the RUAA will control all arbitration agreements, including agreements entered into before the new arbitration statute's effective date, i.e., under the UAA.

An illustration of these provisions is helpful to understand how they will work. Assume a state legislature passes the RUAA and, in accordance with section 31, makes the RUAA effective on January 1, 2005. In accordance with sections 3(c) and 32, the legislature chooses January 1, 2007,²³³ as the date by which all arbitration agreements in the state must conform to the RUAA and on which the UAA will be repealed. Under sections 3(a) and 31, the RUAA would cover any agreements entered into after January 1, 2005. Under sections 3(b) and 33, between January 1, 2005, and December 31, 2006, the UAA would apply to arbitration agreements entered into before January 1, 2005, unless all parties to the arbitration agreement or proceedings agree in a record that the RUAA governs. Under sections 3(c) and 32 on January 1, 2007, the RUAA would apply to all arbitration agreements whether parties entered into the arbitration agreement either before or after January 1, 2005, the effective date of the RUAA.

This approach to the application of the RUAA to arbitration agreements not only provides parties notice and a sufficient time in which to conform their arbitration *39 contracts to the new arbitration statute, but also insures uniform governance by a single rule of law to arbitration agreements after a reasonable transition period.²³⁴

III. Clarification

The RUAA addresses a number of issues not included in the UAA, although some developed from case law under either the UAA or the FAA. In essence, the RUAA codifies and makes uniform a number of arbitration law principles upon which most state and federal courts have agreed. Additionally, the RUAA has updated a number of UAA provisions to reflect modern practice. By eliminating ambiguities and incorporating accepted practices, the RUAA should aid users of the arbitration system to resolve their disputes more effectively and efficiently.

A. Arbitrability

In addition to restating a major tenet of the UAA--that courts must enforce arbitration agreements²³⁵--section 6 of the RUAA specifies who determines whether disputes are arbitrable. The RUAA follows the generally accepted rule in both state and

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federal courts that unless the parties otherwise agree, courts decide issues of substantive arbitrability. Such issues include whether there is a valid arbitration agreement and whether it covers the parties' particular dispute. On the other hand, matters involving procedural arbitrability, whether prerequisites such as time limits, notice, laches, and the like, are for the arbitrator to decide.²³⁶

Before a claim arises parties to an arbitration agreement cannot waive the provision in section 6(a) making arbitration agreements legally enforceable,²³⁷ but they may decide who will resolve issues of substantive and procedural arbitrability. Section 4(a) recognizes the parties' autonomy to determine who will decide *40 jurisdictional issues in their arbitration disputes.²³⁸ For instance, although the general rule in section 6(b) is that the court decides substantive arbitrability, the parties may agree that the arbitrator shall make this determination. Arbitration organizations, such as the American Arbitration Association and the International Chamber of Commerce, provide that arbitrators rather than courts make the initial determination of substantive arbitrability.²³⁹ The RUAA allows this approach that arbitrators decide their own jurisdiction.

The language in section 6(c) of the RUAA stating that the arbitrator decides “whether a contract containing a valid agreement to arbitrate is enforceable”²⁴⁰ was intended to incorporate the “separability” doctrine decided by the United States Supreme Court under the FAA in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*²⁴¹ The Court concluded that the defense of fraud in the inducement of a contract went to the validity of the entire agreement and not just to the arbitration clause. Because the parties had agreed that disputes concerning interpretation of the contract were for the arbitrator, the Court determined that it was appropriate for the arbitrator and not the court to decide this claim even though a favorable ruling on the defense would void the entire contract, including the arbitration clause. The Court held that the arbitration clause was separable from the rest of the contract for purposes of ruling on defenses to the validity of the contract as a whole. Thus, if a disputed issue is within the scope of the arbitration clause, the arbitrator, and not the court, decides challenges to the enforceability of the underlying contract on grounds such as fraud, illegality, unconscionability and the like.

*41 Most states have followed the “separability” doctrine, but some have not.²⁴² The Drafting Committee concluded that the view of the United States Supreme Court and the majority of state courts concerning the separability doctrine should be incorporated into the RUAA.²⁴³ If parties agree that an arbitrator should decide all differences under a contract, they have bargained for the arbitrator, not the courts, to resolve the merits of their dispute. For a court to review the parties' substantive positions under the guise of deciding whether to enforce the arbitration agreement runs counter to the accord the parties struck when they determined that arbitration, not litigation, would be the means to settle contractual disagreements. Thus, section 6(c) provides that the arbitrator decides “whether a contract containing a valid agreement to arbitrate is enforceable.”²⁴⁴

The separability doctrine does not apply when a party challenges only the propriety of the arbitration clause itself on the grounds of fraud or illegality, and the court then properly determines only the validity of the arbitration agreement.²⁴⁵ A court rightly decides whether the parties intended arbitration to apply to their dispute because voluntary agreement is at the heart of the arbitration process. If a court positively concludes on the narrow issue of substantive arbitrability that the arbitration provision is valid and the parties' claims are subject to that clause, the court has completed its task. Then, by the parties' agreement, the arbitrator makes all further decisions on the merits of contractual claims and defenses to the underlying agreement.

*42 The separability doctrine is waivable.²⁴⁶ The parties may agree that a court shall decide issues such as fraud in the inducement or other claims of illegality concerning the contract. In the absence of such an agreement, the general rule embodied in section 6(c)²⁴⁷ applies that the arbitrator will determine the validity of the underlying contract.

B. Arbitral Immunity

Section 14(a) restates the well-established rule that arbitrators are immune from civil liability when acting in their arbitral capacity.²⁴⁸ This doctrine tracks the immunity that courts provided judges early on to insure their independence and protect them in their decision-making process from unwarranted challenges by disgruntled parties. Because of the functional comparability of the role of arbitrators to that of judges, courts concluded that arbitrators should also be protected by the immunity principle. The RUAA codifies this immunity principle.²⁴⁹

***43** The Drafting Committee members debated whether to provide the same arbitral immunity to arbitration organizations. Some argued that because such organizations perform only ministerial acts, persons should be able to hold these organizations liable for negligence. A majority of the Drafting Committee concluded that neutral arbitration organizations, like arbitrators, discharge duties in administering the arbitration process that are the functional equivalent of the duties of judges administering the adjudication process. Case law provides judicial immunity to administrative personnel in the court system when they engage in acts of a judicial nature.²⁵⁰ Likewise, substantial precedent holds arbitration organizations immune from civil liability when performing duties in administering the arbitration process.²⁵¹ The Drafting Committee voted to include arbitration providers in the immunity section “to the same extent as a judge of a court of this State acting in a judicial capacity.”²⁵²

The RUAA intends that the immunity granted to arbitrators and arbitration organizations is comprehensive to insure full freedom in making decisions involving an arbitration case without concern for potential liability. Section 14(b) provides that the RUAA immunity supplements any other immunity granted by judicial decisions or other statutes.²⁵³

Despite the broad arbitral-immunity doctrine, the Drafting Committee was concerned that disaffected parties, either for lack of knowledge about the immunity doctrine or for intimidation or other improper purposes, still would file lawsuits against arbitrators and arbitration organizations. Many cases demonstrate parties' willingness to attack the outcome of an arbitration by filing suit against the arbitrator ***44** or arbitration organization.²⁵⁴ Arbitrators and arbitration organizations are eventually exonerated,²⁵⁵ but such actions, often frivolous, deter and hinder the arbitration process. The RUAA protects arbitrators and arbitral organizations from such actions by making them or their representatives incompetent to testify in a judicial, administrative, or similar proceeding unless either the arbitrator or arbitration provider is making a claim or a party proves that the arbitrator, arbitration organization, or representative has engaged in wrongdoing that would vacate an arbitration award.²⁵⁶ Further, in any action in which a court concludes that the arbitrator or arbitration organization or its representatives were either immune from civil liability or incompetent to testify, the court “shall” award them attorney's fees and other reasonable expenses of litigation.²⁵⁷ Through these two provisions protecting arbitrators and arbitration organizations from testifying in most actions and requiring an award of attorney's fees and litigation costs, the RUAA insures the independence of arbitrators and arbitration organizations and furthers the integrity of the arbitral system.

***45 C. The Arbitration Process**

Section 15 gives arbitrators wide latitude, subject to the parties' agreement, to conduct an arbitration “in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”²⁵⁸ The section clarifies arbitrators' ability to hold pre-hearing conferences to resolve matters such as scheduling, disputed issues, discovery and the like.²⁵⁹ Arbitrators maintain discretion concerning the admissibility and weight of evidence, but this section preserves parties' rights to present evidence and cross-examine witnesses at any hearing.²⁶⁰

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The Drafting Committee debated and changed its mind by a split vote on whether to allow arbitrators to make summary disposition of a case.²⁶¹ The UAA has no provision on this matter. Some courts have upheld arbitrators deciding matters in summary proceedings, but others have cast doubt on such action.²⁶² One reason for the uncertainty is that a ground on which a court may vacate an award is where an arbitrator fails to “consider evidence material to the controversy.”²⁶³ Drafting Committee members argued that without a hearing, an arbitrator could not properly consider the evidence in controversy. Some on the Drafting Committee also asserted that because arbitration is a more informal process than litigation, parties expect and should have a right to a hearing. A majority of the Drafting Committee concluded that the arbitration process, which in some cases involves extremely complex issues and may become very expensive, should include the means to resolve issues or an entire case by summary disposition. However, the statute requires that before an arbitrator may summarily decide a case, the moving party must provide the other party with sufficient notice and a “reasonable opportunity to respond.”²⁶⁴

Because section 15 is a waivable provision,²⁶⁵ parties may shape the type of arbitration process that best suits their needs, whether it be an expedited one or a procedure involving all of the formality and discovery rights of litigation. Absent such agreement, section 15 gives the arbitrator wide discretion to conduct the *46 arbitration with the paramount goal of insuring a fair but expeditious proceeding. In this way, section 15 honors the goals of party autonomy, efficiency and fundamental fairness.

D. Discovery

In a sense, discovery was the battleground over the future of arbitration: whether arbitration would become merely a litigation surrogate or remain a viable substitute for the judicial process. The primary issue was one of cost and delay versus fairness. The matter of discovery was as difficult for the Drafting Committee to resolve as it has been for others involved in the arbitration process. The expense and delay that discovery entails in today's litigation is antithetical to arbitration's valuable benefits of relative speed, informality, and less expense. Indeed, some courts, noting these policy reasons underlying arbitration and that the UAA makes no provision for discovery, have concluded that “pretrial discovery is not available under our present statutes for arbitration.”²⁶⁶

On the other hand, the need for information before an arbitration hearing, especially in complex cases, may be as critical as in litigation. Evidence presented to the Drafting Committee overwhelmingly demonstrated that in many fields of arbitration, discovery has become a fact of life. The Drafting Committee had two key elements to determine: who decides whether to allow discovery and, if discovery is allowed, what standard governs concerning the extent of discovery that may be had. During the first reading of the RUAA in 1999 before the Uniform Law Commissioners, a Commissioner made an impassioned plea simply to apply to the arbitration process the discovery rules developed under the Federal Rules of Civil Procedure. In other words, parties and their advocates would control when and how much discovery may be had, and the standard would be the broad one allowing discovery of any “relevant” matter or “information . . . reasonably calculated to lead to the discovery of admissible evidence.”²⁶⁷ Both the Drafting Committee and NCCUSL rejected this approach.

In an attempt to balance the necessity of pre-hearing discovery in some cases with the desire to maintain the positive benefits of arbitration, the Drafting Committee (1) placed control of discovery in the hands of the arbitrator and not the parties and (2) established a standard that limited both the availability and extent of discovery. The Drafting Committee intended that the full panoply of discovery mechanisms under modern rules of civil procedure would normally not be *47 appropriate for arbitration unless the parties specifically incorporate them into their arbitration agreement.

The Drafting Committee conveyed this intent in section 17, which deals with discovery.²⁶⁸ First, the RUAA makes the discovery provisions waivable,²⁶⁹ so parties may either eliminate discovery or craft their own rules for exchanging information

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that best suits their needs. Second, in the absence of agreement, section 17(c) grants the arbitrator discretion whether and to what extent to allow discovery. Thus, the Drafting Committee rejected proposals that section 17(c) should vest discretion in the parties or their attorneys to determine discovery, which is essentially what occurs in civil litigation.²⁷⁰ Finally, the standard by which arbitrators determine discovery is very much in line with both arbitration's underlying purpose as a more informal means of dispute resolution than litigation and the parties' needs in particular cases for pre-hearing information and evidence. The arbitrator is to permit only such discovery as is appropriate after "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."²⁷¹ The Comments to section 17 underscore the more limited nature of discovery in arbitration and that arbitration is a form of dispute resolution different from traditional litigation.²⁷²

The RUAA resolves the difficult issue of arbitral discovery by recognizing the parties' autonomy to agree to the type of system for exchanging information best suited to their needs, whether this is to eliminate discovery, keep it to a minimum, or provide the same or greater means of discovery than allowed in the judicial system. However, the default provision places responsibility for discovery clearly within the discretion of the arbitrator, who likely will keep this process to a minimum. Thus, the RUAA has adapted discovery to the evolving practice of arbitration while maintaining the identity of arbitration as separate and distinct from litigation.

Another difficult discovery issue arises when parties determine that they need information from an outsider to the arbitral dispute. Section 17 retains arbitrators' present UAA authority to issue subpoenas for attendance of witnesses or production of documents at the hearing and for depositions of unavailable witnesses.²⁷³ In ***48** addition, section 17 now grants arbitrators authority to issue subpoenas for pre-hearing discovery proceedings such as depositions.²⁷⁴

An important discovery matter concerns the arbitrator's authority to issue subpoenas to nonparties to testify or produce information at a hearing or during discovery. The recent holding of the Fourth Circuit in *COMSAT Corp. v. National Science Foundation*²⁷⁵ underscores the significance of this issue. *COMSAT* concluded that under the FAA,²⁷⁶ whose language is similar to that in the UAA,²⁷⁷ arbitrators do not have authority to issue subpoenas to nonparties to produce materials before an arbitration hearing. The court determined that the FAA allows parties only limited discovery in arbitration and that, absent a showing of special need, a party has no right to subpoena documents from outsiders.²⁷⁸

Despite the *COMSAT* holding, numerous other courts have determined that arbitrators under the FAA and UAA may issue orders such as subpoenas to third parties both to attend arbitration hearings and to give testimony or produce information prior to an arbitration.²⁷⁹ These decisions recognize that as in a court or administrative proceeding, a party to an arbitration often needs knowledge or testimony from a nonparty to prove or defend against a claim. Section 17 follows this line of decisions granting arbitrators discretion to compel third persons to testify or give information to insure that parties will receive a just hearing.

