REPORT ON THE

REVISED UNIFORM ARBITRATION ACT

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION
NEW YORK STATE BAR ASSOCIATION

Gregory H. Hoffman,
Committee Chairperson

David E. McCraw,
Revised Uniform Arbitration Act
Subcommittee Chairperson

Simeon H. Baum
Lisa M. Brauner
Michael W. Brody
Jerry Cavaluzzi
Valerie Bynoe-Kasden
Norman J. Itzkoff

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EXECUTIVE SUMMARY

New York has long stood alone in its statutory scheme for arbitration. While 49 other U.S. jurisdictions use some form of the Uniform Arbitration Act (the "UAA") as their governing law, New York arbitrations are governed by Article 75 of the CPLR, which varies from the UAA in form and, in some important ways, in substance. In late 2000, the National Conference of Commissioners on Uniform State Laws (the "Conference") promulgated a significant revision of the Uniform Arbitration Act. The Revised Uniform Arbitration Act ("RUAA") attempts to codify with greater comprehensiveness than its predecessor the law that governs arbitration procedures and proceedings. The RUAA is currently being considered for enactment in states throughout the country. It is expected that in 2004 the New York State Legislature will be asked to consider adoption of the RUAA to replace Article 75.

The RUAA is not a perfect or a comprehensive statutory scheme. The New York State Bar Association's Committee On Alternative Dispute Resolution ("ADR Committee") recognizes that adopting the RUAA alone would fail to address critically important aspects of the arbitration process that, until now, have been ignored. Among these areas are the licensing of arbitrators by the State of New York in a manner similar to the way lawyers are licensed by the State, the creation of a code of ethics tailored to arbitrators whether or not they are lawyers, appropriate coordination between rules governing court-annexed arbitration programs and rules applicable to private arbitration and appropriate regulation of arbitration provider organizations. Nevertheless, this ADR Committee supports enactment of the RUAA with certain modifications set forth herein. In addition to the modifications to the RUAA itself, the ADR Committee's endorsement of the RUAA hinges upon the concurrent creation of a state task force whose mission is to address the issues that have been omitted from the RUAA. The ADR Committee's ultimate recommendation in favor of New York's enacting the RUAA flows from three principles:

- Private parties and arbitrators should know with a greater degree of certainty the law that governs their proceedings.
- As a general matter, the RUAA codifies New York law rather than changes it.
- The changes incorporated in the RUAA advance the underlying objectives of arbitration, including creating a fair and efficient means of alternative dispute resolution.

Not surprisingly, the growth of arbitration has altered the legal landscape upon which arbitration takes place. There are not simply more arbitrations, but more types of arbitrations – varying in everything from the composition of panels and the scope of discovery to the evidentiary rules to be applied and the procedural requirements to be followed. The decisional law over the past 30 years reflects the changing and varied nature of modern arbitration and the increased number of public legal issues that can and do arise from otherwise private dispute resolution.

Litigators and parties to civil litigation benefit from the fact that in New York and other states the rules of civil procedure are spelled out in a fairly elaborated code. Having an elaborated code reduces uncertainty, facilitates the adjudicative process, and helps assure fair application of the law.

The same principle applies with even greater force to arbitration. Parties routinely designate a certain state's law to govern their arbitration. Their legitimate interest in knowing what that law is, and how it will shape their arbitration is advanced by having the major legal principles codified. More importantly, having an elaborated code makes it easier for them to determine what, if anything, they wish to add to their contract to customize their proceedings rather than relying on the default provisions provided by state law.

At the same time, the fact remains that arbitration, because of its limitations on judicial review, does not generate a high volume of court decisions, especially with respect to rulings made by arbitrators about the conduct of the proceedings. Thus, decisional law is a limited mechanism for filling the gaps in a bare-bones statute like Article 75. By codifying a limited amount of procedure – as to notice, the conduct of the hearing, the powers of the arbitrator, and so forth – the RUAA provides an appropriate amount of structure without unduly constricting arbitration proceedings and without infringing unnecessarily on the rights of the parties to waive provisions that do not suit their purposes. The RUAA also brings the clarity of codification to areas of arbitration law that are now not well-articulated in the judicial decisions: for example, the power of the court to consolidate arbitrations, the role of the courts in determining issues of arbitrability, the right of a party to seek preliminary relief either from the arbitrator or through the courts.

