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## ARTICLE

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

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

### I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

5. *Id.* at 30.

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

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

other forms of ADR, such as early neutral evaluation and arbitration, may be used in the alternative.<sup>8</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. Brief History of Arbitration

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

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

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

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

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

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

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

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

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

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

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

22. 9 U.S.C. § 2 (2000).

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

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

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

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

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

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

## B. Primary Issues Addressed in Court Decisions Regarding the UAA

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

tions where an arbitrator decides a matter not submitted to him under the arbitration agreement.<sup>49</sup>

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

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

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

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

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

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

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

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

53. RUAA, prefatory note at 2.

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

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

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

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54. The prefatory note states:

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

*Id.*

55. *Id.*

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

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

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

#### A. New Provisions

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

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

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

58. *Id.*

59. *Id.* § 9(a).

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

61. *Id.*

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

TABLE 1: COMPARISON OF RUAA AND UAA SECTIONS

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

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

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

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

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

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63. *Id.* § 9 cmt. 3.

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

65. RUAA § 9 cmt. 3.

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

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

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

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

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

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

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

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

71. See *Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1183 (Ill. 1992) (“Because courts have given arbitration such a presumption of validity once the proceeding has begun, it is essential that the process by which the arbitrator is selected be certain as to the impartiality of the arbitrator.”).

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

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

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

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



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

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

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

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

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

79. RUAA § 12 cmt. 2.

80. Section 1 of the RUAA defines “knowledge” as actual knowledge.

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

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

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

83. *Id.* § 12(a).

still have stricter disclosure requirements than those provided by the RUAA.<sup>84</sup>

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

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

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

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

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

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

88. See RUAA §§ 11 cmt. 1, 12 cmt. 5.

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

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

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

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

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

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

If a neutral arbitrator fails to disclose a known, direct, and material interest or a known, existing,<sup>100</sup> and substantial relationship, it

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93. RUAA § 4(b)(3) (stating that a party to an agreement may not “agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator”).

94. *See id.* § 11 cmt. 1. UAA section 3 provides for the appointment of arbitrators by the court. It also provides that parties may select arbitrators in their agreement. UAA § 3 n.3. RUAA section 11 maintains this feature of the UAA.

95. The Drafting Committee was aware that parties who select arbitration by contract are foregoing a jury trial and accepting limited judicial review in exchange for a method of speedy resolution that costs less and provides for one’s own choosing of a decision-maker, one likely having expertise in a given field. Parties usually choose arbitrators based on their professional, business, or commercial expertise, or their relationship to the parties. *See* RUAA § 11 cmt. 1, § 12 cmt. 1.

96. *Id.* § 12(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).”) (emphasis added); *see also* Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997) (“We emphasize that this evident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias.”).

97. RUAA § 23(a)(2)(A) (stating that courts should vacate an award where there was “evident partiality by an arbitrator appointed as a neutral arbitrator”).

98. *Id.* § 23 cmt. 1.

99. *Id.* § 12 cmt. 4 (“[I]t is then the burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the nondisclosure or there in fact was no prejudice.”).

100. It appears that a past relationship would not support such a presumption because there is a slight difference in the wording chosen by the Drafting Commit-

is then presumed that the arbitrator acts with “evident partiality” and any award is subject to vacatur.<sup>101</sup> How big a role this rebuttable presumption plays will depend on the types of interests or relationships involved and whether the standard for the presumption to attach appears to be a high one.<sup>102</sup> Some states impose even stricter disclosure requirements on arbitrators.<sup>103</sup>

Finally, all challenges based on an arbitrator’s alleged impartiality are subject to any contract provision detailing methods of challenge and are considered conditions precedent.<sup>104</sup> Timely objections are required before any challenge or review for vacatur is initiated.<sup>105</sup>

3. *Section 10—Consolidation.* The RUAA takes a major step by adding an entirely new section related to the consolidation of multi-party disputes and separate arbitration proceedings. Section 10 provides that, upon motion of one of the parties, a court may order consolidation of some or all claims in situations where there are separate arbitration agreements or proceedings between the same parties or where one party is involved in a separate arbitration agreement or proceeding with a third party.<sup>106</sup> However, in order to consolidate, it must be shown that: (1) the claims arise “in

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tee regarding what is to be disclosed. RUAA sections 12(a)(1) and (2) require the arbitrator to have “a financial or personal interest in the outcome” or “an existing or *past* relationship with any of the parties” before the award can be subject to vacatur. Section 12(e), however, requires the arbitrator to have a “known, direct, and material interest” or a “known, existing, and substantial relationship.”

101. *Id.* § 23(a)(2)(A).

102. RUAA sections 12(a)(1) and (2) are worded differently than section 12(e).

103. *See* CAL. CIV. PROC. CODE §§ 1281.6, 1281.9, 1281.95, 1297.121, 1297.122 (West. Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 172.056 (Vernon Supp. 2002). On a related note, on July 22, 2002, the National Association of Securities Dealers, Inc. (NASD) and the New York Stock Exchange filed suit against the California Judicial Council and its members. Both arbitration organizations are seeking a declaration that they are exempt from the California arbitrator disclosure standards that were implemented in that state on July 1, 2002. *See* NASD, NASD Seeks Exemption from California Arbitration Rules, The Neutral Corner, at [http://www.nasdadr.com/neutral\\_corner/0802\\_default.asp](http://www.nasdadr.com/neutral_corner/0802_default.asp) (last visited October 20, 2002).

104. RUAA section 12(f) reads:

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

105. *Id.* § 12(c).

106. *Id.* § 10(a)(1).

substantial part” from the same transaction or series of transactions; (2) the presence of a common issue of law or fact creates the possibility of conflicting decisions in separate arbitration proceedings; and (3) any prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay, prejudice, or hardship to the party opposing consolidation.<sup>107</sup>

Consolidation has been a source of controversy and conflict.<sup>108</sup> There are few state statutes that address consolidation<sup>109</sup> and most arbitration agreements do not provide for it. It is hardly a reality that all parties are signatories to one agreement document, although it does happen.<sup>110</sup> However, consolidation has been required in some cases for various reasons implicating the interests of efficiency in arbitration and the prevention of conflicting awards.<sup>111</sup> The current trend under the FAA holds that where parties do not expressly agree on consolidation there is no requirement to con-

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107. *Id.* § 10(a)(2)-(4).

108. *Id.* § 10 cmt. 1.

109. *See, e.g.*, CAL. CIV. PROC. CODE § 1281.3 (West 2002); GA. CODE ANN. § 9-9-6 (2002); MASS. GEN. LAWS ch. 251, § 2A (2002); N.J. STAT. ANN. § 2A-23A-3 (West 2002); S.C. CODE ANN. § 15-48-60 (Law. Co-op. 2002); UTAH CODE ANN. § 78-31(a)-(9)(2002).

110. *See Hartford Accident Indem. Co. v. Swiss Reinsurance American Corp.*, 246 F.3d 219 (2d Cir. 2001).

111. *See Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can.*, 210 F.3d 771, 775 (7th Cir. 2000) (holding that consolidation was appropriate when both textual and practical arguments favored it); *New England Energy v. Keystone Shipping Co.*, 855 F.2d 1, 5-6 (1st Cir. 1988) (holding that the FAA did not preclude consolidation when the agreement was silent on the issue and the state law provided for consolidation); *Litton Bionetics, Inc. v. Glen Constr. Co.*, 437 A.2d 208, 217-18 (Md. 1981) (holding that a circuit court is empowered by the state UAA to order consolidation); *Grover-Diamond Assoc. v. Am. Arbitration Ass'n*, 211 N.W.2d 787, 790 (Minn. 1973) (holding that consolidation was appropriate where parties chose the same arbitrator, the arbitration agreement did not prohibit joint arbitrations, and there was no prejudice); *Exber, Inc. v. Sletten Constr. Co.*, 558 P.2d 517, 524 (Nev. 1976) (holding that consolidation is appropriate when evidence, witnesses, and legal issues were the same in both disputes and there was no showing of prejudice); *Polshek v. Bergen County Iron Works*, 362 A.2d 63, 68-70 (N.J. Super. Ct. Ch. Div. 1976) (holding that consolidation was appropriate even without an authorizing statute because of common issues and lack of prejudice); *County of Sullivan v. Edward L. Nezelek, Inc.*, 366 N.E.2d 72, 75 (N.Y. 1977) (holding that a trial court was within its discretion to order consolidation when there was a common contact to the two claims and consolidations would provide a more consistent result); *Plaza Dev. Serv. v. Joe Harden Builder, Inc.*, 365 S.E.2d 231, 233 (S.C. Ct. App. 1988) (holding that consolidation was appropriate where there was no finding of prejudice).

solidate.<sup>112</sup> Despite the fact that a majority of federal appellate courts have ruled against consolidation,<sup>113</sup> the RUAA makes an effort to encourage the use of arbitration in multi-party scenarios similar to judicial consolidation of litigation proceedings.<sup>114</sup> Where common issues of fact and law are present, section 10 allows courts to order consolidation.<sup>115</sup>

4. *Section 4—Waivable Provisions.* Section 4 of the RUAA in effect provides that parties entering into arbitration agreements are free to arrange such contracts as they wish, subject to minimal prohibitions.<sup>116</sup> As such, section 4 operates as a default statute and should be referred to when analyzing the various ways of designing an arbitration clause or agreement.<sup>117</sup> No doubt there is the temptation to craft an agreement heavily in favor of one's own interest. Those who do so should take caution because there is always the increased likelihood of a vacatur challenge.

In general, the RUAA permits parties to vary their agreements in any manner and at any time subsequent to the initial agreement as long as the integrity of arbitration remains intact.<sup>118</sup>

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112. See *Glencore, Ltd. v. Schnitzer Steel Prod. Co.*, 189 F.3d 264, 267 (2d Cir. 1999) (“[T]here is no source of authority in either the FAA or the Federal Rules of Civil Procedure for the district court to order consolidation absent authority granted by the contracts.”); see also 3 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 33.3 (1999). But see *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779, 793 (Cal. Ct. App. 1998) (holding that the FAA does not preempt state law on issues of procedure, including consolidation).

113. See *Champ v. Siegel Trading Co. Inc.*, 55 F.3d 269, 277 (7th Cir. 1995); *U.K. v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Prospective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *Rolls-Royce Indus. Power, Inc. v. Zurn EPC Services, Inc.*, 2001 WL 1397881, at \*6 (D. Ill. 2001).

114. See *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can.*, 210 F.3d 771, 774 (7th Cir. 2000) (stating that “a court can in appropriate circumstances consolidate cases before it”).