***49** On its face, section 17(a) allows an arbitrator to issue a subpoena for the attendance of "a witness"²⁸⁰ at any hearing, and 17(b) is even more explicit that an arbitrator may permit a deposition of "any witness"²⁸¹ TO BE USED AS evidence at an arbitration hearing. Similarly, section 17(c) states that when deciding whether or how much discovery to permit, an arbitrator must take into account the needs not only of the parties to the hearing but also of "other affected persons."²⁸² These references to nonparties in section 17 indicate that the statute encompasses more than parties concerning arbitral subpoenas and discovery. The Comments to section 17 make clear that the Drafting Committee intended an arbitrator to have the power to subpoena testimony and information from third parties in appropriate circumstances.²⁸³

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The statute also provides safeguards so that interference with nonparties will be as little as possible. Section 17(b) permits a non-party witness to request the arbitrator to allow the witness to testify at the hearing by deposition rather than by appearance at the arbitration itself.²⁸⁴ A third party may also request a protective order from an arbitrator to insure that privileged information, confidential data, trade secrets, and similar information not be disclosed as if the matter were in litigation.²⁸⁵

Orders by arbitrators, such as subpoenas and discovery orders, are not self-enforcing.²⁸⁶ Thus, a third party who disagrees with an arbitrator's subpoena simply need not comply with the order. The party to the arbitration proceeding who wants the nonparty to testify or produce information must then proceed in court to enforce the arbitral order.²⁸⁷ Alternatively, the third party against whom the arbitral order has been issued or another party to the arbitration proceeding on behalf of the nonparty may move to quash the subpoena or arbitral order. Courts normally defer to arbitrators' determinations, but have also been solicitous of the non-party status of a person challenging an arbitrator's subpoena or other order. For example, in *Reuters Ltd. v. Dow Jones Telerate, Inc.*,²⁸⁸ an arbitrator attempted to subpoena documents from a third person who was a competitor of the party seeking the information. The court held that although the arbitrator had authority to subpoena information from a third person, this subpoena was inappropriate because it required the nonparty to divulge confidential information that might put it at a competitive disadvantage in relation to the party seeking it. This is an appropriate approach for a court reviewing the propriety of an arbitral subpoena or discovery order to an *50 outside, third party. The nonparty has not agreed to the arbitration provision nor to the arbitrator's implicit authority to compel testimony or information. Moreover, by opting for arbitration parties accept an adjudicative system where discovery generally is disfavored. Before involving a third person in the arbitration process, arbitrators and courts should require a party to present sufficient justification for that person's participation.

Section 17 intends to follow the present, majority approach of courts to safeguard the rights of third parties while insuring sufficient disclosure of information to provide for a full and fair arbitration proceeding. This objective is best met by giving arbitrators discretion to compel testimony or information from nonparties but cautioning arbitrators against unduly infringing on the rights of outsiders. This is one area where courts may more closely insure protection of third persons who challenge the propriety of arbitral orders involving them in the arbitration process.²⁸⁹

A new provision in section 17 should assist parties to arbitrations involving persons in more than one state. Presently, to enforce a subpoena or a discovery-related order against a person in another state requires two court actions. For example, assume an arbitration is held in Missouri and a party would like to depose a witness in New York who will be unavailable for the hearing. Under present practice, the party must seek a subpoena from the arbitrator under section 17(a), request enforcement of that subpoena by a court in Missouri, and then file the Missouri court order in the appropriate court in New York for enforcement.²⁹⁰ Under section 17(g), if New York has adopted the RUAA, the party may take the subpoena from the arbitrator in Missouri directly to the New York court, which may enforce the subpoena "upon conditions determined by the court in order to make the arbitration proceeding fair, expeditious, and cost effective."²⁹¹ This RUAA provision eliminates the need for duplicative court proceedings.

The RUAA resolves the difficult arbitral discovery issues by allowing parties to adopt their own discovery rules, including the full panoply of procedures allowed in the judicial process. If the parties do not provide for discovery rules in their arbitration agreement, then section 17, as a default mechanism, authorizes arbitrators to decide whether to allow discovery and, if so, to what extent. Normally arbitrators will allow only limited discovery under the standards of section 17(c). Although arbitrators have authority to involve third parties in discovery and the arbitral process, the statute recognizes that, as nonparties, these persons are entitled to greater protections from unwarranted interference. Section 17(g) makes the means *51 to compel out-of-state witnesses to attend arbitral discovery proceedings or hearings more efficient. Section 17 not only adapts discovery to evolving arbitration practice, but also maintains arbitration's identity separate and apart from litigation.

E. Jurisdiction

Presently, [section 17 of the UAA](#) provides that where an arbitration agreement requires arbitration in a particular state, the agreement confers jurisdiction on the courts of that state both to enforce the agreement and to enter judgment on an arbitration award. The Drafting Committee determined to treat jurisdiction to enforce an arbitration agreement differently from jurisdiction to enter judgment.

Section 26(a) of the RUAA provides that a state court with jurisdiction over an arbitral dispute and over the parties may enforce an agreement to arbitrate.²⁹² This means that a court with personal jurisdiction over those involved in the controversy and subject-matter jurisdiction concerning the contract may determine whether to require arbitration. For instance, consider a New York corporation that sells consumer goods throughout the country on the Internet by a contract that includes an arbitration agreement; a Missouri resident purchases goods from the New York corporation. The Drafting Committee was concerned that under the UAA, the New York corporation could designate that the arbitration clause's validity could be determined only by a court in New York, making it difficult and expensive for a resident from Missouri or from other states to challenge the arbitration agreement. Under section 26(a), a Missouri court could determine the purchaser's challenge to the arbitration agreement if that court would otherwise have subject-matter and personal jurisdiction over the New York corporation. This provision intends to prevent a party, particularly one with superior bargaining power, from requiring the other party to determine the enforceability of an arbitration agreement only in a distant forum.

Section 26(b) is similar to [UAA section 17](#), which states that a court in the place where the agreement requires the matter to be arbitrated has jurisdiction to enter judgment on the award.²⁹³ Most courts have interpreted [UAA section 17](#) to mean that if the parties' agreement designates a place for the arbitration proceeding, that state has exclusive jurisdiction to determine the validity of the arbitrator's award. The rationale has been to prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of location of the arbitration and subsequent proceedings to enforce the award.²⁹⁴ Section 26(b) codifies this case law by ***52** explicitly providing exclusive jurisdiction for the court in the state where the parties hold the arbitration.²⁹⁵

Section 26 changes the law so that persons may seek enforcement of arbitration agreements in any state with personal and subject-matter jurisdiction. It also makes clear that only courts in the jurisdiction where the parties agreed to hold the hearing may enter judgment on the award. This clarity concerning the appropriate court to decide the validity of the arbitration agreement and to decide the validity of an arbitration award should benefit users of the arbitration process.

IV. Conclusion

The RUAA Drafting Committee members, the academic advisors, the American Bar Association liaisons, and the observers were persons very knowledgeable about arbitration law who brought special insights from their own arbitration and other legal experience. During the drafting process inevitable differences arose over close policy issues, precisely because they were close ones over which reasonable persons with different perspectives and expertise should differ. Nevertheless, all participants were dedicated to proposing a statute that would enhance arbitration as a dispute-resolution mechanism. The result is a product that modernizes arbitration law, revises and clarifies many issues, and makes the arbitration system more efficient and fair. In view of this effort, it is not surprising that so many arbitration organizations and interest groups²⁹⁶ supported, and NCCUSL unanimously passed, the RUAA.

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The Uniform Law Commissioners' passage of the RUAA was an important event, but it is only the first step in the more significant process of state enactment of the proposed law.²⁹⁷ The drafters of the RUAA are hopeful that this act will be even more successful than the UAA which, in some form, has influenced state arbitration legislation in forty-nine jurisdictions.²⁹⁸ With the interconnectedness of commercial, employment and individual transactions throughout the United States and in the international sphere, uniformity is imperative in the law governing arbitration, a major means of dispute resolution. Forty-five years since the UAA's enactment is sufficient time to bring this statute in line with modern arbitration practice in the twenty-first century.

*53 In light of the strong doctrine of federal preemption in the field of arbitration law,²⁹⁹ many persons, including those who participated in drafting and passing the RUAA through NCCUSL, desire that the FAA follow a similar path to that of the RUAA. If this uniform act not only improves state arbitration law but also serves as a precursor for modernizing and revising the FAA, it will make an invaluable contribution to the evolution of arbitral law.

***54 Appendix A**

REVISED UNIFORM ARBITRATION ACT (2000)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

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

JULY 28 - AUGUST 4, 2000

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***55 UNIFORM ARBITRATION ACT (2000)**

SECTION 1. DEFINITIONS. In this (Act):

- (1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.
- (2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.
- (3) "Court" means (a court of competent jurisdiction in this State).
- (4) "Knowledge" means actual knowledge.

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

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

SECTION 2. NOTICE.

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

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

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

SECTION 3. WHEN (ACT) APPLIES.

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

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

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

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

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

***56** (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 restrict unreasonably restrict the right under [Section 9](#) to notice of the initiation of an arbitration proceeding;

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

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

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

SECTION 5. (APPLICATION) FOR JUDICIAL RELIEF.

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

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

SECTION 6. VALIDITY OF AGREEMENT TO ARBITRATE.

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

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

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

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

SECTION 7. (MOTION) TO COMPEL OR STAY ARBITRATION.

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

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

***57** (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.

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(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.

SECTION 8. PROVISIONAL REMEDIES.

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

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

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

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

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

SECTION 9. INITIATION OF ARBITRATION.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the *58 commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

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

SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

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

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

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

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

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(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.

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

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on (motion) of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

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

SECTION 12. DISCLOSURE BY ARBITRATOR.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all *59 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).

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(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).

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

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

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

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

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

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge *60 of a court of this State acting in a judicial capacity. This subsection does not apply:

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

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

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

SECTION 15. ARBITRATION PROCESS.

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

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

(1) if all interested parties agree; or

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

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(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

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

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

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

SECTION 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

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

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

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

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

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

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

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(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 *62 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.

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

SECTION 19. AWARD.

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

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

SECTION 20. CHANGE OF AWARD BY ARBITRATOR.

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

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

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

(3) to clarify the award.

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

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

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

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

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

(3) to clarify the award.

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

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

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

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

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

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

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

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

SECTION 23. VACATING AWARD.

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

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

(2) there was:

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

(B) corruption by an arbitrator; or

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

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(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;

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

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

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

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

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

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

SECTION 24. MODIFICATION OR CORRECTION OF AWARD.

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

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

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

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

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

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

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

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(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in *65 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.

SECTION 26. JURISDICTION.

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

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

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

SECTION 28. APPEALS.

(a) An appeal may be taken from:

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

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

SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 30. ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The provisions of this (Act) governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or

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performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and *66 National Commerce Act, [Pub. L. No. 106-229, 114 Stat. 464 \(2000\)](#), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

SECTION 31. EFFECTIVE DATE. This (Act) takes effect on (effective date).

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

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

Footnotes

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¹ See National Conf. of Comm'rs on Unif. St. Laws, Record of Passage of Uniform and Model Acts, as of September 30, 1999, 1999-2000 Reference Book 114.

² [9 U.S.C. §§ 1-16 \(1994\)](#).

³ The FAA, in turn, was based in large measure upon the New York arbitration statute, which was passed in 1920 and was the first modern, comprehensive law in the United States dealing with commercial arbitration. See [9 U.S.C. § 1](#); [N.Y. C.P.L.R. § 7501 \(McKinney 1998\)](#).

⁴ See *infra* notes 24-28.

⁵ For the drafts of revisions to the Uniform Arbitration Act that the Drafting Committee considered at these eight meetings, see 2000 Annual Meeting Draft; March 2000 Draft; February 2000 Draft; October 1999 Draft; February 19, 1999 Draft; October 9, 1998 Draft; Revised Tentative Draft #2, March, 20, 1998; Revised Tentative Draft #1, October 31, 1997, at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

⁶ The Revised Uniform Arbitration Act ("R.U.A.A.") appears in Appendix A. The RUAA with Official Comments may be found at 2000 Styled Act with Comments, Dec. 13, 2000, at <http://www.law.upenn.edu/bll/ulc/ulc/uarba/arb1031.htm>.

⁷ See 2000 Annual Meeting Draft, at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

⁸ The vote of the delegations of NCCUSL, which is made up of the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands, was 50-0 with one state (Alabama) abstaining and two states (Michigan and Rhode Island) not voting.

⁹ See R.U.A.A. [§§ 1\(6\)](#), 30 (2000).

¹⁰ *Id.* § 6.

¹¹ *Id.* §§ 8, 18.