Most of the RUAA codifies what is already New York law under court decisions and CPLR Article 75. For all the differences in *form* that would result from the replacement of Article 75 with the RUAA, the RUAA has relatively few provisions that would actually alter New York law. Thus, the debate over the RUAA is less about whether New York law should change but whether it should be codified. In fact, the RUAA drafters state that certain unsettled areas of the law – for instance, the right of parties to expand or limit judicial review and the power of courts to vacate awards because of a manifest disregard of the law – are best left to evolution through common law in judges' decisions. But for the customary matters that arise in the conduct of arbitration – how notice is to be given in the absence of a contractual provision, whether provisional relief can be granted, whether arbitrators can make summary dispositions – there is no principled reason not to codify the law, just as we do in those parts of the CPLR governing civil litigation.

The ADR Committee recognizes that some sections of the RUAA could be drafted more clearly to assure that they are capturing New York law and not changing it or to assure that no ambiguity is introduced in the law. Such drafting issues, however, are best left to careful legislative review and fine-tuning. The RUAA represents years of discussion and consideration by the Uniform Law Commissioners. If, as this Committee believes, codification is a worthwhile goal, it makes sense to use the RUAA as the platform from which to achieve to that goal.

With respect to the changes adoption of the RUAA would effect in New York law, the Committee concludes that, on the whole, they are positive in that they advance the objectives of making arbitration fair and efficient. Among the most significant of the changes are:

- **The RUAA would streamline the procedures for obtaining discovery from out-of-state nonparties (Section 17).** The current procedures serve no useful function other than to hinder fact-finding and drive up the expense of arbitration.

- **The RUAA would require certain disclosures of potential conflicts by both neutral arbitrators and arbitrators appointed by the parties (Section 12).** Parties are entitled to know the people who will be determining their dispute. The disclosure scheme is not onerous and would help give assurances to parties that arbitrators are making decisions on the merits and not on the basis of some hidden personal interest.

- **The RUAA would allow punitive damages and spell out procedures for awarding those damages and attorney's fees (Section 21).** These provisions, as revised by the joint committee, balance the competing interests. Parties who want to allow for the possibility of fee shifts or punitive damages will have the right to do so. Those who do not want them can waive them contractually. At the same time, the RUAA imposes limits on such awards, by restricting them to circumstances where they could be awarded by the court. In so doing, the RUAA advances the contractual freedom of parties to arbitration agreements while providing reasonable assurances that there will not be abuses. Given that punitive damages are now a feature of federal arbitration law, it makes little sense to continue the prohibition in arbitrations governed solely by New York law.

- **The RUAA would shift to the arbitrator the question of whether the claim is barred by a statute of limitations or by the failure of a party to perform a condition precedent, both of which are now assigned to the court by Article 75 (Section 6).** In the absence of a contractual provision to the contrary, these questions, like the other issues in dispute, are properly for the arbitrator. As a general matter, arbitration should not be a hybrid adjudication where the parties have to run from the courthouse to the arbitration room (and perhaps back again) to get their disputes fully resolved.

- **The RUAA would eliminate the New York requirement that a motion to stay arbitration be brought within 20 days of notice (Section 7).** This abbreviated statute of limitations rarely serves the ends of justice. To the contrary, it often results in a party's unintentional waiver of a legitimate challenge to arbitration.

Viewed in its entirety, the RUAA is a thoughtful piece of drafting. It attempts to synthesize a large body of arbitration law and codify those principles that are most central to the arbitration process. As would be expected of such an ambitious project, it has flaws. But none of those flaws appears to be irreparable and none of them is so essential to the RUAA as to require its rejection. On balance, with a small number of amendments and with the creation of a task force to more comprehensively address arbitration in New York, the RUAA would be a workable code for arbitration and would help stabilize and clarify New York's arbitration law.

INTRODUCTION

This report represents the views of the Alternative Dispute Resolution Committee of the New York State Bar Association (the "ADR Committee") with the vast majority of the analysis and substance of the Report coming from, in the first instance, the RUAA Subcommittee of the ADR Committee. For more than two years the ADR Committee has been reviewing the RUAA. Between September 2001 and June 2002, the Subcommittee engaged in a series of joint meetings with a subcommittee of the Arbitration Committee of the Association of the Bar of the City of New York. References to the "Joint Committee" in this Report designate the work of the two combined subcommittees. At the conclusion of the Joint Committee's meetings, the Joint Committee drafted several proposed amendments to the RUAA.