115. RUAA § 10(a)(3).

116. *Id.* § 4 (“A party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of [the RUAA] to the extent permitted by law.”).

117. See *id.* § 4 cmt. 1.

118. See *id.* § 6 (stating that although the initial agreement shall be in a “record,” subsequent oral or written modifications are permitted); see generally *id.* § 6 cmt. 1; *Premier Technical Sales, Inc. v. Digital Equip. Corp.*, 11 F. Supp. 2d 1156 (N.D. Cal. 1998); *Cambridgeport Sav. Bank v. Boersner*, 597 N.E.2d 1017 (Mass.

The RUAA demands that parties to a contract be responsible for their consensual arrangements. There is no doubt that parties on the wrong end of an arbitration agreement will challenge such agreements or arbitration provisions. Most will fail,<sup>119</sup> but there is a possibility for success where an agreement runs contrary to fundamental fairness, takes away statutory rights, or undermines an arbitrator's ability to govern the arbitration proceedings.<sup>120</sup> Section 4 explicitly prohibits parties from waiving or varying the effect of the RUAA in a number of substantive areas. Under the RUAA, parties to an arbitration agreement may not contract so as to waive their respective rights to seek judicial relief,<sup>121</sup> to appeal,<sup>122</sup> to be

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1992); *Pellegrine v. Luther*, 169 A.2d 298 (Pa. 1961); *Pac. Dev., L.C. v. Orton*, 982 P.2d 94 (Utah Ct. App. 1999).

119. See RUAA § 6 cmt. 7 (“Despite some recent developments to the contrary, courts do not often find contracts unenforceable for unconscionability.”).

120. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (holding that an arbitration agreement can be invalid when one party promulgates rules that are egregiously unfair); *Shankle v. B-G Maint. Mgmt., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999) (holding an employee's discrimination claim not subject to arbitration where the arbitral forum is substantially limited by having to pay a portion of the arbitrator's fee); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding an employee was not required to arbitrate Title VII claim when the agreement limited his damages below the statutory minimum); *Armendariz v. Found. Health Psychcare Serv. Inc.*, 6 P.3d 669, 683 (Cal. 2000) (noting that an arbitration agreement limiting an employee's remedies under state anti-discrimination claims may be void); *Engalla v. Permanente Med. Group*, 938 P.2d 903, 916-17 (Cal. 1997) (holding that a health maintenance organization could not compel arbitration when it fraudulently induced participant to agree to arbitrate, misrepresented arbitration selection process, and forced delays making participant waive arbitration right); *Gonzalez v. Hughes Aircraft Employees Fed. Credit Union*, 83 Cal. Rptr. 2d 763, 765 (Cal. Ct. App. 1999) (holding an arbitration contract unenforceable because of persuasive procedural and substantive unconscionability); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 152 (Cal. Ct. App. 1997) (finding unconscionable an arbitration clause that was one-sided, reserved litigation rights to employer but not employee, had shorter statute of limitation for employee, and limited damages); *Alamo Rent A Car, Inc. v. Galarza*, 703 A.2d 961, 966 (N.J. Super. Ct. App. Div. 1997) (holding employment discrimination claim not subject to arbitration because it was not clearly delineated in agreement as subject to arbitration); *Arnold v. United Co. Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 1998) (holding unconscionable an arbitration provision when consumer waived right to judicial review in consumer loan agreement while reserving lender's right to judicial review).

121. RUAA §§ 4(b)(1), 5(a) (“Except as otherwise provided in Section 28, an [application] for judicial relief under this [Act] must be made by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing [motions].”). The bracketed sections are provided by the RUAA to ac-

represented by an attorney,<sup>123</sup> to file a motion to compel or stay the arbitration,<sup>124</sup> to seek confirmation of an award,<sup>125</sup> to move to vacate an award,<sup>126</sup> or to request modification or correction of an award.<sup>127</sup> Additionally, arbitration agreements may not limit the immunity of an arbitrator or an arbitration organization from suit<sup>128</sup> or restrict an arbitrator's power to issue pre-hearing orders,<sup>129</sup> to issue subpoenas and permit depositions of parties,<sup>130</sup> or to modify or correct an award.<sup>131</sup> Finally, contracting parties may not structure their ar-

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commodate differences in initiating arbitration in different states. Some states allow the filing of petitions or complaints with or without motions or applications. The terms "application" and "motion" have been bracketed throughout the RUAA for states to substitute where appropriate and does not attempt to alter the already established practice of each state.

122. *Id.* §§ 4(b)(1), 28. The RUAA keeps intact the right to appeal as it appears in the UAA. Appeals may be taken from orders denying a motion to compel arbitration, granting a stay of arbitration, confirming or denying confirmation of an award, modifying or correcting an award, vacating an award without directing a rehearing, or entering a final judgment pursuant to the RUAA. *See id.* § 28 (a)(1)–(6).

123. *Id.* §§ 4(b)(4), 16. Under UAA section 6, an attempt to waive right to be represented by an attorney prior to the proceedings or hearing is ineffective. The RUAA is somewhat different in that it allows an employer or a labor organization to waive the right to representation in a labor arbitration. *Id.* § 4(b)(4).

124. *Id.* §§ 4(c), 7. Section 7 is not a new section. Authority to compel or stay proceedings can be found at UAA section 2.

125. *Id.* §§ 4(c), 22. After a party receives notice of an award, "the party may make a [motion] to the court for an order confirming the award." RUAA § 22. The RUAA alters the language of UAA section 11 regarding confirmation so as to bring it into conformity with the terms used by the FAA.

126. *Id.* §§ 4(c), 23. The RUAA keeps intact UAA section 12 on vacating an award with one addition regarding insufficient or lack of notice as a basis for vacatur, provided that the complaining party establish timely objection, substantial prejudice, and no waiver of objection by appearance at hearing. *Id.* §§ 9, 23(a)(6).

127. *Id.* §§ 4(c), 24.

128. *Id.* §§ 4(c), 14. Section 14 is a new provision granting immunity to an arbitrator. This follows the RUAA's direction to empower arbitrators and enhance the efficiency of arbitration proceedings.

129. *Id.* §§ 4(b)(1), 8. Section 8 is a completely new section granting arbitrators more authority. The RUAA prohibits any waiver of or variance of an arbitrator's authority to preserve the status quo of property that may become the means of satisfying a judgment (e.g., preliminary injunctive relief, replevin, attachment, or sequestration of assets). Note that section 4 does not prohibit parties from waiving or varying an arbitrator's remedies at the award stage or post-hearing stage. *Id.* § 21.

130. *Id.* §§ 4(b)(1), 17.



bitration agreement so as to modify or alter the validity, enforceability, or irrevocability of arbitration agreements,<sup>132</sup> the jurisdiction of a court,<sup>133</sup> the judicial enforceability of an arbitrator's pre-award rulings,<sup>134</sup> a court's authority to award attorney's fees and litigation expenses for services related to confirming, vacating, modifying or correcting an award,<sup>135</sup> the uniformity of application and construction of RUAA,<sup>136</sup> the application of the Electronic Signatures in Global and National Commerce Act,<sup>137</sup> the effective date provisions of the RUAA,<sup>138</sup> or the repeal date of a state's present statute adopting the UAA.<sup>139</sup>

Under section 4, parties are permitted to vary or modify the RUAA provisions regarding notice of the initiation of an arbitration proceeding and the duty of disclosure on the part of a neutral arbitrator as long as such modifications are reasonable.<sup>140</sup>

5. *Section 8—Provisional Remedies.* Section 8 of the RUAA empowers the arbitrator or arbitration panel to deal effectively with the modern arbitration issues of multiparty claims and com-

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131. *Id.* §§ 4(c), 20(d)-(e). If a motion to the court is pending regarding confirmation, vacatur, or modification, “the court may submit [a] claim to the arbitrator to consider whether to modify or correct the award.” *Id.* § 20(d); *see also id.* §§ 22-24. Further, section 20(e) provides that an award must be provided by record and may be subject to confirmation, vacatur, or modification. *Id.* § 20(e); *see also id.* §§ 19(a), 22-24.

132. *Id.* §§ 4(b)(1), 6(a) (“[Arbitration agreements] are valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.”).

133. *Id.* §§ 4(b)(1), 26 (“A court . . . having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.”).

134. *Id.* §§ 4(c), 18. Section 18 is a new provision granting greater power to arbitrators and requiring courts to enforce their rulings.

135. *Id.* §§ 4(c), 25(a), 25(b). Sections 25(a) and 25(b) correspond to UAA sections 14 and 15 with a similar provision in FAA section 13 regarding judgments and docketing.

136. *Id.* §§ 4(c), 29. Section 29 is not a new section. Uniformity of interpretation can be found at UAA section 21.

137. *Id.* §§ 4(c), 30. This is a new provision of the RUAA intended to expand coverage of arbitration agreements using electronic mediums.

138. *Id.* §§ 4(c), 3(a), 3(c). Sections 3(a) and 3(c) govern the effective date of the RUAA. The exception is provided in section 3(b) where parties have entered into a contract under the UAA and have the option to elect coverage under the RUAA.

139. *Id.* §§ 4(c), 32.

140. *Id.* §§ 4(b)(2)-(3), 9, 12. For a detailed discussion of the requirements of RUAA sections 9 and 12, *see supra* Part III.A.1 (section 9) and Part III.A.2 (section 12).

plex discovery. This provisional remedy<sup>141</sup> section was first envisioned by the original drafters of the UAA, but was eliminated in the final 1955 version.<sup>142</sup> Section 8 assists the arbitration process by placing more authority in the hands of arbitrators to handle pre-hearing matters and reduces the opportunity for parties to resort to the courts. The Drafting Committee identified the need to prevent the pre-arbitration dispersal of assets by a party fearing liability and accordingly provided for provisional remedies prior to a hearing that can operate to protect and preserve property.

Where an arbitrator has not been appointed, a party may request the court to enter a provisional remedy to secure property.<sup>143</sup> After an arbitrator has been appointed and is authorized to act, the arbitrator may order provisional remedies, including interim awards, as the arbitrator finds necessary.<sup>144</sup> When an arbitrator is not able to act or cannot provide an adequate remedy on an urgent matter, the parties may request a court to issue a provisional remedy.<sup>145</sup> In such a case, an arbitrator can order a party to perform a

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141. "Provisional remedy" is defined as "[a]n equitable proceeding before judgment to provide for the postjudgment safety and preservation of property." BLACK'S LAW DICTIONARY 1297 (7th ed. 1999).