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- 12 Id. § 12.
- 13 Id. § 14.
- 14 Id. § 15.
- 15 Id. § 17.
- 16 Id. § 18.
- 17 Id. § 21.
- 18 Id. §§ 14, 25.
- 19 Id. § 4.
- 20 Id. §§ 3, 31, 32, 33.
- 21 See Preface to 2000 Styled Act with Comments, *supra* note 6.
- 22 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 1 to R.U.A.A. § 4.
- 23 See Memorandum Sept. 29, 1998 (Contracts of Adhesion and Unconscionability); Policy Statement, *supra* note 6.
- 24 *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).
- 25 See, e.g., *Allied-Bruce Terminix*, 513 U.S. at 273-74 (applying FAA to fullest extent allowable under Interstate Commerce Clause); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d Cir. 2000) (stating that although FAA does not create federal jurisdiction where matter involves claim of violation of securities laws involving interstate commerce, FAA applies); *Specialty Healthcare Mgmt. v. St. Mary Parish Hosp.*, 220 F.3d 650, 653 (5th Cir. 2000) (noting that because FAA does not create federal jurisdiction, confirmation of arbitration award requires an independent basis for jurisdiction including contracts evidencing transactions involving interstate commerce); *Warren-Guthrie v. Health Net*, 101 Cal. Rptr. 2d 260, 265 (Cal. Ct. App. 2000) (deciding that whether insured was required to arbitrate claim of benefit coverage with health maintenance organization was determined by FAA because plan involved interstate commerce); *Carpenter v. Brooks*, 534 S.E.2d 641, 645 (N.C. Ct. App. 2000) (holding that because brokerage agreement involved interstate commerce, FAA and not UAA applies to investors' claims); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. Ct. App. 2000) (determining that FAA applies to employment contracts that relate to interstate commerce).
- 26 See, e.g., *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1; *Cohen v. Wedbush, Noble, Cooke, Inc.* 841 F.2d 282 (9th Cir. 1988); *Creative Tile Mkt. v. SICIS Int'l, S.r.L.*, 922 F. Supp. 1534 (S.D. Fla. 1996); *Thompson v. Skipper Real Estate Co.*, 729 So. 2d 287 (Ala. 1999); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992).
- 27 See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (noting that intent of the contracting parties determines whether state law disallowing punitive damages applies to arbitration); *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (concluding that Federal Arbitration Act did not preempt California law that permits court to stay arbitration pending resolution of related litigation involving third parties not bound by arbitration agreement where parties agreed in contract to abide by state rules of arbitration); *International Technologies Integration, Inc. v. Palestinian Liberation Organization*, 66 F. Supp. 2d 3, 10 (D.C. Cir. 1999) (deciding that where parties agreed to arbitrate disputes in accordance with Virginia law, Virginia's arbitration law, not Federal Arbitration Act, governed determinations of validity of arbitration award); *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1393 (D.C. Cir. 1995) (finding that limitations period in Connecticut's law which was applicable according to the arbitration agreement was not preempted by FAA); *Bank v. International Bus. Machs. Corp.* 915 F. Supp. 491 (D. Mass. 1996) (stating that Massachusetts Uniform Arbitration Act, rather than FAA, applied to arbitration of dispute over purchase of mortgage note where partnership agreement called for use of Massachusetts law in determining rights and obligations of

parties); *Swan v. American Family Mut. Ins.*, 8 P.3d 546, 548 (Colo. Ct. App. 2000) (applying state arbitration statute to determine whether request to arbitrators to modify award tolls time limits for filing a court action); *Hawrelak v. Marine Bank, Springfield*, 735 N.E.2d 1066, 1069 (Ill. App. Ct. 2000) (applying state Uniform Arbitration Act to determine validity of arbitration award); *State Farm Mut. Auto. Ins. v. George Hyman Constr.*, 715 N.E.2d 749, 755 (Ill. App. Ct. 1999) (concluding that a clause in a construction contract which generally chose state law over federal law applied to arbitration of the dispute); *Albright v. Edward D. Jones & Co.*, 571 N.E.2d 1329, 1332-33 (Ind. Ct. App. 1991) (determining that state arbitration law is not preempted by the Federal Arbitration Act in action on claim under securities laws and RICO where the parties agree that their arbitration agreement will be governed by state law); *Group Health Plan, Inc. v. BJC Health Sys., Inc.*, 30 S.W.3d 198, 202 (E.D. Mo. Ct. App. 2000) (applying Missouri arbitration statute rather than FAA to determine propriety of subpoena for confidential information); *JJ's Mae, Inc. v. H. Warshaw & Sons, No. 2373N*, 2000 WL 1725502, *1 (N.Y.A.D. Nov. 21, 2000) (determining that although the Federal Arbitration Act preempts inconsistent State law as to an arbitration agreement's enforceability, it preempts only those provisions of state law that actually conflict with provisions of the Federal statute and does not preempt general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296 (Tex. Ct. App. 2000) (deciding validity of forum-selection clause in arbitration agreement between U.S. and foreign corporation under Texas state law); *In re Godt*, 28 S.W.3d 732, 738-39 (Tex. Ct. App. 2000) (finding that Texas arbitration statute rather than FAA applied to malpractice claim by client against attorney).

28 *Doctor's Assocs.*, 517 U.S. 681. See also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (concluding that in light of the FAA's purpose of putting arbitration clauses on equal footing with other contracts, claimant could not escape the provisions of the contract merely because the agreement is silent as to arbitration costs; rather the party seeking to overcome a valid arbitration agreement on the grounds that it is overly expensive bears the burden of showing the likelihood of incurring the costs); *Stout v. J. D. Byrider*, 228 F. 3d 709, 716 (6th Cir. 2000) (noting that in claim based on fraud and violation of state sales protection act that FAA preempts inconsistent state law); *Warren-Guthrie*, 101 Cal. Rptr. 2d at 265 (holding that statute allowing a state court to disregard an arbitration clause, and order joinder of all parties in a single action or proceeding, due to the possibility of inconsistent rulings, does not establish a defense generally applicable to contracts, but is specifically limited to arbitration clauses, and thus, statute is inconsistent with, and is preempted, by Federal Arbitration Act where statute is used to avoid or delay arbitration of dispute over a contract involving interstate commerce that is governed by FAA).

29 Compare R.U.A.A. § 6(a) and U.A.A. § 1 with 9 U.S.C. § 2.

30 See supra note 27. See also Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 *Wake Forest L. Rev.* 1 (1996) (discussing reach of the federal preemption doctrine); Benjamin K. Byrd et al., Project, *Recent Developments: The Uniform Arbitration Act*, 1998 J. Disp. Resol. 233; Jamie K. Hunt et al., Project, *Recent Developments: The Uniform Arbitration Act*, 1999 J. Disp. Resol. 219.

31 The issue of federal preemption and the RUAA is taken up in more detail in this symposium in Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. Disp. Resol. 67.

32 *Doctor's Assocs.*, 517 U.S. at 681-82 (overruling a state law mandating special notice requirements for arbitration agreements); *Allied-Bruce Terminix*, 513 U.S. at 270 (applying FAA broadly under Interstate Commerce Clause); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (holding that arbitration provision in individual employment agreement applies to claims that fall under the Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (requiring arbitration of claim under federal securities law); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (upholding the arbitration of actions filed under federal securities and RICO laws); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (stating a strong presumption favoring the arbitrability of parties' disputes); *Southland Corp.*, 465 U.S. at 12 (finding that FAA preempts inconsistent state law and applies in both federal and state arbitration actions); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (holding that law under the FAA favors arbitration and any doubts in construing a contract should be in favor of arbitration); *Amijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995) (reiterating federal policy favoring the arbitrability of disputes); *International Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp.*, 13 F.3d 253, 256 (7th Cir. 1994) (holding that a party contesting the submission of the claim to arbitration must clearly show that the presumption of arbitrability does not apply); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989) (holding

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that intent of FAA is to promote the use of arbitration); [Cohen, 841 F.2d at 288](#) (determining that courts should vigorously enforce arbitration agreements). See also Hayford, *supra* note 30.

33 See Jean R. Sternlight, As [Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?](#), 42 *Wm. & Mary L. Rev.* 1, 7-15 (2000) (discussing the prevalence of binding arbitration provisions in various contracts, as well as the implications of those provisions); Samuel Estreicher & San S. Saulson, *Bypass Unions to Negotiate Individual Agreements to Arbitrate Statutory Discrimination Claims*, N.Y. L.J., Jan. 25, 2000, at 1 (stating that Brown & Root/Halliburton, Philip Morris, Cigna, Northrup, Salomon/Smith Barney and International Paper all utilize mandatory arbitration clauses); Stephanie Armour, *Mandatory Arbitration: A Pill Many are Forced to Swallow*, U.S.A. Today, July 9, 1998 at 1A (stating that companies such as Circuit City, Travelers Group, Hooters of America, the Olive Garden and Red Lobster use mandatory arbitration clauses); Lisa Girion, *Arbitration Hearings Expected to Rise in Wake of Court Ruling*, L.A. Times, Aug. 26, 2000 at C1 (stating that “(m)ore than a quarter of California companies require employees to sign arbitration agreements”).

34 See, e.g., Mark E. Budnitz, [Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection](#), 10 *Ohio St. J. on Disp. Resol.* 267 (1995); Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 *Ill. L. Rev.* (forthcoming) (manuscript on file with author); David S. Schwartz, [Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration](#), 1997 *Wis. L. Rev.* 33 (1997); Jean R. Sternlight, [Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration](#), 74 *Wash. U. L.Q.* 637 (1996).

35 See, e.g., [Green Tree Fin.](#), 531 U.S. 79; [We Care Hair Dev., Inc. v. Engen](#), 180 F.3d 838 (7th Cir. 1999); [Harris v. Green Tree Fin. Corp.](#), 183 F.3d 173 (3d Cir. 1999); [Broemmer v. Abortion Servs. of Phoenix, Ltd.](#), 840 P.2d 1013 (Ariz. 1992); [Chor v. Piper, Jaffray & Hopwood, Inc.](#), 862 P.2d 26 (Mont. 1993); [Buraczynski v. Eyring](#), 919 S.W.2d 314 (Tenn. 1996); [Sosa v. Paulos](#), 924 P.2d 357 (Utah 1996); II Ian Macneil et al., *Federal Arbitration Law* § 19.3 (1994) (hereinafter “Macneil Treatise”); Schwartz, *supra* note 34; Stephen J. Ware, [Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto](#), 31 *Wake Forest L. Rev.* 1001 (1996); Julian J. Moore, Note, [Arbitral Review \(or Lack Thereof\): Examining the Procedural Fairness of Arbitrating Statutory Claims](#), 100 *Colum. L. Rev.* 1572 (2000).

36 See, e.g., [Hooters of Am., Inc. v. Phillips](#), 173 F.3d 933 (4th Cir. 1999); [Paladino v. Avnet Computer Techs., Inc.](#), 134 F.3d 1054 (11th Cir. 1998); [Broemmer](#), 840 P.2d 1013; [Armendariz v. Foundation Health Psychcare Servs. Inc.](#), 6 P.3d 669 (Cal. 2000); [Rembert v. Ryan’s Family Steak Houses Inc.](#), 596 N.W.2d 208 (Mich. Ct. App. 1999); [Arnold v. United Co. Lending Corp.](#), 511 S.E.2d 854 (W. Va. 1998).

37 See Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship; National Academy of Arbitrators, *Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems* (May 21, 1997); National Consumer Disputes Advisory Committee, *Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (1998); *Due Process Protocol for Mediation and Arbitration of Health Care Disputes* (1998).

38 See, e.g., [Doctor’s Assocs.](#), 517 U.S. at 684 (enforcing an arbitration agreement under the FAA, preempting a Montana statute which required that “(n)otice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract”).

39 An arbitration agreement is “valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.” R.U.A.A. § 6(a). See also 2000 *Styled Act with Comments*, *supra* note 6, at Official Comment 7 to R.U.A.A. § 6. The FAA has a similar provision that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of contract.” 9 U.S.C. § 2 (1994).

40 See *supra* note 36.

41 R.U.A.A. § 4.

42 The issue of adhesion and the RUA A is analyzed in this symposium in Stephen J. Ware, [Paying The Price of Process: Judicial Regulation of Consumer Arbitration Agreements](#), 2001 *J. Disp. Resol.* 89.

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- 43 R.U.A.A. § 4(b)(4). Because of the longstanding practice in the field of labor-management arbitration to allow arbitration agreements to exclude attorneys, an exception was made for this type of arbitration. However, such agreements rarely involve an adhesion situation because of the relatively equal bargaining power of labor organizations and employers. See 2000 Styled Act with Comments, supra note 6, at Official Comment 4(c) to R.U.A.A. § 4.
- 44 R.U.A.A. § 4(b), (c).
- 45 Id. § 4(a).
- 46 See 2000 Styled Act with Comments, supra note 6, at Official Comment 3 to R.U.A.A. S 4.
- 47 See 2000 Styled Act with Comments, supra note 6, at Official Comment 7 to R.U.A.A. S 6.
- 48 U.A.A. § 1; 9 U.S.C. § 2.
- 49 Id. § 5.
- 50 Id. § 8(a).
- 51 Nat'l Arb. Forum Code of Pro. Rules.
- 52 *In re RealNetworks, Inc., Privacy Litigation*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill., May 8, 2000), demonstrates the problem courts face in interpreting the term “written” in light of modern documents in electronic format. In that case the court was faced with the validity of an electronic licensing agreement containing an arbitration clause, which the user must accept by clicking a button on a computer before downloading the licensor's software. In rejecting the plaintiff's claim that such an arbitration clause is not a “written” agreement within the meaning of section 2 of the FAA, the court looked at definitions of the term “written” in effect at the time the FAA was passed in 1925. There were indications in some of these dictionaries that “written” could mean stored in a medium other than “paper.” The court concluded that the electronic arbitration agreement fit the 1925 definition of “written” because the document was easily printable and storable. The RUAA eliminates the need for such strained reasoning as the court went through in *RealNetworks*.
- 53 R.U.A.A. § 1(6).
- 54 U.A.A. § 8(a).
- 55 R.U.A.A. § 19(a).
- 56 See 2000 Styled Act with Comments, supra note 6, at Official Comment 1 to R.U.A.A. S19.
- 57 15 U.S.C. §§ 7001, 7002.
- 58 See R.U.A.A. § 30.
- 59 See 2000 Styled Act with Comments, supra note 6, at Official Comment 1 to R.U.A.A. S 30.
- 60 RUAA § 9(a) requires a person initiating an arbitration proceeding to “describe the nature of the controversy and the remedy sought” in the notice, which must be in a “record.” See R.U.A.A. § 1(6). This provision is intended to insure that parties give sufficient notice in accord with due process requirements of the dispute and remedy sought but recognizes that the notice is not a formal, legal pleading. Non-attorneys often draft such notices. See 2000 Styled Act with Comments, supra note 6, at Official Comment 5 to R.U.A.A. § 9. Section 23(a)(6) allows a court to vacate an arbitral award when a party fails to give proper notice of initiation but only if the other party has made a timely objection and proves substantial prejudice as a result of the lack of notice. See R.U.A.A. §§ 9(b), 23(a)(6).