The ADR Committee has concluded that New York State should enact the RUAA with the certain modifications. Specifically, the ADR Committee recommends enactment with the modifications set forth in the Report drafted by the Joint Committee. In addition, the ADR Committee's endorsement of the RUAA is tied to the creation of a task force that would address a number of important issues that are not covered in the RUAA, but that are critical to ensuring that arbitration in New York operates in a just, efficient and well-coordinated manner.

Adoption of the RUAA would codify much of New York's arbitration law for the first time. In most instances, the codification is consistent with decisional law handed down by New York's court. However, there are certain areas of New York law that would be changed by adoption of the RUAA. Here are some of the notable areas where arbitration law would either be changed or codified for the first time, were New York to become an RUAA state:

- The RUAA would create a statutory scheme for discovery in arbitration (Section 17).
- The RUAA would streamline the procedures for obtaining discovery from out-of-state nonparties (Section 17).
- The RUAA would require certain disclosures of potential conflicts by both neutral arbitrators and arbitrators appointed by the parties (Section 12).
- The RUAA would spell out procedures for awarding punitive damages and attorney's fees (Section 21).
- The RUAA would shift to the arbitrator the question of whether the action is barred by a statute of limitations or by the failure of a party to perform a condition precedent (Section 6).
- The RUAA would codify the procedures and standards for the granting of provisional remedies (Section 8).
- The RUAA would eliminate the New York requirement that a motion to stay arbitration be brought within 20 days of notice (Section 7).

- The RUAA would clarify whether the arbitrator or the courts are to decide challenges to the validity or scope of arbitration agreements (Section 6).

- The RUAA would codify the authority of the courts to consolidate related arbitrations in some instances (Section 10).

- The RUAA would grant testimonial immunity to arbitrators and arbitral organizations in most litigation brought by the parties following an arbitration (Section 14).

While parties or the arbitral organization could waive or alter many of these provisions and in many instances the Federal Arbitration Act ("FAA") will provide the governing law for arbitration, the RUAA would nonetheless make some changes in New York's legal landscape for arbitration.

ABOUT THE REVISED UNIFORM ARBITRATION ACT

The Uniform Arbitration Act ("UAA") has been enacted, either in whole or with modification, in 49 jurisdictions since it was drafted in 1955 by the National Conference of Commissioners on Uniform State Laws (the "Conference"). The UAA was not adopted by New York, which continues to be governed by the statutory scheme it first enacted some 80 years ago (now codified at CPLR § 7501 et seq.). The third principal arbitration law, the Federal Arbitration Act ("FAA"), is modeled after New York's statute.

The RUAA was passed by the Conference in late 2000 after several years of drafting and revision. It is now under consideration by legislatures in the various states. The main thrust of the RUAA is to fill in some of the gaps that exist in the UAA. The Conference generally attempted to codify certain rules from generally accepted case law. As a result, the RUAA moves various points of arbitration law from decisional law to statute. However, the Conference chose not to address in the RUAA legal issues that remain closely contested, most notably the authority of the courts to vacate an award for "manifest disregard of the law" and so-called "opt-in" provisions under which the parties contractually seek to have the courts review an award de novo.

ABOUT THIS REPORT

Discussion of the RUAA can at times be daunting because the RUAA is a detailed procedural scheme in an area that poses some complex legal issues. While we have strived for clarity, most of the discussions assume at least some familiarity with the relevant provisions of the RUAA. We encourage you to review the text of the RUAA section at issue as you read each section of this Report. There are three relevant source documents you may wish to consult:

1. **The RUAA.** It is attached as Appendix A to the Report and the relevant provisions are reproduced in each section of this Report.

2. **The Joint Committee's Revised RUAA.** Both redlined and clean versions areattached as Appendix B to the Report. The revisions to the RUAA are based on the amendments advocated by the Joint Committee of the State Bar Association and the City Bar. In sections where amendments have been proposed, we have usually reproduced the text of the proposed amendment in our discussion.

3. **CPLR Article 75.** Relevant provisions (and, in some instances, key court decisions) are summarized in each section of this report.

From time to time, the Report refers to the Comments to the RUAA. These can be found in the final version of the RUAA as proposed by the Conference and is available at www.nccusl.org.

SECTION 1: DEFINITIONS
SECTION 2: NOTICE
SECTION 3: WHEN [ACT] APPLIES

To avoid repetition, issues raised in these sections are discussed in the text of this Report where their applicability is relevant.

RUAA

SECTION 1. DEFINITIONS. In this [Act]:

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

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

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

(4) "Knowledge" means actual knowledge.

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

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

SECTION 2. NOTICE.

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

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

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

SECTION 3. WHEN [ACT] APPLIES.