142. RUAA § 8 cmt. 1.

143. *Id.* § 8(a). Section 8(a) reads as follows:

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

*Id.*; see also *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 814 (3d Cir. 1989) (holding that a court order protects the status quo to protect the integrity of the arbitration process); *Hughley v. Rocky Mountain Health Maint. Org., Inc.*, 927 P.2d 1325, 1333 (Colo. 1996) (upholding the issuance of a preliminary injunction until arbitrator addressed the matter of chemotherapy); *King County v. Boeing Co.*, 570 P.2d 713, 718-19 (Wash. App. 1977) (denying declaratory judgment because rental dispute was a matter for the arbitrator to decide).

144. RUAA § 8(b)(1). Section 8(b)(1) reads as follows:

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

*Id.*

145. *Id.* § 8(b)(2). The 1996 English Arbitration Act sections 44(1), (3), (4), and (6) is the source of the term "urgent." *Id.* § 8 cmt. 3.

contract, or compel a party to refrain from particular conduct or produce material.<sup>146</sup>

Most jurisdictions allow courts to issue provisional remedies pending the outcome of an ongoing arbitration.<sup>147</sup> Among federal courts of appeal, the Eighth Circuit is the only dissenter to this view. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*,<sup>148</sup> the court recognized the inherent overlap of authority when a court considers irreparable harm and the likelihood of success on the merits, issues that it concluded should be left to the authority of the arbitrator.<sup>149</sup> There is some indication that security should be provided in such circumstances.<sup>150</sup>

The RUAAs' adoption of section 8 is designed to increase the efficiency of the arbitration process by placing more authority in the hands of arbitrators to handle such pre-hearing matters, thereby reducing the need or opportunity for parties to resort to the courts. In seeking to expand the ability of arbitrators in this area, the Drafting Committee cited a line of precedent holding that arbitrators have broad authority to order provisional remedies and interim relief.<sup>151</sup> Section 8 is intended to codify these developments

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146. See *Fraulo v. Gabelli*, 657 A.2d 704, 711 (Conn. App. 1995) (concerning the arbitrator's preliminary order regarding proceeds of sale); *Park City Assoc. v. Total Energy Leasing Corp.*, 396 N.Y.S.2d 377, 378 (N.Y. App. Div. 1977) (affirming denial of preliminary injunction as "the direction for arbitration encompasses the night of the arbitrator . . . to grant provisional remedies").

147. See CAL. CIV. P. CODE § 1281.8 (West Supp. 2002); N.J. STAT. ANN. § 2A:23A-6(b) (West 2000); N.Y. C.P.L.R. § 7502(c) (McKinney 2002); *BancAmerica Commercial Corp. v. Brown*, 806 P.2d 897, 900 (Ariz. Ct. App. 1990) (issuing a writ of attachment to secure settlement agreement between creditor and debtor); *Lamber v. Superior Court*, 279 Cal. Rptr. 32, 35 (Cal. Ct. App. 1991) (issuing mechanic's lien); *Hughley*, 927 P.2d at 1333 (issuing preliminary injunction to maintain chemotherapy treatment provided by health maintenance organization); *Salvucci v. Sheehan*, 212 N.E.2d 243, 245 (Mass. 1965) (issuing a temporary restraining order to prevent conveyance or encumbrance of property subject to a pending arbitration).

148. 726 F.2d 1286, 1292 (8th Cir. 1984) (stating that there is no judicial relief because the "judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator").

149. See 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 25.1 (1999).

150. See *Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 46 (1944) (holding that private parties may not agree to eliminate the use of traditional admiralty procedures, or its concomitant security, from the requirements of the United States Arbitration Act).

151. RUAAs § 8 cmt. 4; see, e.g., N.J. STAT. ANN. § 2A:23A-6 (providing for provisional remedies such as "attachment, replevin, sequestration and other corre-

and give arbitrators a larger scope of authority so as to further limit the occasions and need for judicial action.

6. *Section 21—Remedies in Final Awards.* A key provision in the RUAA relates to one of the most often litigated issues under the original UAA—remedies.<sup>152</sup> Section 21 expressly provides that an arbitrator may award punitive damages,<sup>153</sup> attorney's fees and

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sponding or equivalent remedies"); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (upholding arbitrator's interim award requiring city to continue performance of coal purchase contract until further order of arbitration panel).

152. RUAA § 21(a)-(e) provides:

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

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

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

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

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

153. Although section 21 is a new feature, the concept of an arbitrator awarding punitive damages is not. This follows the trend of the RUAA in accommodating the growth in arbitration and arbitration common law developments. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (holding that the arbitral award, including punitive damages, should have been enforced according to the scope of the contract between the parties); *Baker v. Sadick*, 208 Cal. Rptr. 676, 681 (Cal. Ct. App. 1984) (holding that a doctor who submitted a tort claim to an arbitrator cannot claim arbitrator's lack of authority over punitive damages); *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo. Ct. App. 1993) ("A valid and enforceable arbitration provision divests the court of jurisdiction over all arbitrable issues."); *Richardson Greenshields Sec., Inc. v. McFadden*, 509 So. 2d 1212, 1213 (Fla. Dist. Ct. App. 1987) (holding that tort actions including punitive damages are proper subjects for arbitration); *Bishop v. Holy Cross Hosp.*, 410 A.2d 630, 632 (Md. Ct. Spec. App. 1980) (holding that under Maryland's Health Care Malpractice Claims Statute, arbitration panels have authority to award punitive damages); *Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726, 731 (N.C. Ct.

expenses,<sup>154</sup> and any other remedy that an arbitrator deems just and appropriate unless the parties provide otherwise in the arbitration agreement.<sup>155</sup> This follows the overall theme of the RUAA by empowering arbitrators while at the same time allowing parties to sculpt their agreement as they see fit. An arbitrator may have broad authority to control the process of arbitration and issue remedies that are just and appropriate, but parties are free to eliminate certain types of remedies through limitation of remedies clauses.

Section 21 does give rise to concerns regarding adhesion contracts in the context of arbitration agreements between consumers and lenders, employers and employees, and medical providers and subscribers. The Drafting Committee chose to leave the issue of adhesion contracts and unconscionability to developing case law across the country.<sup>156</sup> The Drafting Committee noted that a large number of organizations have developed “Due Process Protocols” to ensure procedural and substantive fairness in employment, consumer, and health care arbitrations.<sup>157</sup>

7. *Section 18—Arbitrator Self-Enforcement.* Because arbitration awards are not self-enforcing, parties receiving an unfavorable ruling in an arbitration proceeding may evade an order simply by refusing to comply. Parties receiving favorable rulings are, therefore, forced to seek a court order enforcing the arbitrator’s ruling. Enforcement of final awards is usually not a problem because a prevailing party only has to file a motion with the court for an or-

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App. 1985) (holding that arbitrators may settle any controversy arising between parties to an arbitration contract, including tort claims or claims for punitive damages); *Kline v. O’Quinn*, 874 S.W.2d 776, 782 (Tex. Ct. App. 1994) (holding that arbitrators may determine the sufficiency of pleadings to support awards for punitive damages); *Grissom v. Greener & Sumner Constr., Inc.*, 676 S.W.2d 709, 711 (Tex. Ct. App. 1984) (holding that arbitrator’s award of exemplary damages cannot be modified where such claims have expressly been submitted in the arbitration agreement). *But see* *Leroy v. Waller*, 731 S.W.2d 789, 792 (Ark. Ct. App. 1987) (holding that Arkansas law does not allow arbitration of tort claims, and thus arbitration panels are without power to award punitive damages); *Sch. City of E. Chi., Ind. v. East Chi. Fed. of Teachers*, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981) (holding that arbitrator’s award of punitive damages was void as against public policy); *Shaw v. Kuhnel & Assocs.*, 698 P.2d 880, 882 (N.M. 1985) (holding that “an arbitrator should not be given authority to award punitive damages”); *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976) (“An arbitrator has no power to award punitive damages, even if agreed upon by the parties.”).

154. RUAA § 21(b).

155. *Id.* § 21(a)-(c).

156. *See id.* § 6 cmt. 7.

157. *Id.*

der of confirmation.<sup>158</sup> However, the enforcement of pre-award rulings, such as provisional remedies, is much more problematic. Courts are generally very hesitant to grant review of interlocutory orders of an arbitrator except on issues involving privilege or confidentiality.<sup>159</sup>

Section 18 of the RUAA rectifies this situation and greases the wheels of arbitration by allowing a prevailing party to seek expedited review of an arbitrator's pre-award ruling pursuant to RUAA section 22 (Confirmation of Award). Section 18 also commands that courts "shall summarily decide" such motions and issue an order confirming the ruling unless the court vacates, modifies, or corrects it.<sup>160</sup> Section 18 allows for speedy determinations of pre-hearing rulings.<sup>161</sup> Note, however, that there is no provision in the RUAA providing for an appeal from a court decision on a pre-hearing ruling by an arbitrator.<sup>162</sup>

8. *Section 30—Technology.* Section 30 of the RUAA incorporates the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act<sup>163</sup> regarding the legal effect, validity, and enforceability of electronic records or electronic signatures. The opportunity for online dispute resolution is becoming a new avenue to resolve controversies quickly,<sup>164</sup> and the RUAA attempts to address what the UAA did not, in light of technological advances.

## B. Clarifying Provisions

1. *Section 6—Arbitrability.* Section 6, the updated version of the UAA section 1, addresses the validity of arbitration contracts. It is not an entirely new section, but, among other things, it attempts to provide additional guidance on the issue of who decides

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158. *Id.* § 22; UAA § 11.

159. RUAA § 18 cmt. 1; *see also* Aerojet-General Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973) (stating that "judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases").

160. RUAA § 18.

161. *Id.* § 18 cmt. 2.

162. *Id.* § 18 cmt. 3. The intent of section 18 is not to allow such orders from a lower court to be appealed. *Id.*

163. 15 U.S.C. §§ 7001, 7002 (2000).

164. *See generally* William K. Slate, *Online Dispute Resolution: Click Here to Settle Your Dispute*, DISP. RESOL. J., Nov. 2001-Jan. 2002, at 8.

arbitrability and by what criteria.<sup>165</sup> In response to common law developments in many states, section 6 provides that courts are to decide substantive arbitrability questions, but leaves procedural questions for the arbitrator to decide.<sup>166</sup> Under this clarifying position, arbitrators will have statutory authority to determine whether all conditions precedent are fulfilled prior to the start of arbitration.<sup>167</sup> For example, procedural areas include laches, notice, estoppel, and other conditions precedent. However, statutes of limitations may be an exception to the rule.<sup>168</sup>

While section 6 does not substantially change the UAA, it does explicitly accommodate computer technology.<sup>169</sup> A written agreement or computer agreement is valid, enforceable, and irrevocable under the RUAA unless some basis in law or equity makes it revocable.<sup>170</sup> The RUAA's broad definition of "record" and its adoption of standards regarding the validity of electronic records and signatures<sup>171</sup> allow arbitration agreements and proceedings to take better advantage of new technology.