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- 61 R.U.A.A. § 9(a). The term “obtained” means that the receipt was returned to the sender regardless of whether the recipient signed the receipt. See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 3 to R.U.A.A. § 9.
- 62 R.U.A.A. § 9(a).
- 63 See, e.g., Am. Arb. Ass'n, National Rules for the Resolution of Employment Disputes, R. 4(b)(i)(2); Center for Public Resources, Rules for Non-Administered Arbitration of Business Disputes, R. 2.1; Nat'l Arb. Forum Code of Pro. R. 6(B); Nat'l Ass'n of Securities Dealers Code of Arb. Procedure, Part I, sec. 25(a); New York Stock Exchange Arb. Rules, R. 612(b).
- 64 R.U.A.A. § 4(b)(2).
- 65 U.A.A. § 12(a)(4).
- 66 See, e.g., *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 1105 (Cal. Ct. App. 1995) (concluding that an arbitrator need not “hear” evidence in the audible sense to rule on adjudicative motions but that affidavits would suffice because “(l)egally speaking the admission of evidence is to hear it”).
- 67 R.U.A.A. § 23(a)(3).
- 68 *Id.* §§ 15(d), 23(a)(3).
- 69 See *id.* § 4(a).
- 70 *Id.* § 10.
- 71 See Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev. 473, 481-82 (1987).
- 72 See, e.g., *Hill v. Gateway*, 105 F.3d 1147, 1150 (7th Cir. 1997) (holding that arbitration agreement, sent in box containing computer sold over the telephone to a consumer and which stated that its terms governed the sale unless computer was returned within 30 days, was binding on buyer who did not return computer); *Brower v. Gateway 2000, Inc.* 246 A.D.2d 246, 247 (N.Y. App. Div. 1998) (finding arbitration clause of computer manufacturer in dispute with consumer is unconscionable because it required arbitration in a distant locale for the consumer and imposed on consumer high administrative costs of arbitration); Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, 71 Fla. B.J., Nov. 1997, at 8.
- 73 See MACNEIL TREATISE, *supra* note 35, at III § 33.3.2.
- 74 A growing number of jurisdictions have enacted statutes allowing 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 S1281.3 (West 1997) (consolidation); Ga. Code Ann. § 9-9-6 (1996) (consolidation); Mass. Gen. Laws Ann. ch. 251, § 2A (West 1997) (consolidation); N.J. Stat. Ann. § 2A-23A-3 (West 1997) (consolidation); S.C. Code Ann. § 15-48-60 (1996) (joinder); Utah Code Ann. § 78-31a-9 (1996) (joinder).
- 75 See *New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988); *Litton Bionetics, Inc. v. Glen Constr. Co.*, 437 A.2d 208 (Md. 1981); *Grover-Diamond Assoc. v. American Arbitration Ass'n*, 211 N.W.2d 787 (Minn. 1973); *Exber v. Sletten Constr. Co.*, 558 P.2d 517 (Nev. 1976); *County of Sullivan v. Edward L. Nezelek, Inc.*, 366 N.E.2d 72 (N.Y. 1977); *Plaza Dev. Serv. v. Joe Harden Builder, Inc.*, 365 S.E.2d 231 (S.C. Ct. App. 1988); *Blue Cross of Calif. v. Superior Ct.*, 67 Cal. App. 4th 42 (Cal. Ct. App. 1998); *Polshek v. Bergen County Iron Works*, 362 A.2d 63 (N. J. Super. Ct. Ch. Div. 1976).
- 76 See, e.g., *Stop & Shop Co. v. Gilbane Bldg. Co.*, 304 N.E.2d 429 (Mass. 1973); *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 607 P.2d 856 (Wash. 1980); *J. Brodie & Son, v. George A. Fuller Co.*, 167 N.W.2d 886 (Mich. App. Ct. 1969).
- 77 See generally *Glencore, Ltd. v. Schnitzer Steel Prod. Co.*, 189 F.3d 264, 268 (2d Cir. 1999) (finding that consolidation is not appropriate under the FAA unless the arbitration agreement specifically allows for consolidation); *Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1998) (holding that “a district court cannot order consolidation of arbitration

proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation"); [Champ v. Siegel Trading Co.](#), 55 F.3d 269, 274-75 (7th Cir. 1995) (recognizing that the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have all held that absent an express provision in the agreement a district court may not require consolidation, and adopting that standard as well); [American Centennial Ins. v. National Cas. Co.](#), 951 F.2d 107, 108 (6th Cir. 1991) (stating that the district court does not have power to consolidate when the agreement is silent on the matter); [Baesler v. Continental Grain Co.](#), 900 F.2d 1193, 1195 (8th Cir. 1990) (finding that when an arbitration agreement is silent as to consolidation, a district court has no power to order consolidation); [Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.](#), 873 F.2d 281, 282 (11th Cir. 1989) (questioning only whether consolidation has been expressly authorized by the parties); [Hyundai Am., Inc. v. Meissner & Wurst GMBH & Co.-U.S. Operations](#), 26 F. Supp. 2d 1217, 1219 (N.D. Cal. 1998) (refusing to consolidate, noting that the United States Court of Appeals has refused to consolidate arbitration in similar circumstances); Macneil Treatise, *supra* note 35, at III § 33.3.

78 [Fed. R. Civ. P. 18-20](#) (joinder); 23 (class actions); 42 (consolidation).

79 In a survey of arbitrators in construction cases where there are usually multiple parties that have the same basic claim against an owner, contractor, subcontractor, or architect, 83% favored consolidated arbitrations involving all affected parties. See Dean B. Thomson, [Arbitration Theory and Practice: A Survey of Construction Arbitrators](#), 23 *Hofstra L. Rev.* 137, 165-67 (1994). A similar survey of members of the ABA Forum on the Construction Industry found that 83% of nearly 1,000 responding practitioners also favored consolidation of arbitrations involving multiparty disputes. See Dean B. Thomson, *The Forum's Survey on the Current and Proposed AIA A201 Dispute Resolution Provisions*, 16 *Construction Law.*, July, 1996, at 3, 5.

80 See R.U.A.A. §§ 4(a), 10(c).

81 *Id.* § 10(a).

82 *Id.* § 10(a)(1). The language in section 10(a)(1) regarding “separate agreements to arbitrate” and “separate arbitration proceedings” is intended to cover arbitration among both principals and third-party beneficiaries of either the same arbitration agreement or separate agreements, such as guarantees, which incorporate the arbitration provisions by reference in the underlying contract. See, e.g., [Compania Espanola de Petroleos v. Nereus Shipping Co.](#), 527 F.2d 966 (2d Cir. 1975). But see [United Kingdom](#), 988 F.2d 68.

83 R.U.A.A. § 10(a)(2).

84 *Id.* § 10(a)(3).

85 *Id.* § 10(a)(4).

86 *Id.* § 10(b).

87 *Id.* § 10(c).

88 *Id.* § 10(a)(4).

89 See [Continental Energy Assoc. v. Asea Brown Boveri, Inc.](#), 596 N.Y.S.2d 416, 467 (N.Y. App. Div. 1993) (holding that denial of consolidation is 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.](#), 229 N.Y.S.2d 204, 206 (N.Y. App. Div. 1962) (refusing to consolidate arbitrations where one agreement required American Arbitration Association tribunal, other called for arbitrator to be appointee of president of real estate board).

90 [Connecticut Gen'l Life Ins. Co. v. Sun Life Assurance Co. of Canada](#), 210 F.3d 771, 773 (7th Cir. 2000) (holding that a standard of whether it is more likely than not that parties intended consolidation, rather than adopting a standard requiring parties to show a clear intent to consolidate, is more appropriate because the same considerations of adjudicative economy that argue in favor of consolidating closely related court cases argue for consolidating closely related arbitrations).

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- 91 The example, the Comment to section 10, involves one agreement requiring arbitration in St. Paul, Minnesota, and the other in the adjoining city of Minneapolis. Normally courts should not consider consolidated hearings in either city to violate a substantial right of the parties. See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 3 to R.U.A.A. § 10.
- 92 R.U.A.A. § 10(a)(4).
- 93 *Vigo S.S. Corp. v. Marship Corp. of Monrovia*, 26 N.Y.2d 157, 162 (NY. Ct. App. 1970). See also Macneil Treatise, *supra* note 35, at III § 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).
- 94 R.U.A.A. § 28.
- 95 *Cook v. Erbey*, 207 F.3d 1104, 1105 (9th Cir. 2000) (noting the policy is not to allow appeals from orders that uphold arbitration under FAA § 16); *OPC Farms, Inc. v. Conopco Inc.*, 154 F.3d 1047, 1049 (9th Cir. 1998) (noting that the policy under FAA § 16 “reflects the studied determination of Congress to promote arbitration and to keep judicial involvement to the barest minimum”); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647, 650 (N.D. 1998) (stating that the policy under UAA § 19 is not to allow appeals from orders upholding arbitration). But see *Green Tree Fin.*, 531 U.S. at 79 (finding that order compelling arbitration that resolves the litigation with nothing more for the court to do than execute judgment is a “final order” appealable under FAA, 9 U.S.C. § 16(a)(3)).
- 96 See, e.g., *Drahozal*, *supra* note 34 (manuscript at p. 41, on file with author) (pointing out that in a survey of 34 arbitration agreements between franchisors and franchisees, 16 arbitration clauses prevented class actions in arbitration); *Sternlight*, *supra* note 33, at 16 (contending that companies should not be allowed to use arbitration to preclude class actions in both litigation and arbitration). Cf. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 *Franchise L.J.* 141, 141-42 (1997) (arguing that franchisors should adopt arbitration clauses to thwart class actions); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who’s the Predator? Banks Can Use Arbitration Clauses as a Defense*, *Bus. L. Today*, May-June 1998, at 24 (discussing the use of binding arbitration clauses as an appropriate means to defeat class actions).
- 97 *Fed. R. Civ. P.* 23, 42; 7A *Charles Alan Wright et al., Federal Practice and Procedure* §§ 1751, 2382-86 (2d ed. 1986); *Moore’s Federal Practice* § 42.01 (3d ed. 2000).
- 98 Section 4(a) allows waiver of the right to consolidate but only so long as the waiver is not unconscionable, i.e., only “to the extent permitted by law.” See, e.g., *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1101-03 (W.D. Mich. 2000), on appeal to Sixth Circuit, (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); *Ramirez v. Circuit City Stores*, 90 Cal. Rptr. 2d 916 (Cal. Ct. App. 1999), review granted and opinion superseded, 995 P.2d 137 (Cal. 2000) (finding arbitration clause in contract of employment voided as unconscionable, in part, because it would deprive arbitrator of authority to hear classwide claim).
- 99 See, e.g., *Lozada*, 91 F. Supp. 2d at 1101-03 (finding an arbitration provision is unconscionable in part because it waives class remedies allowable under TILA, as well as certain declaratory and injunctive relief under federal and state consumer protection laws); *Keating v. Superior Court*, 645 P.2d 1192, 1192 (Cal. 1982), rev’d on other grounds, *Southland Corp.*, 465 U.S. at 1 (determining that claims of franchisees were arbitrable and that trial court should have considered whether to make arbitration on a class-action basis); *Ramirez*, 90 Cal. Rptr. 2d at 916 (finding arbitration clause in contract of employment voided as unconscionable, in part, because it would deprive arbitrator of authority to hear classwide claim); *Blue Cross of Calif.*, 67 Cal. App. 4th at 65, (concluding that federal preemption doctrine does not preclude trial court from ordering classwide arbitration in accordance with state decisional law); *Powertel v. Bexley*, 743 So. 2d 570, 577 (Fla. Dist. 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). But cf. *Johnson v. West Suburban Bank*, 225 F.3d 366, 378-79 (3d 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.*, No. 99 C 3952, 2000 WL 45493 at *4 (N.D. Ill. Jan. 11, 2000) (same as to

TILA claim); *Brown v. Surety Fin. Serv, Inc.*, No. 99 C 2405, 2000 U.S. Dist. LEXIS 5734 (N.D. Ill. Mar. 23, 2000) (same); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 632 (D. Del. 1999) (same); *Zawikowski v. Beneficial Nat'l Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) (same); *Randolph v. Green Tree Fin.*, 991 F. Supp. 1410 (M.D. Ala. 1997), rev'd on other grounds, 178 F.2d 1149 (11th Cir. 1999), aff'd in part and rev'd in part on other grounds, *Green Tree Fin.*, 531 U.S. 79 (same); *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 Assocs., 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); *Lopez v. Plaza Fin. Co.*, No. 95-C-7567, 1996 WL 210073 (N.D. Ill. Apr. 25, 1996) (same); *Meyers v. Univest Home Loan, Inc.*, No. C93-1783, 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); *Erickson v. Painewebber, Inc.*, No. 87C 10592, 1990 WL 104152 (N.D. Ill. July 13, 1990) (holding that fraud claims of named-plaintiff asserted in class action must be arbitrated).

100 R.U.A.A. § 12(a).

101 Id. §§ 11(b), 12(a). 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.

Since *Commonwealth Coatings*, most circuit courts of appeal have applied the test as enunciated by Justice White. See, e.g., *ANR Coal Co., v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 499 n.3 (4th Cir. 1999) (noting that courts have given the concurrence particular weight); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992); *Toyota of Berkely v. Automobile Salesmen's Union, Local 1095*, 834 F.2d 751 (9th Cir. 1987); *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982). See also *Dowd v. First Omaha Secs. Corp.*, 495 N.W.2d 36, 38-44 (Neb. 1993) (discussing Nebraska interpretation); *DeBaker v. Shah*, 533 N.W.2d 464, 467 n.4 (Wis. 1995) (noting that courts have not followed the Black standard; rather, "they have adopted the reasoning of Justice White's concurrence in the case which recognizes that arbitrators, who are often effective because of their position in the marketplace, should not be disqualified because of a business relationship if it is disclosed or is de minimus"); *Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc.*, 558 N.E.2d 1187, 1193 (Ohio Ct. App. 1988) (stating that other Ohio decisions confirm that more is needed than "a speculation or appearance of bias" but holding the arbitrator was impartial because there was no "proof of actual bias," and the relationship between the arbitrator and appellees was "too indirect and remote to substantiate any inference of bias").