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

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

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

SECTION 4: EFFECT OF AGREEMENT TO ARBITRATE; NON-WAIVABLE PROVISIONS

Section 4 provides a detailed – and concededly complicated – scheme for what provisions of the RUAA can be waived and when such a waiver can be made. For the sake of clarity, most of the discussion of waiver has been included in our discussion of the applicable substantive provisions that follows. However, we have summarized here the basic structure of the waiver scheme contained in the RUAA.

First, certain provisions cannot be waived prior to the existence of a controversy. In other words, these sections cannot be waived in a pre-dispute arbitration clause. They are:

5(a): The right to move to compel or stay arbitration.

6(a): The standard for finding a valid arbitration agreement.

8: The right to seek provisional remedies.

16: Right to counsel (except in labor cases).

17(a): The right to subpoena witnesses and documents.

17(b): The right to seek depositions for use at the hearing.

26: The courts' jurisdiction for enforcement of agreements and awards.

28: The right to appeal from a lower court's decision pertaining to the arbitration.

Second, certain provisions cannot be unreasonably restricted before a controversy arises. They are:

9: The requirements for notice of arbitration.

12: The requirements governing disclosure of conflict by arbitrators.

Third, certain provisions cannot be waived at any time. Most of these deal with the powers of the courts rather than the conduct of the arbitration. They are:

3(a) & (c): Effective date of enacted RUAA.

7: Procedure for motion to compel or to stay.

14: Immunity of arbitrators in later proceedings.

18: Judicial enforcement of pre-award rulings.

20(d) & (e): Judicial power to remand to arbitration for reconsideration.

22: Judicial power to confirm.

23: Grounds for vacating awards by the courts.

24: Judicial power to modify awards under certain circumstances.

25(a) & (b): Judgments and costs for court proceedings.

29-32: Technical aspects of enactment of RUAA.

Fourth, all other sections are subject to waiver. More important perhaps, that means that certain provisions will be imposed as a matter of law unless waived. Among the noteworthy ones are:

10: The power of the courts to consolidate arbitrations.

15: The requirements governing notice of hearing.

15: The arbitrator's power to grant summary disposition.

17(c): The arbitrator's power to permit discovery and sanction discovery abuses.

21: The arbitrator's power to award punitive damages and attorney's fees.

Waiver and the Joint Committee's Proposed Amendments

The Joint Committee has proposed several amendments to the waiver provisions, all of which are discussed in conjunction with the substantive section to which the waiver provisions apply. However, two deserve note here: First, the Joint Committee opposed waiver of the right to counsel at any time. New York law currently makes the right to counsel unwaivable in arbitration, and the Joint Committee believed that provision should remain New York law.

Second, the Conference intended that that the RUAA would take a neutral position on whether parties could opt for a broader review of an award by a court (the so-called "opt-in" issue). (For instance, the parties might want the award reviewed for error of law, which is not now a ground for vacatur in Section 23.) The Conference believed and the Joint Committee agreed that the opt-in issue should be left to the courts, which are currently split on the question. However, the drafting of the RUAA does not make clear that the statute is supposed to be neutral on the issue. To the contrary, Section 4 states that the parties cannot waive or vary Section 23.

That appears to be a drafting error. Thus, the Joint Committee has proposed that Section 23 be dropped from the "unwaivable" list in Section 4 and the following language be added to Section 4: "A party to an agreement to arbitrate or arbitration proceeding may not narrow the grounds for vacatur set forth in Section 23."

The remaining changes in Section 4 proposed by the Joint Committee grow out of the Joint Committee's revisions of Sections 6 and 7, which address motions to stay and to compel. Those proposed changes in waiver provisions are discussed as part of our analysis of Sections 6 and 7.

RUAA

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

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

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

(1) waive or agree to vary the effect of the requirements of Section 5(a), 6(a), 8, 17(a), 17(b), 26, or 28;

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

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

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

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

SECTION 5: [APPLICATION] FOR JUDICIAL RELIEF

There does not appear to be any significant difference between the RUAA and current New York law with regard to the procedure for invoking judicial relief. The RUAA is designed to incorporate current New York practice: a special proceeding to commence an action or a motion if an action is already pending.

CURRENT NEW YORK LAW

CPLR § 7502 provides: A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy that is not made by motion in a pending action.

RUAA

SECTION 5. [APPLICATION] FOR JUDICIAL RELIEF.