The issue of federal preemption of state arbitration laws is particularly relevant to questions of arbitrability. The U.S. Su-

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165. See RUAA prefatory note. This was a particular issue of concern identified by the Drafting Committee.

166. Compare RUAA § 6(b) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.") with RUAA § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

167. *Id.* § 6(b).

168. Compare *Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1313 (N.Y. 1995) (holding that the court rather than the arbitrator should decide whether a statute of limitations bars an arbitration) with *7-Eleven, Inc. v. Dar*, 757 N.E.2d 515, 521 (Ill. App. Ct. 2001) (upholding arbitrator's determination that agreement's ten-day limitation was not enforceable).

169. Section 6(a) of the RUAA provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." RUAA § 6(a). The reference to "in a record" is provided in the new definitions section. *Id.* § 1. The original UAA does not have a definitions section. The RUAA defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.* § 1(6). In the comments of section 1, the Drafting Committee states that the definition is intended to accommodate the use of electronic evidence in commercial transactions. *Id.* § 1(6) cmt. 5.

170. *Id.* § 6(a).

171. See *supra* Part III.A.8.

preme Court has provided guideposts in the preemption area, suggesting that any arbitration agreement should provide clear and express language about what is being waived or altered.<sup>172</sup> For example, waiver of arbitrability issues to be decided by a court must be clearly stated in the contract along with clear guidance for determining the arbitrability of a contract dispute.<sup>173</sup>

2. *Section 15—Arbitration Procedures.* Section 15 of the RUAA is intended to give broad authority to arbitrators to control and manage all arbitration proceedings.<sup>174</sup> If arbitration is to be placed on equal footing with traditional litigation, an arbitrator must be able to hold pre-hearing conferences and rule on preliminary matters in the same way a judge would conduct judicial pre-trial conferences and preliminary motions. Section 15 seeks to empower arbitrators in ways that the original UAA did not.

Section 15 provides that an arbitrator may conduct an arbitration in any manner that the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.<sup>175</sup> An arbitrator may rule on summary dispositions<sup>176</sup> on the request of any party af-

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172. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (observing that the relevant state law required an objective showing that the parties intended to submit a controversy to arbitration); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (applying common law principle that a party who drafts an ambiguous agreement may not later claim the benefit of the doubt); see also *Volt Info. Scis., Inc. v. Stanford Univ.*, 489 U.S. 468, 475 (1989) (implying that general state law contract principles govern the interpretation of arbitration agreements).

173. See generally Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999) (providing detailed discussion regarding the U.S. Supreme Court's directions regarding arbitration, state arbitration, and contracting parties' authority to choose).

174. The corresponding UAA section is section 5.

175. See RUAA § 15(a). Section 15(a) states that

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

*Id.*

176. Summary disposition is not equated with summary judgment. Questions of law and summary judgment motions are some, but not all, of the matters for an arbitrator to rule on. An arbitrator is not confined to the rules of evidence and is free to consider whatever he or she believes to be relevant to an award. See *id.* § 15 cmt. 3.



ter notice and opportunity to respond have been provided.<sup>177</sup> The UAA did not provide such authority to arbitrators, but the Drafting Committee noted that “arbitrators probably have the inherent authority to perform such tasks.”<sup>178</sup> Section 15, however, explicitly places more procedural matters within the discretion of arbitrators under the RUAA.

3. *Section 17—Discovery.* The RUAA also expands an arbitrator’s authority to issue protective orders<sup>179</sup> and establishes the arbitrator’s authority to issue discovery-related orders.<sup>180</sup> Under the UAA, an arbitrator’s authority included subpoena and deposition powers.<sup>181</sup> The RUAA expands on this authority and provides for arbitrator discretion concerning discovery.<sup>182</sup> However, this grant may conflict with the goals of arbitration, as expansive discovery only weighs down the process and undermines the primary benefits associated with arbitration—efficiency and cost effectiveness.

4. *Section 14—Arbitrator Immunity.* Another addition to the RUAA is section 14, providing that arbitrators and arbitration or-

177. *Id.* § 15(b)(1)-(2). Section 15(b) reads as follows:

[a]n arbitrator may decide a request for summary disposition of a claim or particular issue: (1) if all interested parties agree; or (2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties . . . and the other parties have a reasonable opportunity to respond.

*Id.*

178. *Id.* § 15 cmt. 2.

179. *Id.* § 17(e) (“An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action . . .”).

180. *Id.* § 17(c) (“An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.”).

181. UAA § 17. Under the RUAA the subpoena and deposition authority is not subject to party waiver. *See* RUAA § 4(b)(1). However, there is no restriction on whether parties can alter or vary the protective order or other discovery-related authority. A party’s ability to waive pre-hearing discovery should encourage parties to negotiate their own methods of discovery. *Id.* § 17 cmt. 3.

182. *See* RUAA § 17 cmt. 3 (“[D]iscretion rests with the arbitrators whether to allow discovery. The discovery procedure in Section 17(c) is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties.”).

ganizations acting in that capacity are immune from civil liability.<sup>183</sup> Arbitral immunity is the rule in virtually every jurisdiction,<sup>184</sup> shielding arbitrators from having to testify<sup>185</sup> in any type of proceeding.<sup>186</sup> Unless criminal activity waives the immunity<sup>187</sup> or a complaining party desires to have an arbitrator testify in order to show alleged fraud,<sup>188</sup> arbitrators possess immunity similar to that of judicial officers. Immunity questions commonly arise when a party attempts to summon an arbitrator to testify about his reasoning supporting an award or any suspected conflicts of interest.

Section 14(d)(2) recognizes that arbitrators who have engaged in corruption, fraud, partiality, or other misconduct may be required to give testimony so that a party will have evidence to prove such grounds to vacate an award under sections 23(a)(1) and (2).<sup>189</sup> However, “[s]uch testimony or records from an arbitrator are only required after the objecting party makes a sufficient initial showing that such grounds exist.”<sup>190</sup> Without such objective evidence, arbitrators should not have to testify or produce records from the arbitration proceeding.<sup>191</sup>

Extending quasi-judicial immunity when arbitrators function similarly to judges is a codification of common law.<sup>192</sup> This section

183. *Id.* § 14(a).

184. *Feichtinger v. Conant*, 893 P.2d 1266, 1267 (Alaska 1995).

185. RUAA § 14(d). Section 14(d) reads as follows:

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

*Id.*; *see also* *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 430 (9th Cir. 1996) (denying request to depose arbitrator); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2d Cir. 1991) (denying request to depose arbitrator where there was no clear evidence of bias or impropriety).

186. RUAA § 14(a) (“An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.”).

187. *Id.* § 14 cmt. 8 (“Section 14 does not grant arbitrators or arbitration organizations immunity from criminal liability arising from their conduct in their arbitral or administrative roles.”).

188. *Id.* § 14 cmt. 5.

189. *Id.* § 14(d)(2).

190. *Id.* § 14 cmt. 5.

191. *Id.*

192. *See Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (extending judicial-like immunity when “functional comparability” of non-judicial officials’ acts and judgments resembles that of judicial official); *Feichtinger v. Conant*, 893 P.2d

is new, but not surprising in light of the fact that the RUAA seeks to empower arbitrators and raise the process of arbitration to near equal status with traditional litigation.<sup>193</sup> The immunity also applies to arbitration organizations and organization representatives so long as each is acting with judge-like responsibilities.<sup>194</sup> There is no waiver of immunity when an arbitrator fails to disclose known, direct, and material interests or known, existing, and substantial relationships.<sup>195</sup> The sole remedy for this situation is vacatur.<sup>196</sup> As a deterrent to challenging arbitrators' immunity, the RUAA makes it permissible to collect attorney's fees and expenses associated with the successful defense of lawsuits.<sup>197</sup>

5. *Sections 22, 23, 24, and 25—Judicial Review.* Since arbitration has always been a resolution process that narrows judicial attention, the RUAA includes few substantive changes from the original UAA provisions regarding confirmation,<sup>198</sup> vacatur,<sup>199</sup>

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1266, 1267 (Alaska 1995) (“Arbitral immunity gives arbitrators absolute immunity from liability for damages arising out of quasi-judicial actions taken by them.”).

193. See, e.g., *Southwire Co. v. Am. Arbitration Ass'n*, 545 S.E.2d 681, 684-85 (Ga. Ct. App. 2001); *Higdon v. Constr. Arbitration Assocs., Ltd.*, 71 S.W.3d 131, 132 (Ky. Ct. App. 2002); *Kabia v. Koch*, 713 N.Y.2d 250, 256-57 (Civ. Ct. 2000); *Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors*, 745 N.E.2d 1069, 1081 (Ohio Ct. App. 2000).

194. RUAA § 14(a); see *Olson v. Nat'l Ass'n of Sec. Dealers, Inc.*, 85 F.3d 381, 383 (8th Cir. 1996); *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); see also *New England Cleaning Serv., Inc. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *Honn v. Nat'l Ass'n of Sec. Dealers, Inc.*, 182 F.3d 1014, 1018 (8th Cir. 1999); *Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982).

195. RUAA § 14(c); see also *id.* § 12.

196. *Id.* § 23.

197. *Id.* § 14(e). Section 14(e) reads as follows:

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

*Id.*

198. See RUAA § 22. This section is not waivable per section 4 of the RUAA. Compare UAA § 11.

modification, or correction<sup>200</sup> of awards. The Drafting Committee was aware that in order to enhance the efficiency and effectiveness of arbitration it was important to refrain from adding new grounds for courts to review the merits of arbitration awards.

During the revision process, the most controversial area of discussion was the proposed addition of more grounds on which courts could vacate arbitration awards. Ultimately, “manifest disregard of the law” and “violation of public policy” were not included in section 23 (Vacating Award) as permissible bases on which a court could vacate an arbitration award.<sup>201</sup> Nor does the RUAA provide for expanded judicial review of an arbitrator’s decision for errors of law or fact. The Drafting Committee believed that several policy risks weighed against such a substantive change. Notably, the Drafting Committee believed that allowing parties a “second bite at the apple” would effectively undermine the finality of arbitration and increase costs, both in terms of time and resources.<sup>202</sup>

The only new ground for vacatur in section 23 relates to situations in which arbitration is conducted notwithstanding improper notice under section 9.<sup>203</sup> A party seeking to challenge an award on this basis must make a timely objection and show that the lack of proper notice substantially prejudiced its rights.<sup>204</sup> It is also worth noting that the RUAA allows for a shorter time period than the FAA in which a prevailing party can file a motion requesting judicial confirmation of an award.<sup>205</sup> Although it declines to provide new grounds for judicial review, the RUAA imposes few restrictions on the ability of parties to add appropriate grounds for judicial review when drafting their arbitration agreements. Section 4 of

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199. See RUAA § 23. This section is not waivable per section 4 of the RUAA. Compare UAA § 12.