102 R.U.A.A. § 12(b). See, e.g., AAA Int'l Arb. R., Art 7: "Prior to accepting appointment, a prospective arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. Once appointed, an arbitrator shall disclose any additional such information to the parties and to the administrator."; IBA Ethics For Int'l Arbitrators R. 4.3: "The duty of disclosure continues throughout the arbitral proceedings as regards new facts or circumstances."; Rules of Pro. of the Inter-Am. Comm'l Arb. Comm'n, sec. II, art. 9: "A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

103 R.U.A.A. §§ 12(c), (d).

104 See 2000 Styled Act with Comments, supra note 6, at Official Comment 5 to R.U.A.A. § 12. See also *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346, 351 (Colo. Ct. App. 2000) (determining that a party-appointed arbitrator had duty to disclose substantial business relationship with the party); *McNaughton & Rodgers v. Besser*, 932 P.2d 819 (Colo. Ct. App. 1996) (concluding member

of three-person arbitration panel has duty to disclose facts that would persuade a reasonable person of bias). Similarly, the arbitration rules of the International Chamber of Commerce provide:

Every arbitrator appointed or confirmed by the Court must remain independent of the parties involved in the arbitration. Before appointment or confirmation by the Court, a prospective arbitrator shall disclose in writing to the Secretary General of the Court any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties. Upon receipt of such information, the Secretary General of the Court shall provide it to the parties in writing and fix a time-limit for any comments from them. An arbitrator shall immediately disclose in writing to the Secretary General of the Court and the parties any facts or circumstances of a similar nature which may arise between the arbitrator's appointment or confirmation by the Court and the notification of the final award.

I.C.C. Arb. Pro., art. 13, R. 7.

- 105 R.U.A.A. § 4(a). It is only in the case of neutral arbitrators that before an arbitration matter arises parties cannot unreasonably restrict the right under [section 12](#) to disclosure of facts that might cause a conflict of interest. R.U.A.A. § 4(b)(3).
- 106 Id. § 23(a)(2).
- 107 [ANR Coal](#), 173 F.3d at 493 (finding that an arbitrator's failure to disclose relationship between arbitrator's law firm and a party did not warrant vacating the award for evident partiality because “nondisclosure, even of such facts, has no independent legal significance and does not in itself constitute grounds for vacating an award”); [Woods v. Saturn Distrib. Corp.](#), 78 F.3d 424, 427 (9th Cir. 1996) (holding that “(t)he party challenging the arbitration decision has the burden of showing partiality” when claiming arbitrators had a financial interest in the outcome of the proceeding); [Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.](#), 48 F.3d 125, 125 (4th Cir. 1995) (reversing district court's finding of bias on the basis of family relationship between arbitrator and one of the parties, stating that partiality must be direct, definite, and capable of demonstration with specific facts that prove bias); [Polin v. Kellwood Co.](#), 103 F. Supp. 2d 238, 255 (S.D.N.Y. 2000) (stating that to avoid summary confirmation of an arbitration where one party alleges that arbitrator was biased, the standard is “high and a party moving to vacate the award has the burden of proof”); [Federal Vending, Inc. v. Steak & Ale of Florida, Inc.](#), 71 F. Supp. 2d 1245, 1245 (S.D. Fla. 1999) (stating that judicial review is limited, and the bases for vacating an award are “narrow” and refusing to vacate award on ground of evident partiality because arbitrator did not disclose liquidated damage award to one of the parties in prior arbitration); [In re Carina Int'l Shipping Corp.](#), 961 F. Supp. 559, 563 (S.D.N.Y. 1997) (determining that “judicial review of an arbitral award is rather narrow” and that “(a) party seeking to overturn an arbitration award is under a heavy burden to prove that the standards for such relief have been met,” which party did not meet in alleging bias by one arbitrator to act due to undisclosed financial interest); [Hobet Mining, Inc. v. United Mine Workers of Am.](#), 877 F. Supp. 1011, 1019 (S.D. W. Va. 1994) (stating that “even where the failure to disclose (a family relationship between arbitrator and one of the parties) is ‘a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially’”); [Washburn v. McManus](#), 895 F. Supp. 392, 392 (D. Conn. 1994) (noting that the FAA has a strong presumption in favor of enforcing awards and that a court will not vacate an award on grounds of evident partiality due to arbitrator's undisclosed involvement in litigation similar to the subject matter of the arbitration).
- 108 R.U.A.A. § 12(e).
- 109 R.U.A.A. § 11(b).
- 110 See R.U.A.A. §§ 12(e), 23(a)(2).
- 111 See, e.g., [McNaughton & Rodgers](#), 932 P.2d 819 (concluding that chairman of arbitration panel acted appropriately when refusing to recuse a panel member who had a relationship with one of the parties because the objecting party failed to demonstrate evident partiality).
- 112 See, e.g., [Safeco Ins. Co. of Am. v. Stariha](#), 346 N.W.2d 663 (Minn. Ct. App. 1984); [William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed'n](#), 472 S.E.2d 346, 348 (N.C. Ct. App. 1996). See also [Tex. Civ. Prac. & Rem. Code § 172.056](#). 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.

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- 113 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.” § 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.
- 114 R.U.A.A. § 4(b)(3).
- 115 *Island Creek Coal Sales Co. v. City of Gainesville, Fla.*, 729 F.2d 1046, 1047 (6th Cir. 1984), abrogated by *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000) (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*, 657 A.2d 704, 717 (Conn. App. Ct. 1995) (upholding under UAA arbitrator's issuance of preliminary orders regarding sale and proceeds of property); *Fishman v. Streeter*, Nos. 60341, 62193, 1992 WL 146830, *5 (Ohio Ct. App., June 25, 1992) (upholding under UAA arbitrator's interim order dissolving partnership); *Park City Assoc. v. Total Energy Leasing Corp.*, 396 N.Y.S.2d 377, 378 (N.Y. App. Div. 1977) (upholding under New York state arbitration statute a preliminary injunction by an arbitrator). See also *N.J. Stat. Ann. § 2A:23A-6* (allowing provisional remedies such as “attachment, replevin, sequestration and other corresponding or equivalent remedies”); A.A.A., Commercial Disp. Resol. 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.”); C.P.R. 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 Commercial. Arb. Rules, art. 17 (providing that arbitrators may 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); Macneil Treatise, supra note 35, at II §§ 25.1.2, 25.3 & III 36.1.
- 116 See Timothy J. Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, Proceedings of the 38th Ann. Meeting, Nat'l Academy of Arb. 201, 210 (BNA Books 1985).
- 117 R.U.A.A. § 8(a). Even if a court issues a provisional remedy prior to the appointment of an arbitrator, after the arbitrator is selected the arbitrator has the authority to determine whether the court-ordered remedy should remain in effect. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (granting 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.”).
- 118 R.U.A.A. § 8(b)(1).
- 119 Id. § 8(b)(2). See, e.g., *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989) (stating that a 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, 1329 (Colo. 1996) (providing that court grants preliminary injunction to continue status quo that health maintenance organization must provide chemotherapy treatment when denial of the relief would make the arbitration process a futile endeavor); *King County v. Boeing Co.*, 570 P.2d 713, 714 (Wash. Ct. App. 1977) (denying request for declaratory judgment because the issue was for determination by the arbitrators rather than the court).
- 120 See 2000 Styled Act with Comments, supra note 6, at Official Comment 1 to R.U.A.A. § 18.
- 121 R.U.A.A. § 18. By use of the term “expedited,” the RUAA intends that a court should give priority to a request to enforce an order under section 18. See 2000 Styled Act with Comments, supra note 6, at Official Comment 2 to R.U.A.A. § 18. Further, to limit litigation on arbitral pre-award rulings, a party cannot appeal a court decision on the matter under [section 28](#). See 2000 Styled Act with Comments, supra note 6, at Official Comment 3 to R.U.A.A. § 18.
An arbitrator's order denying a request for a pre-award ruling is not subject to an action for review under section 18 because such a provision would lead to delay and more litigation without corresponding benefit to the process and the primary reason to allow a

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court to consider a favorable pre-award ruling is because such arbitral orders are not self-enforcing. The parties whose pre-award requests for relief are denied by an arbitrator may seek review of such denial after the final award is issued under section 20, vacatur, or section 21, modification or correction of an award.

122 R.U.A.A. § 18.

123 Id. § 21.

124 Id. § 21(c).

125 Macneil Treatise, *supra* note 6, at III ch. 36; Michael Hoellering, *Remedies in Arbitration, Arbitration and the Law* (1984); *David Co. v. Jim W. Miller Constr., Inc.*, 444 N.W.2d 836, 842 (Minn. 1989); *SCM Corp. v. Fisher Park Lane Co.*, 358 N.E.2d 1024, 1028 (N.Y. 1976).

126 R.U.A.A. § 21(c).

127 Id. § 21(c). See U.A.A. § 12(a).

128 U.A.A. § 10.

129 R.U.A.A. § 21(b).

130 *Mastrobuono*, 514 U.S. 52; *Baker v. Sadick*, 208 Cal. Rptr. 676 (Cal. Ct. App. 1984); *Anderson v. Nichols*, 359 S.E.2d 117 (W. Va. 1987); *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. Ct. App. 1993); *Richardson Greenshields Sec., Inc. v. McFadden*, 509 So. 2d 1212 (Fla. Dist. Ct. App. 1987); *Bishop v. Holy Cross Hosp.*, 410 A.2d 630 (Md. App. 1980); *Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726 (N.C. Ct. App. 1985); *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex. Ct. App. 1994); *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709 (Tex. Ct. App. 1984). But see *Shaw v. Kuhnel & Assocs.*, 698 P.2d 880, 882 (N.M. 1985); *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976); *School City of E. Chicago, Ind. v. East Chicago Fed'n of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981).

131 R.U.A.A. § 21(a), (b).

132 Quite contrary to sections 21(a) and (b), section 21(c) provides that even if a court could not grant a particular remedy, this fact “is not a ground for refusing to confirm an award under section 22 or for vacating an award under section 23.”

133 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 2 to R.U.A.A. § 21.

134 *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 37 (S.D.N.Y. 1979) (“An award may not be vacated . . . on the grounds that the arbitrators' opinion fails to interpret correctly the law applicable to the issues in dispute in the arbitration proceeding.”). See also *Maidman v. O'Brien*, 473 F. Supp. 25 (S.D.N.Y. 1979); Andrew M. Campbell, *Annotation, Construction and Application of Section 10(a)(4) of Federal Arbitration Act (9 USCS § 10(a)(4)) Providing for Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute Powers*, 136 A.L.R. Fed. 183, 428-30 (1997) (discussing courts' general refusal to vacate an award for “manifest disregard” of the law, and listing cases in which courts refused to so vacate awards).

135 R.U.A.A. § 21(a).

136 Id. § 21(e).

137 *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (stating that “(a)rbitrators have no obligation to the court to give their reasons for an award”); *Atlanta Gas Light Co. v. Trinity Christian Methodist Episcopal Church*, 500 S.E.2d 374, 377 (Ga. Ct. App. 1998) (concluding that an arbitrator is not required to enter written findings of fact or law to support an award, neither is she required to show the reasoning behind the award); *McKibben v. Grigg*, 582 N.W.2d 669, 671 (N.D. Ct. App. 1998) (finding that there is no general rule that arbitrators must find facts and give reasons for their awards); R. D. Hursh, *Annotation, Necessity That Arbitrators, in Making Award, Make Specific Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969, (1962) (“It seems established beyond a peradventure that, absent a statute or a stipulation in the arbitration agreement itself that the

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award of the arbitrator must meet specific formal requirements, an arbitration award need not recite the arbitrator's findings of fact or conclusions of law.”).

- 138 The prerequisites outlined in section 21(a) for utilizing the same evidentiary standards as in a judicial action and in section 21(e) of the award giving the basis in law for punitive damages are waivable under RUAA section 4(a). Thus, in their arbitration agreements parties may not require these evidentiary rules or legal standards.
- 139 See 2000 Annual Meeting, *supra* note 7, § 21; March 2000 Draft, *supra* note 5, § 21.
- 140 In order to ensure that there is a factual and legal basis for a punitive damages remedy, parties and arbitrators will almost certainly need a transcript of the arbitration hearing. This will drive up the costs of arbitration.
- 141 See *supra* Part I. regarding the goals of the Drafting Committee in writing the RUAA.
- 142 Recent data from the securities industry provides some evidence that arbitrators are generally reluctant to award punitive or other exemplary damages and do not abuse the power to punish through excessive awards. See generally Richard Ryder, *Punitive Award Survey*, 8 *Sec. Arb. Commentator*, Nov. 1996, at 4; Thomas J. Stipanowich, [Punitive Damages and the Consumerization of Arbitration](#), 92 *Nw. U. L. Rev.* 1 (1997).
- 143 RUAA § 21(b) allows an arbitrator to grant reasonable attorney's fees and other expenses of arbitration “by agreement of the parties to the arbitration proceeding.” There is no similar provision in § 21(a) on punitive damages.
- 144 See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 261 (1984) (“The basis for allowance of punitive damages rests upon the principle that they are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.”); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1320 (10th Cir. 1998) (“Punitive damages . . . are intended to provide a punishment for the benefit of society as a restraint upon the transgressor, and as a warning and example serving as a deterrent to commission of like offenses in the future.”); Marc Galanter and David Luban, [Poetic Justice: Punitive Damages and Legal Pluralism](#), 42 *Am. U. L. Rev.* 1393 (1993) (discussing nature of punitive damages generally); Timothy E. Travers, Annotation, [Arbitrator's Power to Award Punitive Damages](#), 83 *A.L.R.3d* 1037 (2000) (noting that punitive damages are assessed “largely for the public benefit” and also stating that “(p)unitive damages are generally awarded in the interest of society . . . in order to punish the particular party involved and to serve as an example to deter him and others from committing like offenses in the future”).
- 145 R.U.A.A. § 4(a).
- 146 Unlike section 21, parties cannot waive [section 8](#) on provisional remedies before a claim arises. R.U.A.A. § 4(b)(1).
- 147 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 3 to R.U.A.A. § 4.
- 148 See discussion *supra* on waivability of rights Part I.B.
- 149 See, e.g., *Gilmer*, 500 U.S. 20 (age discrimination); *Rodriguez de Quijas*, 490 U.S. 477 (securities laws); *Shearson/American Express*, 482 U.S. 220 (securities law and civil RICO claims); *Mitsubishi Motors*, 473 U.S. 614 (antitrust claim). See also 1991 Civil Rights Act, *Pub. L. No. 102-166*, § 118, 105 *Stat.* 1071, 1081 (“arbitration . . . is encouraged to resolve disputes” under the Americans with Disabilities Act, Title VII of the 1964 Civil Rights Act, the Civil Rights Act of 1866, and the Age Discrimination in Employment Act).
- 150 R.U.A.A. § 4(a).
- 151 See, e.g., *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (stating that employee with race discrimination claim under Title VII is bound by pre-dispute arbitration agreement under FAA if the employee has the right to the same relief as if he had proceeded in court); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1995) (providing that arbitration clause compelling franchisee to surrender important rights, including right of attorney fees, guaranteed by the Petroleum Marketing Practices Act, contravenes this statute); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 466 (S.D.N.Y. 1997) (finding that award under arbitration clause requiring each side to pay own attorney's fees in Title VII claim on which plaintiff prevailed but where

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arbitrators refused to award attorney's fees set aside as a manifest disregard of the law; the arbitration of statutory claims as a condition of employment are enforceable only to the extent that the arbitration preserves protections and remedies afforded by the statute); [Armendariz, 6 P.3d at 694](#) (stating limitation in arbitration agreement on remedies for employee to only backpay and not allowing employee in anti-discrimination claim to attempt recovery of punitive damages or attorney's fees contributes to determination that arbitration clause is void as unconscionable).