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

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

SECTION 6: VALIDITY OF AGREEMENT TO ARBITRATE

Sections 6 and 7 address a particularly difficult area of arbitration law: When a party objects to the very fact of the arbitration, who should decide whether arbitration is proper, the court or the arbitrator? Because the answer to that question will turn both on the grounds of the objection and the particular provisions of the parties' agreement, codification of the operative legal principles is problematic. The Joint Committee found that the provisions in the RUAA were both internally inconsistent and contrary to good case law. As a result, the Joint Committee proposed a revision of Sections 6 and 7.

Arbitrability and the Joint Committee's Proposed Amendment

Sections 6 and 7 deal with the thorny issue of who decides four related issues: whether a contract containing an arbitration agreement is valid, whether the arbitration agreement itself is valid, whether the dispute falls within the scope of the arbitration agreement and whether a condition precedent to arbitration has been met. Compounding those issues is the question of whether the parties can, by their agreement, alter the statutory scheme for who decides.

Both New York law and Section 6 of the RUAA reflect the rule recognized in most other jurisdictions that, in the absence of an agreement to the contrary, courts decide "substantive arbitrability" (whether a dispute is covered by an arbitration agreement) while arbitrators determine issues of "procedural arbitrability" (whether claims are barred by an applicable statute of limitations, estoppel, laches, etc.). See Smith Barney Shearson v. Sacharow, 91 N.Y.2d 39 (1997). However, the Joint Committee observed that those terms are often unclear and confusing to both litigants and courts. While the RUAA attempts to make the underlying concepts more explicit, the language of the RUAA is inadequate to the task.

For instance, the Joint Committee discovered an error in the drafting of these sections. Section 4 allows the parties to waive Section 6(b), which assigns to the court the question of whether an agreement to arbitrate exists. Thus, by agreement, the parties can designate that question for the arbitrator. However, Section 7(2)(b) assigns that question to the court and is unwaivable. In addition, the language of Section 6 and Section 7 is inconsistent in discussing the key concepts of contractual validity. For instance, Section 6(a) says an agreement is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract." (emphasis added.) Did the drafters intend to exclude challenges based on enforceability and validity and limit the standard to that applying for revocation? Similarly, Section 7 interchanges phrases like "no agreement to arbitrate" and "no enforceable agreement" even though they are different and their differences are legally significant.

The Joint Committee looked carefully at the kinds of challenges that are made to arbitrability and established the following scheme:

1. **Validity of the arbitration clause.** The court should decide whether an agreement to arbitrate exists and is valid, enforceable, and irrevocable, and the parties should not be able to waive the right to that judicial forum prior to a controversy arising between them. (In

other words, the parties cannot agree in their arbitration provision that the arbitrator will decide whether an agreement to arbitrate exists and is valid, enforceable, and irrevocable.)

2. **Scope of the arbitration clause.** Unless the parties agree otherwise, the court should decide whether a particular controversy is subject to the parties' agreement to arbitrate. The parties should be able to waive the right to that judicial forum in their agreement to arbitrate or at any other time.

3. **Validity of the overall contract and conditions precedent.** The arbitrator should decide whether a condition precedent to arbitration has been fulfilled and whether a contract containing an agreement to arbitrate is valid, enforceable, and irrevocable but the parties should be free to give that question to the courts through their arbitration agreement.

Working from those principles, the Joint Committee drafted the following as a replacement for current Section 6:

> § 6. VALIDITY OF AGREEMENT TO ARBITRATE.
> (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for finding a contract invalid, unenforceable or revocable.
> (b) The court shall decide whether an agreement to arbitrate exists or is invalid, unenforceable or revocable unless the person seeking to avoid the alleged agreement participated in the arbitration proceeding without raising the objection no later than the earlier of the initial submission by the party on any motion for summary disposition under Section 15(b), a decision on such a motion or the beginning of the hearing under Section 15(c).
> (c) Unless the parties otherwise agree, the court shall decide whether a controversy is subject to an agreement to arbitrate.
> (d) Unless the parties otherwise agree, an arbitrator shall decide (i) whether a condition precedent to arbitrability has been fulfilled or (ii) whether a contract containing a valid agreement to arbitrate is invalid, unenforceable, or revocable.

We believe the amended language significantly clarifies Section 6 and is a useful codification of a particularly difficult area of arbitration law.

Limitations Periods and Conditions Precedent

We would make special note of the fact that both under the proposed amendment and as written the RUAA would change two features of New York law.