200. See RUAA § 24. This section is not waivable per section 4 of the RUAA. Compare UAA § 13.

201. RUAA § 23 cmt. C(1).

202. *Id.* § 23 cmt. B(1).

203. *Id.* § 23(a)(6).

204. *Id.* §§ 23(a)(6), 23(b).

205. *Id.* § 22 cmt. 2. This comment states that

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

*Id.*

the RUAA merely prohibits attempts to eliminate all judicial review.<sup>206</sup>

Section 25 allows the court discretion to award attorney's fees and expenses for contested judicial proceedings to confirm, vacate, modify, or correct an award.<sup>207</sup> This provision is waivable under section 4. If the parties wish for a different rule, they remain free to contract as they please.<sup>208</sup> Section 25 also updates the word choice of UAA section 15 regarding judgment rolls and docketing so that arbitration awards can be "recorded, docketed, and enforced as any other judgment in a civil action."<sup>209</sup>

#### IV. ALASKA'S ARBITRATION LAW AND THE RUAA

In fifteen states, legislation adopting the RUAA was introduced during the 2001-02 legislative session; one state, Utah, has officially enacted the RUAA.<sup>210</sup> This part of the Article will examine whether the RUAA would create harmony or discord with Alaska arbitration law and whether the Alaska legislature should consider adopting the RUAA.

##### A. Review of Alaska Law

Unlike many jurisdictions, Alaska case law on arbitration in general, and on the UAA in particular, is fairly limited. Cases under the UAA have generally focused on issues such as who deter-

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206. *Id.* § 4.

207. *Id.* § 25.

208. *Id.* § 25 cmt. 6.

209. *Id.* § 25 cmt. 2.

210. The jurisdictions introducing such legislation, as of August 2002, are Arizona, Connecticut, the District of Columbia, Idaho, Illinois, Indiana, Minnesota, Missouri, New Jersey, Ohio, Oklahoma, Utah (enacted), Vermont, Virginia, and West Virginia. See National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org> (last modified Aug. 16, 2002). The RUAA is also gaining support from numerous groups, including an endorsement from the ABA's House of Delegates in San Diego, California (Feb. 14-20, 2001). The RUAA has also been endorsed by seven separate sections of the ABA: Dispute Resolution; Litigation; Business Law; Labor and Employment Law; Torts and Insurance Practice; Real Property, Probate and Trust Law; and Senior Lawyers. Press Release, Revised Uniform Act Receiving Widespread Support, National Conference of Commissioners on Uniform State Laws (Feb. 22, 2001), available at <http://www.nccusl.org/nccusl/pressreleases/pr2-22-01-1.asp>. The RUAA has also been endorsed by the American Arbitration Association, the National Arbitration Forum, the National Academy of Arbitrators, Jams, the Dispute Resolution Committee of the Association of the Bar of the City of New York, and the American College of Real Estate Lawyers. *Id.*

mines arbitrability, the level of review that courts should apply to an arbitrator's decision and award, the availability of particular remedies, and the role of the arbitrator in weighing evidence.

Consistent with other jurisdictions, the Alaska Supreme Court has routinely asserted that Alaska's arbitration statute (a version of the UAA) "evinces a strong public policy in favor of arbitration."<sup>211</sup> Given that arbitration should be an alternative to litigation, not a prelude to it, the court "ha[s] followed a policy of minimal court interference with arbitration."<sup>212</sup> The court has also routinely stressed that such a policy permits parties, "in the absence of restricting statutory terms," to contract freely "for the terms of arbitration that they desire."<sup>213</sup>

1. *Arbitrability.* While courts have been mixed on the issue of whether arbitrators or courts determine the arbitrability of a dispute,<sup>214</sup> the Alaska Supreme Court has fallen on the side of the debate that honors the parties' intent. In *State v. Public Safety Employees Ass'n*,<sup>215</sup> the court stressed that arbitration was "a creature of contract law," allowing the parties to contract freely for those terms deemed important for an arbitration agreement.<sup>216</sup> The court adopted the federal rule, which provides that "arbitrability is a question for the courts '[u]nless the parties clearly and unmistakably provide otherwise.'"<sup>217</sup> The court concluded that the arbitrator should decide which issues are arbitrable since the parties had "unmistakably agreed to submit the question" to the arbitrator.<sup>218</sup>

2. *Procedural Issues.* Several procedural issues have arisen in judicial review of arbitrator decisions. Chief among them are consolidation and intervention, although some other minor issues have also been discussed.<sup>219</sup> In *Consolidated Pacific Engineering v. Greater Anchorage Borough*,<sup>220</sup> the Alaska Supreme Court examined whether the superior court could order the consolidation of two arbitration proceedings over the objection of a party.<sup>221</sup> The court noted that nothing in Alaska's court rules or statutes, even Alaska's arbitration statute, either permitted or prohibited con-

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211. *Modern Const., Inc. v. Barce, Inc.*, 556 P.2d 528, 529 (Alaska 1976); *Univ. of Alaska v. Modern Const., Inc.*, 522 P.2d 1132, 1138 (Alaska 1974).

212. *City of Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 459-60 (Alaska 1985) (citing *Nizinski v. Golden Valley Elec. Ass'n*, 509 P.2d 280, 283 (Alaska 1973)).

213. *Bd. of Educ., Fairbanks North Star Borough Sch. Dist. v. Ewig*, 609 P.2d 10, 12 (Alaska 1980) (citing *Anchorage Med. & Surgical Clinic v. James*, 555 P.2d 1320, 1321 (Alaska 1976)).

solidation of arbitration proceedings.<sup>222</sup> The court then observed a split in authority among other jurisdictions and the American Arbitration Association's longstanding policy not to approve consolidation without the consent of all parties.<sup>223</sup> Emphasizing the rights of the parties to determine the terms of arbitration through contract, the court concluded that consolidation could not be ordered absent language in the arbitration agreement supporting it.<sup>224</sup> The court

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214. Hayford & Peebles, *supra* note 1, at 355-57. For a broadened and more philosophical examination of the arbitrability question, see Rau, *supra* note 173.

215. 798 P.2d 1281 (Alaska 1990).

216. *Id.* at 1285.

217. *Id.* (quoting AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

218. *Id.*

219. For example, in Marathon Oil Co. v. ARCO Alaska, Inc., 972 P.2d 595 (Alaska 1999), the Alaska Supreme Court observed that in bifurcated proceedings, a partial decision as to one portion of the case (liability, for example) cannot be revised by the arbitrators once it has been issued. *Id.* at 602 (citing Trade & Transp. v. Natural Petro. Charterers, 931 F.2d 191, 195 (2d Cir. 1991)). The court added that other courts have held that even when "the parties have not explicitly agreed to the finality of a liability decision, the decision should be considered final if the record suggests that the parties" believed it was final. *Id.* (citing McGregor Van De Moere, Inc. v. Paychex, Inc., 927 F. Supp. 616, 618 (W.D.N.Y. 1996)).

Then in Int'l Bhd. of Electric Workers, Local Union 1547 v. City of Ketchikan, 805 P.2d 340 (Alaska 1991), the court held that the superior court erred in interpreting an award found to be ambiguous. *Id.* at 341. The court noted that when asked to clarify an ambiguous award, the superior court should follow two steps. *Id.* First, it should determine "whether the award is, in fact, ambiguous." *Id.* Then, in cases where ambiguity does exist, the only option for the superior court is to remand to the arbitrator for clarification. *Id.* The court stressed that a superior court may not interpret an arbitrator's award. *Id.* at 343. In that same case, the Alaska Supreme Court noted that "[t]here is nothing in Alaska's declaratory judgment act which prohibits its use to determine questions arising out of arbitration." *Id.* at 342.

Finally, the Alaska Supreme Court has noted that a party will waive any challenge to an arbitrator's actions by failing to object during the arbitration proceedings. See, e.g., Integrated Res. Equity Corp. v. Fairbanks North Star Borough, 799 P.2d 295, 298-99 (Alaska 1990); Alaska State Hous. Auth. v. Riley Pleas, Inc., 586 P.2d 1244, 1248 (Alaska 1978).

220. 563 P.2d 252 (Alaska 1977).

221. *Id.* at 252.

222. *Id.* at 254.

223. *Id.* at 254-55.

224. *Id.* at 255.

also stressed that this approach reflected how the “law now favors arbitration with a minimum of court interference.”<sup>225</sup>

The Alaska Supreme Court has provided even less guidance on the issue of intervention. The fundamental rule is that the language of the arbitration agreement governs.<sup>226</sup> In *Powers v. United Services Automobile Ass’n*,<sup>227</sup> the court examined whether an injured motorist who pursued a successful arbitration against a primary carrier could preclude a secondary carrier from additional arbitration where the secondary carrier had neither notice nor opportunity to participate in the first arbitration.<sup>228</sup> The court affirmed the superior court’s holding that collateral estoppel did not preclude the secondary carrier from pursuing additional arbitration, primarily because there was no privity between the secondary carrier and the parties to the arbitration agreement.<sup>229</sup> The court also rejected as meritless the contention that the secondary carrier waived its right to arbitrate by “fail[ing] to participate in the subject arbitration.”<sup>230</sup> The court found there was not “direct, unequivocal conduct” that indicated the secondary carrier had abandoned its right to arbitrate.<sup>231</sup> Finally, the court noted it was unclear whether intervention was even an option in arbitration,<sup>232</sup> since the Alaska version of the UAA provided no guidance on intervention.<sup>233</sup>

3. *Judicial Review.* Generally speaking, actions to vacate an award are governed by Alaska’s arbitration statute.<sup>234</sup> Such appli-

225. *Id.* (quoting *Nikiski v. Golden Valley Elec. Ass’n, Inc.*, 509 P.2d 280, 283 (Alaska 1973)).

226. *See, e.g.*, *Bd. of Education, Fairbanks North Star Borough Sch. Dist. v. Ewig*, 609 P.2d 10, 13 (Alaska 1980) (“The arbitrator will be without power or authority to make any decisions . . . which [are] violative of the terms of this Agreement.”).

227. 6 P.3d 294 (Alaska 2000).

228. *Id.* at 295.