- 152 Section 9 is also a new provision which has been added to the RUAA.
- 153 See discussion supra regarding initiation of the arbitration process Part II.A. RUAA § 4(b)(2) prohibits a party from unreasonably restricting the right to notice of initiation of an arbitration under RUAA § 9 before a claim arises.
- 154 Parties may agree to change the notification provisions outlined in section 9 by agreement, so long as they do not unreasonably restrict the right to notice of commencement of the arbitration proceedings. R.U.A.A. §§ 4(b)(2), 9(a).
- 155 R.U.A.A. § 9(b).
- 156 *Id.* § 23(a)(6).
- 157 Although there was some discussion about an “opt-in” provision for arbitral errors of fact in the meetings of the Drafting Committee from the outset, the focus of this provision was on errors of law. See, e.g., October 1997 Draft, supra note 5, § 19. The Drafting Committee believed that it should not sanction agreements that would involve the court in the fact-finding process of an arbitration. *Id.*
- 158 For example, the February 1999 draft of the RUAA included for consideration a provision that parties could contract for judicial review of arbitration awards to be vacated for errors of law but not for errors of fact. See February 1999 Draft, supra note 5, § 19(b).
- 159 See U.A.A. § 12(a); 9 U.S.C. § 10(a) (1994).
- 160 See R.U.A.A. § 23(a).
- 161 9 U.S.C. § 10(a).
- 162 See discussion supra of federal preemption Part I.A.
- 163 U.A.A. § 12(a).
- 164 9 U.S.C. § 10(a).
- 165 For the differing positions of the proponents and opponents for a provision in the RUAA allowing for parties to opt-in to a judicial standard of review for errors of law or fact see 2000 Styled Act with Comments, supra note 6, at Official Comment B to R.U.A.A. § 24.
- 166 64 F.3d 993 (5th Cir. 1995).
- 167 *Id.* at 996. The court relied upon the Supreme Court's decisions in [First Options of Chicago v. Kaplan](#), 514 U.S. 938 (1995); [Mastrobuono](#), 514 U.S. 52 and [Volt](#), 489 U.S. 468.
- 168 130 F.3d 884 (9th Cir. 1997). *LaPine* was a 2-1 decision with the majority opinion written by Judge Fernandez who simply brushed aside any concern about parties “creating” jurisdiction. Judge Kozinski concurred with Judge Fernandez but expressed doubt about whether Congress had authorized review beyond the grounds stated in section 10(a) of the FAA. Judge Mayer dissented on the ground that the court did not have authority to review an arbitration award in any manner that the parties agreed to in their arbitration clause.
- 169 9 U.S.C. § 10(a).
- 170 130 F.3d at 892. The majority relied upon opt-in to a judicial standard in [Volt](#), 489 U.S. 468; [Prima Paint](#), 388 U.S. 395; and the decision of the Fifth Circuit in [Gateway Technologies](#), 64 F.3d 993.
- 171 935 F.2d 1501 (7th Cir. 1991).

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- 172 148 F.3d 992 (8th Cir. 1998).
- 173 9 U.S.C. § 10(a).
- 174 935 F.2d at 1505.
- 175 For two commentators refuting the argument that an “opt-in” review clause is precluded on the ground of creating jurisdiction, see Alan Scott Rau, Contracting Out of the Arbitration Act, 8 Am. Rev. of Intern'l Arb. 225 (1997) and Stephen J. Ware, “Opt-In” for Judicial Review of Errors of Law under the Revised [Uniform Arbitration Act](#), 8 Am. Rev. of Intern'l Arb. 263 (1997).
- 176 Compare [Chicago, Southshore & South Bend R.R. v. Northern Indiana Commuter Transp. Dist.](#), 682 N.E.2d 156, 159 (Ill. App. Ct. 1997), rev'd on other grounds, 703 N.E.2d 7 (Ill. App. Ct. 1998) (refusing to give effect to an arbitration clause permitting a party to set aside an arbitration award due to an error of law because it went beyond the statutory ground for vacatur) and [Dick v. Dick](#), 534 N.W.2d 185, 191 (Mich. Ct. App. 1994) (disallowing an opt-in clause as a hybrid form of arbitration that did not comport with the Michigan arbitration statute) with [Tretina Printing, Inc. v. Fitzpatrick & Assocs.](#), 640 A.2d 788 (1994) (determining that “parties are free to expand the scope of judicial review by providing for such expansion in their contract”). See also [NAB Constr. Corp. v. Metropolitan Transp. Auth.](#), 579 N.Y.S.2d 375 (1992) (approving a contractual provision allowing court review of an arbitrator's decision if it was arbitrary, capricious or so grossly erroneous so as to evidence bad faith).
- 177 See 2000 Styled Act with Comments, supra note 6, at Official Comment B.5. to R.U.A.A. § 24.
- 178 For further discussion of the issue of opt-in provisions and the RUAA in this symposium, see Hayford, supra note 31.
- 179 A number of arbitration organizations already provide in their rules for arbitral, appellate review. See, e.g., CPR Institute for Dispute Resolution, CPR Arbitration Appeal Procedure, available at [http:// www.cpradr.org](http://www.cpradr.org) (last modified March 21, 2001); Judicial Arbitration and Mediation Services (“JAMS”), Arbitration Guide and Rules, Optional Appeal Procedure, available at [http:// www.jamsadr.com/optionalArbAppeal](http://www.jamsadr.com/optionalArbAppeal) (last visited April 8, 2001).
- 180 See, e.g., Stephen L. Hayford and Ralph Peeples, Commercial Arbitration in Evolution: An Assessment and Call for Dialogue, 10 Ohio St. J. on Disp. Resol. 405-06 (1995).
- 181 See Harry T. Edwards, [Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain](#), 64 Chi.-Kent L. Rev. 3 (1988); Stephen L. Hayford, [A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur](#), 66 Geo. Wash. L. Rev. 443, 477-80 (1998); Stephen L. Hayford, [Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards](#), 30 Ga. L. Rev. 731 (1996); Brett Randall, [The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards](#), 1992 BYU L. Rev. 759; Laurie A. Tribble, Note, [Vacating Arbitrator's Awards Under the Public Policy Exception: Are Courts Second Guessing Arbitrator's Decisions?](#), 38 Vill. L. Rev. 1051 (1993).
- 182 See Hayford, [A New Paradigm](#), supra note 181; Hayford, [Law in Disarray](#), supra note 181; Brad A. Galbraith, Note, [Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the “Manifest Disregard of the Law Standard,”](#) 27 Ind. L. Rev. 241 (1993);
- 183 See Stephen L. Hayford, [Reining in the Manifest Disregard of the Law Standard: The Key to Restoring Order to the Law of Vacatur](#), 1998 J. Disp. Resol. 117; Hayford, [Law in Disarray](#), supra note 181.
- 184 461 U.S. 757 (1983).
- 185 Id. at 766 (quoting [Hurd v. Hodge](#), 334 U.S. 24, 34-35 (1948)).
- 186 Id. (quoting [Muschany v. United States](#), 324 U.S. 49, 66 (1945)).
- 187 484 U.S. 29 (1987).

- 188 [Id.](#) at 43 (quoting [W.R. Grace](#), 461 U.S. at 766).
- 189 See, e.g., [Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17](#), 121 S. Ct. 462 (2000) (drug laws); [United Paperworkers Int'l Union v. Misco, Inc.](#), 484 U.S. 29 (1987) (drug laws); [PaineWebber, Inc. v. Agron](#), 49 F.3d 347 (8th Cir. 1995) (NASD regulations); [Arizona Elec. Power Coop., Inc. v. Berkeley](#), 59 F.3d 988 (9th Cir. 1995) (lawyer's professional code of conduct); [Brown v. Rauscher Pierce Refsnes, Inc.](#), 994 F.2d 775 (11th Cir. 1993) (state securities statute); [Gulf Coast Indus. Workers Union v. Exxon Co.](#), 991 F.2d 244 (5th Cir. 1993) (drug laws); [Schoonmaker v. Cummings & Lockwood of Connecticut](#), 747 A.2d 1017 (Conn. 2000) (lawyer's code of professional conduct); [Town of Groton v. United Steelworkers](#), 757 A.2d 501 (Conn. 2000) (criminal statute precluding embezzlement); [State of Minnesota v. Minnesota Ass'n of Prof'l Employees](#), 504 N.W.2d 751 (Minn. 1993) (criminal statute prohibiting embezzlement of state funds by public employees); [Chicago Fire Fighters Union Local No. 2 v. City of Chicago](#), 735 N.E.2d 108 (Ill. App. Ct. 2000) (state law favoring safe and effective fire protection services); [County of DeWitt v. American Fed'n of State, County & Mun. Employees Council 31](#), 699 N.E.2d 163 (Ill. App. Ct. 1998) (state law protecting the elderly from abuse); [City of Lynn v. Thompson](#), 737 N.E.2d 475 (Mass. App. Ct. 2000) (federal and state laws and city regulations prohibiting unwarranted actions by police officer that results in serious injury to members of the public); [Miller v. Miller](#), 620 A.2d 1161 (Pa. Super. Ct. 1993) (child custody laws).
- 190 See, e.g., [Gulf Coast Indus. Workers](#), 991 F.2d at 248 (vacating arbitration award reinstating employee who tested positively for cocaine); [Delta Airlines, Inc. v. Air Line Pilots Ass'n](#), 861 F.2d 665, 670 (11th Cir. 1988) (refusing to enforce arbitration award reinstating pilot who flew passenger plane while intoxicated); [Iowa Elec. Lt. & Power Co. v. Local Union 204 of IBEW](#), 834 F.2d 1424, 1426 (8th Cir. 1987) (overturning arbitral award reinstating machinist who deliberately violated federally mandated safety regulations at nuclear power plant). See also [Schoonmaker](#), 747 A.2d at 1024 (stating that court determines under de novo review whether arbitrator's decision violates public policy); [Faherty v. Faherty](#), 477 A.2d 1257, 1261 (N.J. 1984) (refusing to defer to arbitrator's award affecting child support because of the court's nondelegable, 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 best interests of the child); cases cited *infra* note 193.
- 191 [Agron](#), 49 F.3d 347; [Seymour v. Blue Cross/Blue Shield](#), 988 F.2d 1020 (10th Cir. 1993); See also cases cited *supra* note 151.
- 192 For a critique of this approach, see Hayford, *A New Paradigm*, *supra* note 181.
- 193 [Brown](#), 994 F.2d 775; [Diapulse Corp. of Am. v. Carba, Ltd.](#), 626 F.2d 1108 (2d Cir. 1980); [Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp.](#), 628 F.2d 81 (D.C. Cir. 1980).
- 194 See, e.g., [Town of Groton](#), 757 A.2d at 508 (holding that arbitration award reinstating employee violated the clear public policy against embezzlement and was properly vacated); [State of Connecticut v. American Fed'n of State, County & Mun. Employees Council 4](#), 747 A.2d 480, 484 (Conn. 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); [Chicago Fire Fighters Union Local No. 2](#), 735 N.E.2d at 118 (determining that arbitrator's award reinstating discharged employees and rescinding suspensions of other employees who participated in unauthorized retirement party at firehouse violated public policy favoring safe and effective fire protection services); [County of DeWitt](#), 699 N.E.2d at 165 (overturning arbitral award reinstating nursing home employee who struck elderly patient as violation of public policy protecting elderly from abuse or harm); [City of Lynn](#), 737 N.E.2d at 480 (reversing decision of arbitrator reinstating discharged police officer who had twice broken arms of citizens while taking them into custody).
- 195 See, e.g., [Minnesota Ass'n of Prof'l Employees](#), 504 N.W.2d at 755 (finding that although employee who was discharged for filing false expense report appeared to violate well-defined and dominant public policy, arbitrator's reinstatement order did not violate any public policy); [Ralston v. City of Dahlonga](#), 512 S.E.2d 300, 303 (Ga. Ct. App. 1999) (holding that arbitrator's remedy that requires city to pay an award which includes a punitive damage amount does not violate public policy).
- 196 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment C to R.U.A.A. § 24.
- 197 9 U.S.C. § 10(a).