First, it would eliminate the right of a party to seek a court determination of whether a statute of limitations applies. New York cases have held that the courts are empowered to determine whether a statutory time limit bars arbitration, while a contractual limitations period is left to the arbitrators. See Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y. 2d 193, 201-02 (1995). Under CPLR § 7502, however, a party may opt not to bring the statutory question to the courts and instead present it to the arbitration panel. The RUAA would eliminate that option and require the matter to be determined by arbitration. This would appear to be consistent with the overarching public policy to encourage arbitration of disputes where parties have contractually agreed to do so.

The RUAA is silent on the authority of an arbitrator to simply ignore an applicable statute of limitations. Whether an arbitrator's decision to ignore a clearly applicable statute of limitations would constitute "manifest disregard of the law" or "irrationality" and therefore justify vacatur remains to be determined.

Second, current New York law allows a court to determine whether a condition precedent to arbitration has been met. See County of Rockland v. Primiano Construction Co., 51 N.Y. 2d 1 (1980). Application of the New York rule has at times perplexed the courts. Compare Enlarged City School District v. Tory Teachers Assn., 69 N.Y. 2d 905, 907 (1987) (issue of compliance with contractual step-by-step grievance process leading to arbitration is a procedural question for the arbitrator) with Suffolk Regional Off Track Betting Corp. v. Local 577S, 270 A.D. 2d 351, 352 (2d Dep't 2000) (issue of compliance with step-by-step process leading to arbitration is a question of arbitrability for the courts). The RUAA would assign the question of whether a condition precedent has been met to the arbitrator unless the parties had agreed otherwise.

The issue of conditions precedent is concededly difficult. The parties have agreed to go to arbitration only if the conditions precedent are met. Why should a party be denied the benefit of that contractual limitation on arbitration and, in effect, be forced to go to arbitration to defend its right not to go arbitration? On the other hand, by agreeing to arbitration, the parties have signaled their willingness to have disputes resolved by an arbitrator. We believe the proposed amendment above, which assigns the question of conditions precedent to the arbitrator but allows the parties by agreement to give the question to the courts, strikes an appropriate balance.

CURRENT NEW YORK LAW

CPLR § 7502(b) provides:

If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in Section 7503 or subdivision (b) of Section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of Section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

RUAA

§ 6. VALIDITY OF AGREEMENT TO ARBITRATE

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

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

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

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

SECTION 7: MOTION TO COMPEL OR STAY

Section 7 sets out the procedure to be used by the parties to bring challenges arising under Section 6 or to compel arbitration, in which case Section 6 will be invoked by the resisting party. The Joint Committee redrafted Section 7 to make it conform to the proposed amendment to Section 6 and to clarify the use of terminology. The Joint Committee's amended Section 7 would read as follow:

> § 7. [MOTION] TO COMPEL OR STAY ARBITRATION.
>
> (a) On [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
> (1) if the refusing party does not appear or does not oppose the [motion], the court shall order the parties to arbitrate; and
> (2) if the refusing party opposes the [motion], the court shall proceed summarily to decide whether the issue is for decision by the court and, if so, whether the grounds asserted preclude arbitration. If the grounds asserted do not preclude arbitration, the court shall order the parties to arbitrate.
> (b) On [motion] of a person alleging that an arbitration proceeding has been initiated or threatened and that grounds exist to avoid arbitration, the court shall proceed summarily to decide whether the issue is for decision by the court and, if so, whether the grounds asserted preclude arbitration. If the grounds asserted do not preclude arbitration, the court shall order the parties to arbitrate.
> (c) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.
> (d) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a [motion] under this section must be made in that court. Otherwise a [motion] under this section may be made in any court as provided in Section 27.
> (e) If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.
> (f) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.
> (g) If a party makes a motion to stay arbitration, and unless the court otherwise orders, the arbitration proceeding may continue

pending (1) final resolution of the issue by the court or (2) decision by the court that the issue is to be resolved by the arbitrator.
(h) A party who fails to make a motion to stay arbitration prior to the earlier of a decision in the arbitration on a motion for summary disposition under Section 15(b) or the commencement of the arbitration hearing under Section 15(c) shall be precluded from asserting that an arbitration agreement does not exist or is invalid, unenforceable or revocable.