229. *Id.* at 297.

230. *Id.* at 298.

231. *Id.* at 299 (quoting *Airoulofski v. State*, 922 P.2d 889, 894 (Alaska 1988)).

232. *Id.*

233. *See* ALASKA STAT. §§ 09.43.010-09.43.180 (Michie 2001).

234. *See id.* § 09.43.120(a). Section 09.43.120(a) reads as follows:

On application of a party, the court shall vacate an award if

- (1) the award was procured by fraud or other undue means;
- (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party;
- (3) the arbitrators exceeded their powers;



cations before the superior court should be conducted in the same manner as provided for in the hearing of motions.<sup>235</sup> The arbitration award is to be presumed valid.<sup>236</sup> At a hearing, the party challenging the award bears the burden of proof.<sup>237</sup>

The proper standard of review for an arbitration award depends on the basis for the arbitration.<sup>238</sup> The Alaska Supreme Court has identified at least five different standards of review applicable to arbitrators' decisions and awards of remedies: (1) purely unreviewable;<sup>239</sup> (2) the "reasonably possible" standard;<sup>240</sup> (3) the "gross error" standard;<sup>241</sup> (4) the "arbitrary and capricious" standard;<sup>242</sup> and (5) a due process standard.<sup>243</sup> The level of review or the scrutiny applied to the arbitrator's decision increases as the parties lose their autonomy over the terms of the arbitration process. A brief summary of these standards will be useful in determining if certain provisions of the RUAA comport with Alaska law.

For arbitrations conducted under the UAA, "the standard of review is highly deferential."<sup>244</sup> In *Ahtna, Inc. v. Ebasco Constructors, Inc.*,<sup>245</sup> the court noted that in arbitrations conducted under Alaska's Uniform Arbitration Act, an arbitrator's findings of fact are unreviewable even in the face of gross error.<sup>246</sup> Similarly, the

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(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of AS 09.43.050, as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the objection.

*Id.*

235. *City of Fairbanks Mun. Util. Sys. v. Lees*, 705 P.2d 457, 460-61 (Alaska 1985) (citing ALASKA STAT. § 09.43.150; ALASKA R. CIV. P. 77).

236. *Lees*, 705 P.2d at 461; *Univ. of Alaska v. Modern Constr., Inc.*, 522 P.2d 1132, 1139 (Alaska 1974).

237. *Lees*, 705 P.2d at 461.

238. *Butler v. Dunlap*, 931 P.2d 1036, 1038 (Alaska 1997) (per curiam).

239. *See, e.g., Ahtna, Inc. v. Ebasco Constructors, Inc.*, 894 P.2d 657, 660-61 (Alaska 1995).

240. *See, e.g., Modern Constr.*, 522 P.2d at 1137.

241. *See, e.g., City of Fairbanks v. Rice*, 628 P.2d 565, 567 (Alaska 1981).

242. *See Butler*, 931 P.2d at 1039.

243. *See A. Fred Miller, PC v. Purvis*, 921 P.2d 610, 618 (Alaska 1996).

244. *Butler*, 931 P.2d at 1038.

245. 894 P.2d 657 (Alaska 1995).

246. *Id.* at 660-61; *see also Alaska State Hous. Auth. v. Riley Pleas, Inc.*, 586 P.2d 1244, 1247-48 (Alaska 1978). The court has also applied this "statutory stan-

court has asserted several times that there is no judicial review of the merits of an arbitrator's decision.<sup>247</sup> The *Ahtna* court noted that an arbitrator's conclusions of law, including conclusions concerning the meaning of the parties' contract, are not reviewable except with respect to questions concerning arbitrability.<sup>248</sup> The court favorably quoted the U.S. Supreme Court's rationale: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."<sup>249</sup> The court took great pains to emphasize that the *Riley Pleas* standard, prohibiting judicial review of an arbitrator's construction of the contract as to issues other than arbitrability, was the proper standard for courts to apply.<sup>250</sup>

When arbitrability is the issue, the standard of review concerning questions of law is whether the arbitrator's conclusion is reasonably possible.<sup>251</sup> Under this standard, an arbitrator's construction of the contract, not the underlying factual findings, will be reviewed to determine whether it "is a reasonably possible [construction] that can seriously be made in the context in which the contract was made."<sup>252</sup> Applying this standard, the court in *Breeze v. Sims*<sup>253</sup> concluded that it was within the arbitrator's powers as a trier of fact to determine that an oral contract existed between the parties and obligated former clients to pay their attorney's fees and entitled clients to demand fee arbitration pursuant to Alaska Bar Rule 34.<sup>254</sup> Additionally, in *Marathon Oil Co. v. ARCO Alaska, Inc.*,<sup>255</sup> the court held that the arbitrators' interpretation of an agreement was reasonable when they found that the current field operator (Marathon Oil) was responsible for gas re-delivery, even

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dard of review" to findings of fact issued by an arbitrator pursuant to Alaska Bar Rule 34 (fee arbitration). *Breeze v. Sims*, 778 P.2d 215, 217 (Alaska 1989).

247. See, e.g., *Masden v. Univ. of Alaska*, 633 P.2d 1374, 1376-77 (Alaska 1981); *Riley Pleas*, 586 P.2d at 1247.

248. *Ahtna*, 894 P.2d at 661.

249. *Id.* (quoting *United Steel Workers of Amer. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

250. *Id.* at 661-62.

251. *Univ. of Alaska v. Modern Constr., Inc.*, 522 P.2d 1132, 1137 (Alaska 1974).

252. *Id.* (quoting Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND. L. REV. 685, 706 (1957)).

253. 778 P.2d 215 (Alaska 1989).

254. *Id.* at 217-18 (citing *Curran v. Hastreiter*, 579 P.2d 524, 526 (Alaska 1978); see also *Alaska State Hous. Auth. v. Riley Pleas, Inc.*, 586 P.2d 1244, 1247 (Alaska 1978)).

255. 972 P.2d 595 (Alaska 1999).

though this conclusion required the arbitrators to revise the final liability decision.<sup>256</sup>

In disputes where the arbitration agreement expressly excludes the arbitration from Alaska's arbitration statute,<sup>257</sup> the Alaska Supreme Court has used a standard of "gross error" in reviewing an arbitrator's decisions of law and fact.<sup>258</sup> "Gross error" is defined as "only those mistakes which are both obvious and significant."<sup>259</sup>

The "most searching" standard of review applied by the Alaska Supreme Court applies to cases of compulsory arbitration.<sup>260</sup> Under this standard, the court must overturn the arbitrator's finding if it concludes that the determination was "arbitrary and capricious."<sup>261</sup> This standard of review has been impliedly equated with the "abuse of discretion" standard.<sup>262</sup> The Alaska Supreme Court, in explaining why a heightened standard of review was necessary for mandatory arbitration, has provided the following:

When parties agree to submit their differences to an arbitrator, they should be bound by his decision. Courts should be reluctant to upset arbitrators' awards, lest the advantages of arbitration as a fast and certain means of resolving disputes be lost. Occasional uncorrected errors in arbitrators' decisions are tolerable because the parties have agreed to accept reduced possibilities of appellate review in order to have their dispute resolved

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256. *See id.* at 601-02. The court specifically rejected an argument by Marathon Oil that the arbitrators were not empowered to interpret the agreement, noting, "[a]bsent the ability to construe arbitration agreements, arbitrators would be precluded from acting during hearings because the agreements are the source of their powers." *Id.* at 601.

257. ALASKA STAT. § 09.43.010 (Michie 2000) provides:

A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration a subsequent controversy between the parties is valid, enforceable, and irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. However, AS 09.43.010-9.43.180 do not apply to a labor-management contract unless they are incorporated into the contract by reference or their application is provided for by statute.

258. *See City of Fairbanks v. Rice*, 628 P.2d 565, 567 (Alaska 1981); *Nizinski v. Golden Valley Elec. Ass'n, Inc.*, 509 P.2d 280, 283 (Alaska 1973); *see also City of Valdez v. 18.99 Acres*, 686 P.2d 682, 687-88 n.9 (Alaska 1984).

259. *Rice*, 628 P.2d at 567.

260. *Butler v. Dunlap*, 931 P.2d 1036, 1039 (Alaska 1997).

261. *Id.*; *see also Public Safety Employees Ass'n, Local 92 v. State*, 895 P.2d 980, 984 (Alaska 1995); *Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n*, 839 P.2d 1080, 1088 (Alaska 1992).

262. *Butler*, 931 P.2d at 1039.

quickly and with certainty. Compulsory arbitration is different. The parties have not agreed voluntarily to accept reduced possibilities of appellate review in order to resolve their dispute swiftly. It is by operation of law that the parties are denied their usual right to have their disputes resolved by the courts. Therefore, a standard of review higher than gross error is appropriate.<sup>263</sup>

The court has also applied this standard in situations where a party seeks to support a claim that an arbitrator's decision should be vacated for refusing to grant a request for postponement.<sup>264</sup>

A final standard of review applicable only to attorney fee arbitration is one that examines whether due process was accorded in the arbitration proceeding. In *A. Fred Miller, P.C. v. Purvis*,<sup>265</sup> an attorney filed a petition to vacate an arbitrator's award, arguing that he was denied due process because judicial review on the merits of the arbitrator's decision was not available.<sup>266</sup> Under the fee arbitration rules, a client that has a fee dispute with an attorney has a right to have the dispute resolved by arbitration.<sup>267</sup> The court noted that the rules include several fairly specific procedural provisions for the arbitration of fee disputes, including notice and hearing requirements, the opportunity to challenge the panel peremptorily, the ability to compel witnesses, procedures for taking telephonic evidence, and a requirement for the arbitrator to provide a written decision.<sup>268</sup> Applying the *Mathews v. Eldridge*<sup>269</sup> standards to these rules, the court concluded that the rules satisfied the minimal requirements of having an opportunity to be heard and the right to represent one's interests.<sup>270</sup> The court balanced the interest in appellate review with the undesirability of the extra delay and expense associated with extended review, concluding that "the benefits to be gained from appellate review on the merits necessarily outweigh the detriments which such review would entail."<sup>271</sup>

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263. *State v. Public Safety Employees Ass'n*, 798 P.2d 1281, 1287 (Alaska 1990).

264. *See Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1316 (Alaska 1997) ("[A] litigant should be required to show that the arbitrator committed gross error in his determination that a litigant did not show 'sufficient cause' for postponement.").

265. 921 P.2d 610 (Alaska 1996).

266. *Id.* at 611-12.

267. *See ALASKA BAR R.* 34(b).

268. *See A. Fred Miller*, 921 P.2d at 612.

269. 424 U.S. 319 (1976).