- 198 See supra Part I.A.
- 199 As noted previously, NCCUSL passed the RUAA on August 3, 2000. See supra Part I. On November 28, 2000, the Supreme Court decided [Eastern Associated Coal, 121 S. Ct. 462](#), in which the Court again applied the public-policy doctrine. The Court, similar to its decisions in *W.R. Grace and Misco*, upheld an arbitrator's award reinstating an employee found to have violated an employer's drug policy despite the employer's claim that the award was contrary to public policy. Although the Court reiterated the narrowness of the standard for setting aside arbitration awards for public-policy reasons, the Court stated that "the public policy exception is not limited solely to instances where the arbitration award itself violates positive law." *Id.* at 467. The Court determined that an arbitrator's award becomes part of the collective-bargaining agreement and should be reviewed as a contractual provision to see whether it runs counter to public policy. The opinion seems to follow the first approach noted above that courts will look at the merits of an arbitrator's decision in determining whether the arbitral award violates public policy. *Id.* at 466.
- This standard disturbed Justice Scalia, who concurred in the judgment but not in the opinion, because he found it "hard to imagine how an arbitration award could violate a public policy . . . without actually conflicting with positive law." *Id.* at 470. He believed that the majority's opinion would simply cause further litigation to determine whether in a particular case there is a violation of public policy. It is fair to say that the contours of the Supreme Court's standard on the public-policy exception remain uncertain.
- 200 In [Wilko v. Swan, 346 U.S. 427, 436-37 \(1953\)](#), overruled on other grounds, and [Rodriguez de Quijas, 490 U.S. 477](#), the Court stated in dicta:
- While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the (relevant law) would constitute ground for vacating the award pursuant to section 10(a) of the Federal Arbitration Act, that failure would need to be made clearly to appear. In unrestricted submissions (to arbitration) . . . the interpretations of the law by the arbitrators in contrast to manifest disregard (of the law) are not subject, in the federal courts, to judicial review for error in interpretation.
- See also [First Options, 514 U.S. at 942](#) (noting in dicta that "parties (are) bound by arbitrator's decision not in manifest disregard of the law").
- 201 [Greenberg, 220 F.3d 22](#); [Dawahare v. Spencer, 210 F.3d 666 \(6th Cir. 2000\)](#); [Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752 \(5th Cir. 1999\)](#); [Montes v. Shearson Lehman Bros., 128 F.3d 1456 \(11th Cir. 1997\)](#); [Carte Blanche \(Singapore\) PTE Ltd. v. Carte Blanche Int'l, 888 F.2d 260 \(2d Cir. 1989\)](#); [O.R. Secs., Inc. v. Professional Planning Assocs., 857 F.2d 742 \(11th Cir. 1988\)](#); [Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 \(2d Cir. 1986\)](#); [Hunter, Keith Indus. v. Piper Capital Mgt. Inc., 575 N.W.2d 850 \(Minn. 1998\)](#); [May v. First Nat'l Pawn Brokers, Ltd., 887 P.2d 185 \(Mont. 1994\)](#); [Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 \(Utah 1996\)](#); [Ralston, 512 S.E.2d 300](#); [Harris v. Bennett, 503 S.E.2d 782 \(S.C. Ct. App. 1998\)](#).
- 202 [Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239 \(1st Cir. 1995\)](#) (holding that "arbitration awards are subject to review where it is clear from the record that the arbitrator recognized the applicable law--and then ignored it"); [Marshall v. Green Giant Co., 942 F.2d 539, 550 \(8th Cir. 1991\)](#) (finding that "(m)anifest disregard of the law exists when the arbitrator commits an error that was 'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. . . . (and when) the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it'" (citing [Bobker, 808 F.2d at 933](#)); [San Martine Compania de Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796, 801 \(Haw. Ct. App. 1961\)](#) (concluding that "a manifest disregard of the law in the context of the language used in *Wilko v. Swan* might be present when arbitrators understand and correctly state the law, but proceed to disregard the same").
- 203 See Hayford, A New Paradigm, supra note 181, at 468.
- 204 See cases cited supra notes 191-202. In none of these cases did persons challenging the arbitration award on the ground of manifest disregard of the law prevail. For a case in which a claimant did succeed in showing that an arbitration award violated the standard of manifest disregard, see [Nearly v. Prudential Ins. Co. of Am., 63 F. Supp. 2d 208 \(D. Conn. 1999\)](#).
- 205 See 2000 Styled Act with Comments, supra note 6, at Official Comment C to R.U.A.A. § 24.
- 206 See 2000 Styled Act with Comments, supra note 6, at Official Comment C5 to R.U.A.A. § 24.
- 207 For further discussion of these issues regarding vacatur and the RUAA in this symposium, see Hayford, supra note 31.

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- 208 The RUAA adds only the additional ground of vacatur for improper notice of initiation of an arbitration. See R.U.A.A. § 23(a)(6).
- 209 Richard C. Reuben, [Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice](#), 47 *UCLA L. Rev.* 949, 1054-55 (2000) (noting that the finality of an arbitration award is a benefit of the arbitration process which any unitary theory of public civil dispute resolution must protect).
- 210 See U.A.A. § 12(a); 9 U.S.C. § 10(a); R.U.A.A. § 23(a).
- 211 See Marvin F. Hill, Jr. & Anthony V. Sinicropi, [Improving the Arbitration Process: A Primer for Advocates](#), 27 *Willamette L. Rev.* 463, 472 (1991).
- 212 R.U.A.A. § 23.
- 213 *Id.* § 24.
- 214 *Id.* § 22.
- 215 Macneil Treatise supra note 35, at IV § 40.13 (“(O)ver the years the courts have taken a fairly uniform approach to awards: Awards should be confirmed and enforced unless there is clear evidence of a gross impropriety.”); John S. Murray et. al., *Processes of Dispute Resolution: The Role of Lawyers* 624 (2d ed. 1996) (“The conventional wisdom is that successful challenges to arbitration awards are rare.”).
- 216 R.U.A.A. § 25(c).
- 217 *Id.*
- 218 See discussion supra of vacatur Part II.E.
- 219 See discussion infra of awarding arbitrators and arbitration organizations attorney's fees and costs of litigation Part III.B.
- 220 See, e.g., [Fogerty v. Fantasy, Inc.](#), 510 U.S. 517 (1994) (Copyright Act of 1976, 17 U.S.C. §§ 101, 116); [Christianburg Garment Co. v. EEOC](#), 434 U.S. 412 (1978) (Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e); [Bercovitch v. Baldwin Sch., Inc.](#), 191 F.3d 8 (1st Cir. 1999) (Americans with Disabilities Act, 42 U.S.C. §§ 12101, 12205 (1994)).
- 221 See 2000 Styled Act with Comments, supra note 6, at Official Comment 4 to R.U.A.A. § 25.
- 222 R.U.A.A. § 4(a).
- 223 Typically, statutes are made effective prospectively only. See, e.g., U.A.A. § 20.
- 224 Section 3 of the RUAA is based upon the effective date and application provisions in the Revised [Uniform Partnership Act \(S 1206\)](#) and the 1996 Amendments constituting the [Uniform Limited Liability Partnership Act of 1994 \(S 1210\)](#).
- 225 R.U.A.A. § 31.
- 226 *Id.* § 33.
- 227 *Id.* § 3.
- 228 *Id.* § 32.
- 229 *Id.* § 3(a).
- 230 *Id.* § 1(6).
- 231 *Id.* § 3(b).

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- 232 Id. §§ 3(c), 32.
- 233 Sections 3(c) and 32 refer to this date as the “delayed date.” In the example January 1, 2007, is the “delayed date.”
- 234 Retroactive application of statutes to preexisting contracts is acceptable when the legislation has a legitimate purpose and the measures are reasonable and appropriate to that end. 2 Sutherland Stat. Const. § 41.07 (5th ed. 1993). The need for uniform application of arbitration laws and to avoid two sets of rules governing arbitration agreements that are of a long-term duration are legitimate rationales for retroactive application, especially because parties will be given a time period in which to determine whether to opt for coverage under the UAA or the RUAA and during which to adjust any provisions in their arbitration agreements for eventual application of the RUAA.
- 235 “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” R.U.A.A. § 6(a). See also U.A.A. § 1; 9 U.S.C. § 2.
- 236 See *First Options*, 514 U.S. 938; *Des Moines Asphalt & Paving Co. v. Colcon Ind.*, 500 N.W.2d 70, 72 (Iowa 1993), overruled by *Wesley Retirement Servs. v. Hansen Lind Meyer*, 594 N.W.2d 22 (Iowa 1999); *Exber*, 558 P.2d 517; *State v. Stremick Constr. Co.*, 370 N.W.2d 730, 735 (N.D. 1985); *City of Cottonwood v. James L. Fann Contracting, Inc.* 877 P.2d 284, 292 (Ariz. Ct. App. 1994); *Amalgamated Transit Union Local 900 v. Suburban Bus Div.*, 634 N.E.2d 469, 474 (Ill. App. Ct. 1994); *City of Morris v. Duininc Bros.*, 531 N.W.2d 208, 210 (Minn. Ct. App. 1995); *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430, 433 (Mo. Ct. App. 1993). But see *Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1313 (N.Y. 1995) (stating that under New York arbitration law a court rather than an arbitrator decides whether a statute of limitations time bars an arbitration).
- 237 R.U.A.A. § 4(b)(1).
- 238 Id. § 4(a).
- 239 American Arbitration Association, Commercial Dispute Resolution Procedure R-8(b), at <http://www.adr.org> (last visited May 16, 2001); International Chamber of Commerce International Court of Arbitration, Rule of Arbitration, art. 19, at <http://www.iccwbo.org/court/english/arbitration/rules> (January 1998). See also *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (finding that when parties agreed that all disputes arising out of or in connection with distributorship agreement would be settled by binding arbitration in accordance with the rules of arbitration of the International Chamber of Commerce, they agreed to submit issues of substantive arbitrability to arbitrator); *Daiei v. United States Shoe Corp.*, 755 F. Supp. 299, 302 (D. Haw. 1991) (noting that parties agreed to submit issues of substantive arbitrability to arbitrator, when they incorporated by reference in their arbitration agreement the rules of the International Chamber of Commerce providing that “any decision as to the arbitrator’s jurisdiction shall lie with the arbitrator”).
- 240 R.U.A.A. § 6(c).
- 241 388 U.S. 395 (1967).
- 242 A majority of states recognize some form of the separability doctrine under their state arbitration laws. See *New Process Steel Corp. v. Titan Indus. Corp.*, 555 F. Supp. 1018 (S.D. Tex. 1983) (applying Texas law); *Schneider, Inc. v. Research-Cottrell, Inc.*, 474 F. Supp. 1179 (W.D. Pa. 1979) (applying Pennsylvania law); *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258 (Ala. 1994); *Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 673 P.2d 251 (Cal. 1983); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916 (D.C. 1992); *Brown v. KFC Nat’l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996); *Quirk v. Data Terminal Sys., Inc.*, 400 N.E.2d 858 (Mass. 1980); *Weinrott v. Carp*, 298 N.E.2d 42 (N.Y. 1973); *Jackson Mills, Inc. v. BT Capital Corp.*, 440 S.E.2d 877 (S.C. 1994); *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 437 S.E.2d 22 (S.C. 1993); *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 705 P.2d 490 (Ariz. Ct. App. 1985); *Weiss v. Voice/Fax Corp.*, 640 N.E.2d 875 (Ohio Ct. App. 1994); *Gerwell v. Moran*, 10 S.W.3d 28 (Tex. App. 1999); *Pinkis v. Network Cinema Corp.*, 512 P.2d 751 (Wash. Ct. App. 1973). See also William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 *Am. Rev. Int’l Arb.* 133, 143 (1997) (“(T)he separability doctrine permits arbitrators to invalidate the main contract . . . without the risk that their decisions will

call into question the validity of the arbitration clause from which they derive their power. In other words, the separability doctrine gives arbitrators the tools with which to do their job, by examining fully the parties' agreement.”).

Other states have either limited or declined to follow the *Prima Paint* doctrine on separability. See *Atcas v. Credit Clearing Corp. of Am.*, 197 N.W.2d 448 (Minn. 1972); *Shaw* 698 P.2d 880, 881-82; *Shaffer v. Jeffery*, 915 P.2d 910, 916 (Okla. 1996) (recognizing that majority of states apply the doctrine of separability but declining to follow the doctrine); *Frizzell Constr. Co. v. Gatlinburg L.L.C.*, 9 S.W.3d 79 (Tenn. 1999); *Rosenthal v. Great Western Fin. Sec. Corp.*, 926 P.2d 1061 (Cal. 1996); *Goebel v. Blocks & Marbles Brand Toys, Inc.*, 568 N.E.2d 552 (Ind. Ct. App. 1991); *City of Wamego v. L.R. Foy Constr. Co.*, 675 P.2d 912 (Kan. Ct. App. 1984); *George Engine Co. v. Southern Shipbuilding Corp.*, 376 So. 2d 1040 (La. Ct. App. 1979); *Holmes v. Coverall N. Am., Inc.*, 633 A.2d 932 (Md. Ct. Spec. App. 1993).

243 See 2000 Styled Act with Comments, supra note 6, at Official Comment 4 to R.U.A.A. § 6.

244 R.U.A.A. § 6(c).

245 *Prima Paint*, 388 U.S. 395.

246 R.U.A.A. § 4(a). Allowing the parties to waive or vary the provision of the RUAA applies to § 6(c).

247 *Id.* § 6(c).

248 See *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990) (holding that “(b)ased primarily on the ‘functional comparability’ of the arbitrator’s role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity”); *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (“While the (Federal Arbitration) Act does not so provide, case law dictates that arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings (T)he functional comparability of the arbitrators’ decision-making process and judgments to those of judges . . . generates the same need for independent judgment free from the threat of lawsuits.”); *International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. and Its Locals 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1185 (6th Cir. 1983) (concluding that an arbitrator is “functionally comparable to a judge and, consequently, he is clothed with an immunity that is analogous to judicial immunity”); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1209-10 (6th Cir. 1982) (listing circuits that have found that arbitrators are functionally comparable to judges and should thus be afforded immunity); *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853 (W.D. S.C. 1957) (disallowing party to require arbitrators to testify in an attempt to impeach arbitration award); *Boraks v. American Arbitration Ass’n*, 517 N.W.2d 771, 772 (Mich. Ct. App. 1994) (noting that the functional comparability of arbitrators is “well established”).

Four states presently provide some form of arbitral immunity in their arbitration statutes: Cal. Civ. Proc. Code § 1297.119; Fla. Stat. Ann. § 44.107 (West 1995); N.C. Gen. Stat. § 7A-37.1 (1995); Utah Code Ann. § 78-31b-4 (1994).

249 See *Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (establishing the principle that the extension of judicial-like immunity to non-judicial officials is properly based on the “functional comparability” of the individual’s acts and judgments to the acts and judgments of judges). See also *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) (holding that the key to the extension of judicial immunity to non-judicial officials is the “performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights”); *Austern*, 898 F.2d at 886 (affirming dismissal of claim against arbitration organization and stating that “(b)ased primarily on the ‘function comparability’ of the arbitrator’s role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity”); *Wasyf*, 813 F.2d at 1581 (determining that “arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings”); *Greyhound*, 701 F.2d at 1185 (finding that an arbitrator’s “purpose is ‘functionally comparable’ to a judge and, consequently, he is clothed with an immunity that is analogous to judicial immunity”); *Corey*, 691 F.2d at 1208-09 (stating that based upon the policies of judicial and quasi-judicial immunity such immunity would be applied to arbitrators); *Boraks*, 517 N.W.2d at 772 (noting that “(i)t is well established that, for reasons of public policy, arbitrators are protected from civil suit by the doctrine of arbitral immunity”); Richard J. Mattera, Note, Has the *Expansion of Arbitral Immunity Reached Its Limits After United States v. City of Hayward?*,

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12 Ohio St. J. on Disp. Resol. 779 (1997) (discussing the history, development, and future of arbitral immunity); 4 Am. Jur. 2d Alternative Dispute Resolution § 172 (1995) (discussing judicial immunity for arbitrators).