The 20-Day Rule

The RUAA, both as written and as amended by the Joint Committee, would make a critical alteration in New York law. Currently, New York sets an exceedingly short 20-day limitations period for seeking a stay of arbitration, as set forth in CPLR § 7503(c). Although the Joint Committee agreed that setting a period for challenges has merit, there also was concern about the unusually abbreviated nature of the period, which can easily run before a client comprehends that action needs to be taken. In the end, the Joint Committee incorporated the timetable set forth in the above-proposed amendment to Section 6: Any application to stay the proceedings must be brought before the earlier of (A) a decision on a motion for summary judgment or (B) the beginning of the hearing. A party that does not raise a challenge, does not participate in the arbitration and defaults would continue to have the right to argue that there was no agreement to arbitrate in a vacatur action under Section 23.

CURRENT NEW YORK LAW

CPLR § 7503 provides that:

(a) Application to compel arbitration; stay of arbitration. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or

agent thereof if such party is an association or corporation, and stating that *unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.* Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. *An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded.* Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested....Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void. (Emphasis added.)

RUAA

§ 7. [MOTION] TO COMPEL OR STAY ARBITRATION.

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

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

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

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

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

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

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

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

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

SECTION 8: PROVISIONAL REMEDIES

The RUAA would preserve and codify New York case law with respect to the recognition of the authority of arbitrators to order provisional remedies. It would also establish a standard for determining which provisional remedies could be sought from a court. While we generally agree with the approach taken by the RUAA, we recommend one change in wording.

Access to the Courts

The RUAA would make clear that a party could go to court for a provisional remedy, even after an arbitrator is appointed, in extraordinary circumstances. While the latter may have the effect of encouraging some additional litigation, it is an important safeguard in instances where an arbitrator cannot act.

Under the RUAA a party could seek the court's assistance in only two circumstances: (1) "before an arbitrator is appointed or is authorized or able to act . . . [and] upon motion of a party"; and (2) after an arbitrator is appointed and authorized to act, but only if "the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." We believe those limitations are adequate to protect the authority of the arbitrator while giving parties access to the courts when necessary.

Standard for Provisional Remedies and the Joint Committee's Proposed Amendment

The ADR Committee has a concern about the somewhat confusing fashion in which the RUAA sets out the standard to be applied by the courts and the arbitrators in determining whether provisional remedies are warranted. The RUAA, in both instances, states that provisional remedies may be granted "to the same extent and under the same conditions as if the controversy were the subject of a civil action" (Section 8(a) and 8(b)(1)). However, it then confuses the matter by also stating that provisional remedies can be granted by the court "to protect the effectiveness of the arbitration proceeding" (Section 8(a)) and by the arbitrator when "necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy" (Section 8(b)). These two clauses could be read to set a different or additional standard from that used in civil proceedings.

The Joint Committee has recommended in its proposed amendments that those two clauses be removed. The intent of the section is to have the standards used in civil actions apply and deletion of the language makes that clear.

CURRENT NEW YORK LAW

CPLR 7505 enumerates only two powers of arbitrators: the power to subpoena and to administer oaths. The power of an arbitrator to grant provisional remedies is not enumerated. However, in New York, courts have affirmed the power of arbitrators to order provisional remedies. See Park City Assocs. v. Total Energy Leasing Corp., 58 A.D.2d 786, 396 N.Y.S. 2d 377 (1st Dep't 1977) (upholding preliminary injunction by arbitrator under New York state arbitration statute).

CPLR 7502(c) provides that the New York Supreme Court may consider an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy on the limited ground that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."

RUAA

SECTION 8. PROVISIONAL REMEDIES.

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

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

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

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

SECTION 9: INITIATION OF ARBITRATION

Section 9 sets forth the requirements for initiating an arbitration and essentially tracks the requirements of the CPLR. Unless the parties have agreed otherwise, notice is effective only if given by certified or registered mail, return receipt requested, or by a method authorized for commencement of an action under the CPLR. The notice must "describe the nature of the controversy and the remedy sought."

A party that appears at the hearing without objecting to the lack or insufficiency of the notice will be deemed to have waived any such objection.

CURRENT NEW YORK LAW

CPLR 7503(c) provides that the "notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested."

RUAA

SECTION 9. INITIATION OF ARBITRATION.

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

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

SECTION 10: CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS

The RUAA would permit the courts to consolidate arbitration proceedings. While New York case law has allowed consolidation as a matter of discretion, the RUAA would set forth standards to guide the court's determination. We believe that Section 10 provides a workable approach. It provides the courts with some guidance as to when consolidation is appropriate yet retains judicial flexibility to order consolidation as to only certain claims or to refuse consolidation when undue prejudice would result.