270. *A. Fred Miller*, 921 P.2d at 617-18.

271. *Id.* at 618.

4. *Remedies.* The Alaska Supreme Court has examined two general areas of remedies—pre- and post-judgment interest and attorney’s fees. Primarily, the court has approached the issue as one of contractual intent. For example, in *Board of Education, Fairbanks North Star Borough v. Ewig*,<sup>272</sup> the court upheld an award of a teacher’s back pay because a disagreement over salary might include such an award, and it did not violate the arbitration agreement.<sup>273</sup> Additionally, in *Alaska Public Employees Ass’n v. State, Department of Environmental Conservation*,<sup>274</sup> the court emphasized an arbitrator’s broad discretion in fashioning a remedy, holding that under the applicable agreement this power permitted the arbitrator to define a worker’s former job by function rather than merely by its title.<sup>275</sup>

Regarding pre-judgment and post-judgment interest, the Alaska Supreme Court has held that it is the duty of the arbitrator to award pre-judgment interest, while the superior court may order post-judgment interest. In *Ebasco Constructors, Inc. v. Ahtna, Inc.*,<sup>276</sup> the court noted that Alaska was different from many other jurisdictions in that it awarded pre-judgment interest largely “as a matter of course.”<sup>277</sup> In *Ebasco Constructors*, the superior court had awarded both pre- and post-judgment interest.<sup>278</sup> Reversing the superior court as to the pre-judgment interest, the supreme court noted that “permitting a reviewing court to add pre-award interest to an arbitration award would be inconsistent with the policy of allowing the arbitrator to determine all arbitrable aspects of a dispute.”<sup>279</sup> The Alaska Supreme Court affirmed the superior court, however, as to the post-judgment interest, noting that computation of such awards will always be fairly straightforward, and that an arbitrator, at the time of an arbitration award, is less capa-

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272. 609 P.2d 10 (Alaska 1980).

273. *Id.* at 14.

274. 929 P.2d 662 (Alaska 1996).

275. *Id.* at 666 (“We have stated: ‘there is ample authority for the proposition that arbitrators generally have authority to fashion any remedy necessary to resolution of the dispute.’” (citation omitted)).

276. 932 P.2d 1312 (Alaska 1997).

277. *Id.* at 1317 (quoting *Hofmann v. von Wirth*, 907 P.2d 454, 455 (Alaska 1995) (quoting *Tookalook Sales & Serv. v. McGahan*, 846 P.2d 127, 129 (Alaska 1993))).

278. *Ebasco Constructors*, 932 P.2d at 1314.

279. *Id.* at 1317-18.

ble of determining the total amount of post-judgment interest to be awarded.<sup>280</sup>

Under Alaska's version of the UAA, the superior court is authorized to award attorney's fees and costs to the prevailing party in an action to affirm or modify an arbitration award.<sup>281</sup> The Alaska Supreme Court has not permitted attorney's fees absent direct reference to arbitrating under the UAA or other specific language in the arbitration agreement permitting such an award. It has limited this application to attorney's fees associated with the superior court action to vacate or confirm the arbitration award. For example, in *Marathon Oil Co. v. ARCO Alaska, Inc.*,<sup>282</sup> the Alaska Supreme Court affirmed the superior court's decision to uphold an arbitration award and its ruling that the arbitration agreement permitted recovery of attorney's fees in an action to vacate or correct the award.<sup>283</sup> However, in *Harold's Trucking v. Kelsey*,<sup>284</sup> the court noted that attorney's fees are not typically available in the arbitration proceeding itself.<sup>285</sup> Similarly, the court has held that the superior court's calculation of Rule 82 fees (attorney's fees) based on the damages awarded *at arbitration* was clearly erroneous.<sup>286</sup>

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280. *Id.* at 1318. The court also affirmed the award of post-judgment interest as applied to the arbitrator's award of attorney's fees. The court observed:

For purposes of determining whether post-award interest is permissible, there is no persuasive reason to treat attorney's fees differently than other parts of an arbitrator's award. An award of interest simply "places an injured plaintiff in the same position as if he had been compensated immediately for his loss."

*Id.* (quoting *City & Borough of Juneau v. Commercial Union Ins. Co.*, 598 P.2d 957 (Alaska 1979)).

281. *See* ALASKA STAT. § 09.43.140 (Michie 1968); *Anchorage Med. & Surgical Clinic v. James*, 555 P.2d 1320, 1324 (Alaska 1976) (interpreting ALASKA STAT. § 09.43.140).

282. 972 P.2d 595 (Alaska 1999).

283. *Id.* at 604.

284. 584 P.2d 1128 (Alaska 1978).

285. *Id.* at 1130; *see also* ALASKA STAT. § 09.43.100 (Michie 2001) ("Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." (emphasis added)).

286. *See* *Integrated Res. Equity Corp. v. Fairbanks North Star Borough*, 799 P.2d 295, 300 (Alaska 1990). The court noted that the language in Civil Rule 82 referring to the "costs of the action" applied only to the action in the superior court to confirm, vacate, modify or correct an arbitrator's award. The court vacated the award of attorney's fees, stressing that the prevailing party was entitled

5. *Evidentiary Issues.* The Alaska Supreme Court, consistent with other jurisdictions, has held that strict evidentiary rules do not apply to arbitration proceedings.<sup>287</sup> However, despite this relaxed approach, the court has also held that the principles of due process require that parties have a right to a fair hearing and the opportunity to cross-examine witnesses.<sup>288</sup> The court has been reluctant to reverse an arbitrator's decision when an arbitrator has excluded one specific form of evidence, but has admitted other forms; this is particularly so where the arbitrator's exclusion of evidence was directly related to determining the credibility of witnesses.<sup>289</sup> The court has also noted that the arbitrator is permitted to exclude evidence as cumulative.<sup>290</sup>

## B. Comparing Key RUAA Provisions to Alaska's Common Law

While the Alaska Supreme Court has not had the occasion to address many of the issues raised in the new or clarifying provisions of the RUAA, the issues the court has addressed have been resolved consistent with the majority view. The RUAA codification of the approach adopted in the majority of jurisdictions on many points is consistent with Alaska common law. Many other provisions, while not decided by Alaska courts, are most likely consistent with the position the Alaska Supreme Court would take.

1. *Arbitrability.* Section 6 of the RUAA provides that, unless the parties otherwise agree, courts determine the substantive issues of arbitrability, while arbitrators decide the procedural aspects, such as time limits, laches, notice and other similar matters. Under prior Alaska case law, the court had followed the federal rule, which provides that arbitrability is a question for the courts unless the parties clearly provide otherwise.<sup>291</sup> The RUAA preserves this approach by providing that the parties may provide in their arbitra-

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to reasonable attorney's fees only for the confirmation hearing, and remanded the case to the superior court. *Id.*

287. *See, e.g.,* *Racine v. State, Dep't of Transp. & Pub. Facilities*, 663 P.2d 555, 557 (Alaska 1983) (holding that the plaintiff's due process rights were not infringed).

288. *See id.*

289. *See* *City of Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 461-62 (Alaska 1985).

290. *See id.* at 462 (citing *Atlas Floor Covering v. Crescent House & Garden, Inc.*, 333 P.2d 194, 198-99 (Cal. Ct. App. 1958)).

291. *State v. Pub. Safety Empls. Ass'n*, 798 P.2d 1281, 1285 (Alaska 1990) (citing *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

tion agreement whether the courts or arbitrators will determine matters of substantive or procedural arbitrability.<sup>292</sup>

2. *Procedural Issues.* Under RUAA section 10, courts have the ability to order the consolidation of arbitration proceedings under appropriate circumstances.<sup>293</sup> The original UAA, and most state statutes, do not contain a provision regarding consolidation. RUAA section 10 contradicts federal case law under the FAA<sup>294</sup> and the case law of several state jurisdictions<sup>295</sup> by holding that allowing courts to order consolidation conflicts with the concept of party autonomy (assuming that consolidation is not provided for in the arbitration agreement). However, empirical evidence has shown that parties to a multi-party arbitration dispute prefer that courts have the power to provide for consolidation.<sup>296</sup>

On the surface, permitting consolidation might seem to conflict with Alaska law as well. In *Consolidated Pacific Engineering, Inc. v. Greater Anchorage Area Borough*,<sup>297</sup> the Alaska Supreme Court held that parties could not be ordered to consolidate absent supporting language in the arbitration agreement.<sup>298</sup> However, it is overly simplistic to conclude that section 10 of the RUAA conflicts with the court's holding in *Consolidated Pacific*. First, the court noted that the UAA was silent as to consolidation.<sup>299</sup> Second, the court stressed the importance of minimal court interference.<sup>300</sup> Under the RUAA, however, consolidation is provided for explicitly, thus avoiding a situation where a court would have to analogize to the civil rules for guidance. Third, section 10 is a default provision; hence, the RUAA permits the parties to determine in their arbitration agreements whether to provide for consolidation and preserve

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292. RUAA § 4(a).

293. *Id.* § 10.

294. *See, e.g.*, *Glencore, Ltd. v. Schnitzer Steel Prod. Co.*, 189 F.3d 264, 267-68 (2d Cir. 1999) (finding consolidation under FAA inappropriate absent specific language permitting consolidation in the arbitration agreement).

295. *See, e.g.*, *Stop & Shop Cos. v. Gilbane Bldg. Co.*, 304 N.E.2d 429, 431-32 (Mass. 1973); *J. Brodie & Son, Inc. v. George A. Fuller Co.*, 167 N.W.2d 886, 888 (Mich. Ct. App. 1969); *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 607 P.2d 856, 857 (Wash. 1980).

296. *See Heinsz, supra* note 26, at 13 (discussing results of two surveys showing that 83% of practitioners and arbitrators polled preferred judicial determinations on consolidation).

297. 563 P.2d 252 (Alaska 1977).

298. *Id.* at 255.

299. *Id.* at 254.