- 250 See, e.g., *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993) (affirming dismissal of claim against judicial clerks, stating that although clerks are not entitled to immunity for ministerial functions, they are entitled to immunity for acts that are “an integral part of the judicial process”); *Olivia v. Heller*, 839 F.2d 37, 39 (2d Cir. 1988) (affirming dismissal of claim against judicial clerk, stating “courts have granted absolute immunity to court clerks when they were performing discretionary acts of a judicial nature”); *Fariello v. Campbell*, 860 F. Supp. 54 (E.D.N.Y. 1994) (granting summary judgment on claim against the chief clerk of the court and a judicial clerk on the basis of immunity).
- 251 See *New England Cleaning Servs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999); *Honn v. National Ass'n of Sec. Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999); *Hawkins v. National Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330 (5th Cir. 1998); *Olson v. National Ass'n of Sec. Dealers, Inc.*, 85 F.3d 381 (8th Cir. 1996); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973); *Cort v. American Arbitration Ass'n*, 795 F. Supp. 970 (N.D. Cal. 1992); *Boraks*, 517 N.W.2d 771; *Candor Central Sch. Dist. v. American Arbitration Ass'n*, 411 N.Y.S.2d 162 (N.Y. Sup. Ct. 1978).
- 252 R.U.A.A. § 14(a). The Drafting Committee saw little difference in an arbitrator making decisions, such as the location or time of the hearing or determining when briefs will be filed, and the personnel of arbitration organizations deciding these issues. However, because of the definition of arbitration organization, only a “neutral” arbitration organization is entitled to immunity under section 14. R.U.A.A. § 1(1). See also 2000 Styled Act with Comments, supra note 6, at Official Comment 1 to R.U.A.A. § 1.
- 253 R.U.A.A. § 14(b).
- 254 See notes supra 248-250 and infra note 255.
- 255 See, e.g., *New England Cleaning Servs.*, 199 F.3d at 543 (affirming dismissal on basis of arbitral immunity); *Honn*, 182 F.3d at 1018 (affirming dismissal on basis of arbitral immunity); *Hawkins*, 149 F.3d at 332 (affirming defendant's motion for summary judgment because of immunity); *Austern*, 898 F.2d at 887 (affirming dismissal of complaint against arbitration sponsor on the basis of immunity); *Wasył*, 813 F.2d at 1583 (affirming summary judgment for immunity); *Corey*, 691 F.2d at 1213 (same).
- 256 R.U.A.A. § 14(d), which is based on the California Evidence Code providing that arbitrators shall not be “competent to testify . . . as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding.” *Cal. Evid. Code § 703.5*. See also *N.J.R. Super. Ct. R. 4:21A-4* (2001); *N.Y. Ct. R. § 28.12* (2001).
The exception requiring an arbitrator or representative of an arbitration organization to testify where a party claims vacatur on grounds of fraud, evident partiality, or other misconduct under section 23(a)(1) or (2) is intended to be a very limited one. A court should not require the arbitrator or representative of the arbitration organization to testify when a party merely asserts one of these grounds for vacatur; rather, the person must make a “prima facie” showing that the arbitrator or representative of the arbitration organization has committed the wrongdoing. See, e.g., *Northwest Airlines, Inc. v. Air Line Pilots Ass'n., Int'l*, 385 F. Supp. 634, 640 (D.D.C. 1974) (describing “the arbitrator as a judge, . . . and therefore it is (not) appropriate to probe his decisional processes” and thus refusing to require testimony by the arbitrator); *Gramling*, 151 F. Supp. at 861-62 (disallowing party to require arbitrators to testify without making a showing of wrongdoing on part of arbitrators in an attempt to impeach arbitration award); *Martin Weiner Co. v. Fred Freund Co.*, 155 N.Y.S.2d 802, 805 (N.Y. App. Div. 1956) (reasoning that allowing arbitrator to testify concerning his or her intent would disturb the finality of arbitration and thus not allowing arbitrator testimony as to the propriety of award). See also Reuben I. Friedman, Annotation, *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award*, 80 A.L.R.3d 155 (discussing general rule that arbitrators' testimony is inadmissible for use in subsequent litigation regarding the propriety of arbitration awards, and examining specific situations like fraud in which those claims often arise). Cf. *Carolina-Virginia Fashion Exhibitors Inc. v. Gunter*, 230 S.E.2d 380, 388 (N.C. 1976) (holding that where there is objective basis to believe that arbitrator misconduct has occurred, deposition of the arbitrator may be permitted and the deposition admitted in action for vacatur). If a party unsuccessfully attempts to subpoena or otherwise require testimony from the arbitrator or representative of the arbitration organization, then the requirement for attorney's fees and expenses of litigation in section 14(e) applies.
- 257 R.U.A.A. § 14(e).

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- 258 Id. § 15.
- 259 Id. § 15(a).
- 260 Id. §§ 15(a), (c), (d).
- 261 See February 1999 Draft, *supra* note 6, at Reporter Notes 5 & 8 to Draft R.U.A.A. § 11(b) at xx (noting 4-3 vote to delete provision on summary disposition but then a 5-1 vote to add a provision on summary disposition).
- 262 *Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (confirming a summary adjudication by an arbitrator based on documentary evidence but expressing reservations about deciding arbitration cases without an evidentiary hearing); Schlessinger, 47 Cal. Rptr. 2d 660-61 (upholding arbitrator's award based on a summary adjudication but cautioning that the appropriateness of such summary action depends upon whether the party opposing a summary motion is given a fair opportunity to present its position); *Stifler v. Seymour Weiner*, 488 A.2d 192, 195 (Md. Ct. App. 1985) (stating that dispositive motion is appropriate on issue of statute of limitations); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 929 P.2d 1200, 1203 (Wash. Ct. App. 1997) (stating that full hearing of all evidence regarding merits of a claim is unnecessary where decision may be made on basis of motion to dismiss). But see *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1418 (N.D. Okla. 1996) (vacating arbitration award and finding that the arbitration panel was guilty of misconduct and exceeded its powers in refusing to hear pertinent evidence by deciding case without a hearing).
- 263 R.U.A.A. § 23(a)(3).
- 264 Id. § 15(b)(2).
- 265 Id. § 4(a).
- 266 *Rippe v. West Am. Ins. Co.*, No. 353954, 1993 WL 512547 (Conn. Super. Ct. Dec. 2, 1993). See also *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980) (finding that party to arbitration contract had no right to pre-hearing discovery).
- 267 See Fed. R. Civ. P. 26(b)(1); James Wm. Moore et al., *Moore's Federal Practice* ¶ 26.02 (3d ed. 1999) (noting the broad standard of Rule 26, and recognizing that there is a general “perception that parties abuse the discovery tools” in using that rule); Charles Alan Wright et al., 8 *Federal Practice and Procedure* § 2001 (2d ed. 1994) (stating that the underlying philosophy of the discovery rules “was that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged The scope of discovery was broadened and the restrictions imposed upon it were directed chiefly at the use of, rather than the acquisition of, the information discovered, although concerns about cost have risen to prominence in recent years.”).
- 268 See R.U.A.A. § 17(c)-(f).
- 269 Id. § 4(a).
- 270 Most courts have allowed discovery only at the discretion of the arbitrator. See, e.g., *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988); *Transwestern Pipeline Co. v. J.E. Blackburn*, 831 S.W.2d 72 (Tex. App. 1992). The few state arbitration statutes that have addressed the matter of discovery also leave these issues to the discretion of the arbitrator: *Mass. Gen. Laws. Ann. ch. 251, § 7(e)* (West 2000) (stating that only the arbitrators may enforce a request for production of documents and entry upon land for inspection and other purposes); *Tex. Civ. Prac. & Rem. Code Ann. § 171.007(b)* (West 2000) (providing that arbitrator may allow deposition of adverse witness for discovery purposes); *Utah Code Ann. § 78-31a-8 (2000)* (allowing arbitrators to order discovery in their discretion).
- 271 R.U.A.A. § 17(c).
- 272 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 3 to R.U.A.A. § 17: “(T)he default standard of section 17(c) is meant to discourage most forms of discovery in arbitration.”

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- 273 R.U.A.A. § 17(a), (b); U.A.A. § 7(a), (b). The parties cannot waive R.U.A.A. § 17(a) and (b) before a claim arises. See R.U.A.A. § 4(b)(1).
- 274 R.U.A.A. § 17(d).
- 275 190 F.3d 269 (4th Cir. 1999).
- 276 “The arbitrators . . . 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.” 9 U.S.C. § 7.
- 277 “The arbitrators may issue . . . subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths.” U.A.A. § 7(a).
- 278 See also [Burton](#), 614 F.2d at 391 (holding that under the FAA a party only upon a showing of special need or hardship may petition a district court to compel pre-arbitration discovery); [Integrity Ins. Co. v. American Centennial Ins. Co.](#), 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (finding that arbitrator lacks authority to compel nonparty witness to appear for depositions prior to arbitration hearing, as witnesses who are not parties to arbitration agreement “never bargained for or voluntarily agreed to participate in an arbitration”).
- 279 [In re Brazell](#), No. M-82 AGS, 2000 WL 364997 (S.D.N.Y. April 7, 2000) (concluding that case law supports arbitrator's authority to require pre-hearing production of documents from third parties); [Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.](#), 879 F. Supp. 878, 880 (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, 44-45 (M.D. Tenn. 1994) (stating that under “(t)he power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing”); [Stanton](#), 685 F. Supp. at 1242-43 (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) (stating that “the Uniform Arbitration Act provides for the issuance of subpoenas by an arbitrator to non-party witnesses at an arbitration proceeding, to compel their testimony or the production of documents”); [United Elec. Workers Local 893 v. Schmitz](#), 576 N.W.2d 357 (Iowa 1998) (holding that Iowa Arbitration Act confers on arbitrators the power to subpoena nonparty witnesses). See also Gary B. Born, *International Commercial Arbitration in the United States* 844 (1994) (finding that although the FAA “can be read” as only authorizing arbitrators to require witnesses to attend arbitral hearings, “(l)ower courts have not, however, construed § 7 in this fashion”).
- 280 R.U.A.A. § 17(a).
- 281 *Id.* § 17(b).
- 282 *Id.* § 17(c).
- 283 See 2000 Styled Act with Comments, *supra* note 6, at Official Comment 8 to R.U.A.A. § 17.
- 284 R.U.A.A. § 17(b).
- 285 *Id.* § 17(e).
- 286 Under the UAA and FAA courts have allowed nonparties to challenge the propriety of arbitral subpoenas or other discovery-related orders. See, e.g., [COMSAT](#), 190 F.3d 269; [Integrity Ins.](#), 885 F. Supp. 69.
- 287 See R.U.A.A. § 18 (allowing judicial enforcement of a pre-award ruling by an arbitrator in an expedited judicial proceeding).
- 288 231 A.D.2d 337 (N.Y. App. Div. 1997). See also [Group Health Plan, Inc.](#), 30 S.W.3d at 203 (concluding that when parties to prior arbitration entered into an agreement, which was signed by both parties and arbitration panel, providing that materials related to that arbitration were confidential, such confidential information was not discoverable in unrelated arbitration).

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- 289 See Heinsz, *supra* note 116, at 218-19, 221-22 (arguing that courts should enforce subpoenas of labor arbitrators against third parties unless the person's objection is primarily a legal issue such as privilege or confidentiality).
- 290 See, e.g., *Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 559 F. Supp. 875, 877-78 (M.D. Pa. 1982) (noting that "(u)pon a party's refusal to comply, enforcement of the subpoena may be had via a petition in the United States District Court for the district in which the arbitrator sits"); *Amgen*, 1994 WL 594372, at *1-*2 (finding that "(s)ince the Arbitrator in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7 of the Federal Arbitration Act, to bring its petition to compel compliance in (Illinois). Instead, Amgen brought the petition in this court In short, Amgen has filed its motion to compel compliance in the wrong district.").
- 291 R.U.A.A. § 17(g).
- 292 *Id.* § 26(a).
- 293 *Id.* § 26(b).
- 294 *State ex rel. Tri-County Constr. Co. v. Marsh*, 668 S.W.2d 148, 152 (Mo. Ct. App. 1984) ("(E)very state that has considered the question of jurisdiction to confirm the award has focused on the place of arbitration and not the locus of the contract (T)he place of contracting is not always, or even frequently, the convenient location for arbitration. Modern business operates in a multi-state environment, and the parties should be permitted to choose the place of arbitration and confirmation upon consideration of convenience, and not upon artificial concepts of the place of contracting."). See also *Kearsarge Metallurgical Corp. v. Peerless Ins. Co.*, 418 N.E.2d 580 (Mass. 1981); *General Elec. Co. v. Star Technologies, Inc.* 1996 WL 377028 (Del. Ch. June 13, 1996); *Stephanie's v. Ultracashmere House Ltd.*, 424 N.E.2d 979 (Ill. App. Ct. 1981); *Tru Green Corp. v. Sampson*, 802 S.W.2d 951 (Ky. Ct. App. 1991).
- 295 After an arbitral dispute arises, the parties may change the jurisdictional requirements of section 26(a) and (b) by agreement. R.U.A.A. § 4(b)(1).
- 296 The American Arbitration Association; JAMS; the National Academy of Arbitrators; the Dispute Resolution Section of the American Bar Association ("ABA"); the Labor and Employment Law Section of the ABA; the Torts and Insurance Practice Section of the ABA; the ABA Real Property, Probate and Trusts Section; the ABA Senior Lawyers Division; the American College of Real Estate Lawyers; and the Committee on Arbitration of the Association of the Bar of the City of New York expressly supported the RUA.A.
- 297 The author is already aware of efforts to introduce the RUA.A into thirteen states: Alabama, Arizona, California, Connecticut, Illinois, Missouri, Minnesota, New Jersey, New York, Ohio, Oregon, Utah, and Vermont (documents on file with author).
- 298 See *supra* Part I.
- 299 See *supra* Part I.A.

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