300. *Id.* at 255.



party autonomy.<sup>301</sup> Lastly, section 10(a)(4) requires courts determining whether to grant consolidation to consider any prejudice resulting from “undue delay” or “hardship.” This would provide additional protection against the concerns expressed by the court in *Consolidated Pacific*.<sup>302</sup>

3. *Judicial Review.* The scope of a court’s authority is one of the few areas left relatively unchanged in the new RUAA. Most relevant to Alaska jurisprudence was a decision by the Drafting Committee *not* to provide a section allowing parties to “opt-in” to judicial review of arbitration awards for errors of law.<sup>303</sup> Particularly, the Drafting Committee decided against allowing parties to seek judicial review of an arbitrator’s decision when the law was incorrectly applied.<sup>304</sup>

The decision by the Drafting Committee not to adopt this provision keeps the RUAA in line with the Alaska Supreme Court’s decisions regarding judicial review. As previously noted, the Alaska Supreme Court’s overall approach to review of decisions by arbitrators is “highly deferential.”<sup>305</sup> The court has consistently held that an arbitrator’s conclusions of law, including those related to the meaning of a contract, are not reviewable except as to issues of arbitrability.<sup>306</sup> Thus, the RUAA does not conflict with Alaska law regarding the standard of review.<sup>307</sup>

4. *Remedies.* Unlike the original UAA, the RUAA explicitly grants the arbitrator authority to award attorney’s fees and punitive damages. The safe-harbor provision of section 21 provides that the arbitrator may award punitive damages and attorney’s fees

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301. RUAA § 10(a)-(c).

302. 563 P.2d at 254-55.

303. RUAA § 23 cmt. B(1).

304. *See Heinsz, supra* note 26, at 27-28 (discussing debate over whether to include opt-in provision).

305. *See, e.g., Butler v. Dunlap*, 931 P.2d 1036, 1038 (Alaska 1997) (per curiam).

306. *See, e.g., Ahtna, Inc. v. Ebasco Constructors, Inc.*, 894 P.2d 657, 661 (Alaska 1995).

307. The Drafting Committee also considered and rejected two other possible grounds for vacatur: for reasons of public policy, an approach adopted in several other jurisdictions, and for “manifest disregard of the law.” *See supra* Part III.B.5; Heinsz, *supra* note 26, at 32-35. The Alaska Supreme Court has never considered either of these grounds for reviewing and vacating an arbitrator’s decision. Once again, however, a decision to reject these additional grounds for vacating an award brings the RUAA in line with the Alaska Supreme Court’s *laissez faire* approach to judicial review of an arbitrator’s decision.

only if “authorized by law in a civil action.”<sup>308</sup> When the arbitration agreement requires the arbitrator to follow the applicable law, then the arbitrator is required to apply the law correctly, despite the previously mentioned standards of review.<sup>309</sup> Thus, the arbitrator would not be allowed to award either attorney’s fees or punitive damages that exceeded limitations provided for in Alaska law. The RUA A also requires the arbitrator to apply the same standard the courts would apply in determining the appropriateness of punitive damages.<sup>310</sup> Thus, the arbitrator would have to follow the Alaska Supreme Court’s standards for punitive damages.<sup>311</sup> In addition, the inherent limitations of the RUA A’s punitive damages provision would not permit the arbitrator to award punitive damages exceeding statutory limitations.<sup>312</sup>

The RUA A provides a final level of protection in not granting parties the ability by agreement to confer authority on an arbitrator to grant punitive damages, although it does permit parties to agree to the provision of attorney’s fees.<sup>313</sup> One commentator has

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308. RUA A § 21(a)-(b).

309. See *Pub. Safety Employees Ass’n v. State*, 895 P.2d 980, 985 (Alaska 1995) (finding that the arbitrator violated the arbitrary and capricious standard of review by failing to correctly apply applicable law).

310. See RUA A § 21(a).

311. *Alaska Statebank v. Fairco*, 674 P.2d 288, 296 (Alaska 1983). The Alaska Supreme Court observed that in order to recover punitive damages, a party must prove that the wrongdoer’s conduct was “outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another.” *Id.* at 296. A party need not prove actual malice. *Id.* Rather, “[r]eckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.” *Barber v. Nat’l Bank of Alaska*, 815 P.2d 857, 864 (Alaska 1991) (quoting Restatement (Second) of Torts § 908 (Tent. Draft No. 19, 1973)). Punitive damages must be proven by clear and convincing evidence. ALASKA STAT. § 09.17.020(b) (Michie 2001). To reach this standard, the proponent must “produce[] in the trier of fact a firm belief or conviction about the existence of a fact to be proved.” *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994) (quoting *Castellano v. Bitkower*, 346 N.W.2d 249, 253 (Neb. 1984)).

The Alaska Supreme Court has specifically held that punitive damages are not available in a breach of contract claim unless the conduct constituting the breach is itself an independent tort. *Lee Houston & Assocs. v. Racine*, 806 P.2d 848, 856 (Alaska 1991). This standard alone places great limitations on the application of punitive damages to arbitration under the RUA A in Alaska, since most arbitration disputes are contractual in nature.

312. See ALASKA STAT. § 09.17.020(f)-(h) (Michie 2001).

313. RUA A § 21(b) (permitting arbitrators to grant reasonable attorney’s fees and other expenses of arbitration “by agreement of the parties to the arbitration proceeding,” yet failing to provide the same authority as to punitive damages).

noted that this omission reflects the intent of the Drafting Committee, as a matter of public policy, to avoid granting a power to punish that would not ordinarily be bestowed upon private parties.<sup>314</sup> Since section 21 is also one of the waivable provisions of the new Act,<sup>315</sup> the parties are still free to dictate the scope of the arbitrator's authority through their agreements, consistent with Alaska law.

Section 25(c) also grants the court discretion to award “reasonable attorney’s fees and other reasonable expenses of litigation” to a prevailing party in any contested judicial proceeding to confirm, vacate, or modify an arbitration award.<sup>316</sup> This provision is wholly consistent with the Alaska Supreme Court’s prior decisions and the current Alaska arbitration statute.<sup>317</sup>

5. *Evidence.* Under section 15 of the RUAA, arbitrators maintain their discretion concerning the admissibility and weight of evidence while the parties’ rights to present evidence and cross-examine witnesses are preserved.<sup>318</sup> This allows the RUAA to remain consistent with the Alaska Supreme Court’s emphasis on the importance of an opportunity for a fair hearing and the cross-examination of witnesses.<sup>319</sup> While section 15 also provides for summary disposition, an issue not yet addressed by Alaska courts, it requires that the opposing party be given the opportunity to respond<sup>320</sup> and is waivable under section 4.<sup>321</sup>

Aside from these specific issues, the overall tone and approach of the RUAA harmonizes well with the Alaska Supreme Court’s hands-off approach to arbitrability. One of the common themes running throughout Alaska jurisprudence is the desire to permit minimal court interference to further the goal of contractual

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314. See Heinsz, *supra* note 26, at 25 n.144.

315. See RUAA § 4(a).

316. *Id.* § 25(c).

317. See ALASKA STAT. § 09.43.140 (Michie 2001) (allowing the court to award “[c]osts of the application and of the proceedings subsequent to the application, and disbursements” after judgment “confirming, modifying, or correcting an award” from arbitration); *Marathon Oil Co. v. ARCO Alaska, Inc.*, 972 P.2d 595, 604 (Alaska 1999) (interpreting ALASKA STAT. § 09.43.140 to include attorney’s fees).

318. RUAA § 15(a)-(d).

319. See *Racine v. Dep’t of Trans. & Pub. Facilities*, 663 P.2d 555, 557 (Alaska 1983) (preventing use of hearsay evidence in arbitration proceeding where it “deprive[s] a party of the right to a fair hearing” and “the right and opportunity to conduct cross-examination in a particular case”).

320. RUAA § 15(b)(2).

321. *Id.* § 4(a).

autonomy between parties.<sup>322</sup> While many of the new provisions would introduce issues not yet addressed in Alaska, they are also waivable provisions under section 4, thus preserving each party's ability to draft an arbitration agreement suitable to its needs.

More importantly, the certainty and flexibility provided for under the RUA are a much-needed commodity in Alaska. Several of the previously discussed Alaska cases noted the absence of any guidance under the UAA, arbitration agreements, or operating rules of procedure for the applicable arbitration organization.<sup>323</sup> While substantively correct decisions, a review of these cases highlights some of the inadequacies of an arbitration system that provides for expediency at the expense of a more familiar and comforting approach that parties are accustomed to under traditional litigation. The RUA brings more of these familiar procedures, such as compelling discovery,<sup>324</sup> and providing for consolidation,<sup>325</sup> as well as substantive options, such as attorney's fees<sup>326</sup> and punitive damages,<sup>327</sup> into the realm of arbitration with clear guidance so as to avoid any confusions during the confirmation process. It also takes important measures to ensure that parties will continue to control their own arbitration destiny.

#### V. CONCLUSION AND RECOMMENDATIONS

Alaska became a state in 1959, some four years after the promulgation of the UAA by the NCCUSL. It was another nine years before the Alaska Legislature adopted the UAA for Alaska. Certainly, it is understandable that the legislature was not in a hurry.

Since that time, arbitration has become a viable alternative to litigation, despite its relative shortcomings. Alaska has taken steps to formally embrace arbitration in ways outside of adopting the UAA, and ADR in general has flourished.<sup>328</sup> As we approach another legislative session in Alaska, perhaps it is time for some legislators to seriously consider whether they want to contribute to Alaska's growth in arbitration and to the improvement in dispute resolution services and mechanisms in Alaska. The original UAA,

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322. See, e.g., *Int'l Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan*, 805 P.2d 340, 341 (Alaska 1991).

323. See, e.g., *Powers v. United Servs. Auto Ass'n*, 6 P.3d 294, 299-300 (Alaska 2000).

324. *Id.* § 17.

325. *Id.* § 10.

326. *Id.* § 21(b).

327. *Id.* § 21(a).

328. See generally *ADR IN ALASKA*, *supra* note 4, at Part 2.

while an important leap forward in improving arbitration services in the 1950s, is now a mere relic that contributes more doubt and confusion than it does certainty in the modern age of arbitration.

As noted previously, the RUAA strengthens and recognizes some of the most sacred tenets of arbitration law as pronounced by the Alaska Supreme Court. It emphasizes party autonomy over all things, allowing most of its new provisions to be waived if parties disagree on issues such as consolidation or the availability of punitive damages. Even when arbitrators are permitted to consider and apply these issues, it commands them to act in a manner consistent with applicable law. Given the 1997 tort reform movement, potential opponents can rest assured that the standards required for establishing punitive damages, and the limits placed on such monetary awards, will remain intact. Most importantly, parties have been given the opportunity to fashion more suitable and certain remedies, where skeleton language under the UAA and judicial inability to act prevailed before.

The authors recommend that the Alaska Legislature adopt the RUAA in substantial form as soon as possible. It has already been over two years since the NCCUSL adopted its final form; let us not allow the cloud of uncertainty and unpredictability to permeate in Alaska for longer than necessary. Certainly, the legislature will have other fish to fry, but given the RUAA's codification of the majority approach to many arbitration issues, and its harmony with Alaska jurisprudence, this should be an easy bill to pass. We look forward to seeing it assigned to a House or Senate Bill number in the near future.