The RUAA rejects the position of the Second Circuit Court of Appeals, which prohibits consolidation under federal law under any circumstances. It would also honor a pre-dispute decision by the parties not to have consolidated arbitration – that is, the parties can waive Section 10 under Section 4. Where an arbitration agreement is silent on consolidation, however, consolidation would be allowed.

Under the standards set forth, Section 10 would permit consolidation when the proceedings at issue arise from the same or related transactions and there are common issues of law or fact. It would also require the court to weigh the relative prejudice of consolidating versus not consolidating. Finally, the section specifically would allow the court to consolidate some claims but not others.

The RUAA does not address how a court is to adjust procedural requirements that may be rendered unworkable in a consolidated proceeding. For instance, if A and B have an arbitration agreement providing for a tripartite panel with each party choosing one arbitrator (and those two panelists then choosing a third), and A and C have a similar agreement, how is the panel to be composed in a consolidated proceedings involving all three parties? The RUAA is silent on such issues. We believe that such issues are best left to resolution by the courts as they arise.

CURRENT NEW YORK LAW

The CPLR does not specifically address consolidated arbitration proceedings. However, New York courts have permitted consolidation in cases involving common legal or factual issues. See County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y. 2d 123, (1977) (holding that absent explicit provision by the parties in their agreement with respect to consolidation a court may exercise its wide discretion in ordering consolidation of arbitration proceedings). The public policy underlying this position is adjudicative efficiency and the avoidance of potentially conflicting results.

The Second Circuit, however, has held that there is no source of authority in the FAA for courts to order consolidation. See Glencore Ltd. v. Schnitzer Steel Prod. Co., 189 F.3d 264 (2d. Cir. 1999). Federal courts may not consolidate two or more arbitration proceedings unless consolidation is specifically agreed to by the parties. Id. at 266, citing Government of the United Kingdom of Great Britain v. Boeing Co., 998 F.2d 68 (2d Cir. 1993). Other circuits have allowed consolidation.

RUAA

SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

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

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

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

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

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

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

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

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

Section 11 has two important provisions. First, where there is no agreement between the parties to the contrary, Section 11(a) authorizes the court to appoint an arbitrator when the arbitrator "fails or is unable to act" and no successor has been appointed. While this is consistent with New York law, the RUAA does not provide guidance on what it means for an arbitrator to fail to act or be unable to act. For instance, at what point would a delay in action by the arbitrator become a failure to act? Would the failure of the arbitrator to meet a deadline imposed by the parties' contract constitute a failure or inability to act? While such issues could spawn litigation, the ADR Committee concludes that little would be gained by amending Section 11 in an effort to anticipate the various possible factual scenarios. The matter should be left to adjudication by the courts.

Second, Section 11(b) prohibits anyone from serving as a neutral arbitrator if he has a "known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party." That language is not defined in the RUAA, but we believe that the RUAA language provides a sufficient standard for the courts.

A significant issue involves the interaction between Section 11(b) and Section 12(e), which governs disclosure. Under 12(e), a neutral arbitrator is presumed to act with evident partiality (which is a basis for vacating an award) if he or she fails to disclose a "known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party." Thus, the implication of 12(e) is that a neutral with such a conflict could serve, provided there was disclosure (and presumably consent of the parties), while 11(b) states flatly that such an arbitrator is barred from serving.

In effect, the net result under the RUAA is this: First, a neutral with such a conflict must disclose it under Section 12(c). If no disclosure is made, the prejudiced party will have the right to seek vacatur of the award, and there will be a presumption of evident partiality. Second, upon disclosure of the conflict, a party may require disqualification of the arbitrator under Section 11(b) (although the procedure for doing so is not explicitly set forth in the RUAA). Third, if a party allows the neutral to serve after the disclosure, the presumption of evident partiality will not attach in any action challenging the award.

We concluded that the RUAA could have more clearly set forth how that scheme was to work. Nonetheless, we believe that the scheme provides appropriate remedies to the parties in the event that a conflicted individual was named as an arbitrator. We have not proposed any amending language.

CURRENT NEW YORK LAW

Article 75 of the CPLR has no provision barring an interested party from serving as a neutral arbitrator; however, partiality of a neutral constitutes grounds for vacating an award under CPLR 7511.

RUAA

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

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

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

SECTION 12: DISCLOSURE BY ARBITRATOR

Section 12 of the RUAA marks a significant break from the CPLR. It would require disclosures to be made by all arbitrators, whether they were appointed as neutrals or non-neutrals. Under Section 12, arbitrators are to make "a reasonable inquiry" and then disclose "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator." Such facts include a financial or personal interest in the outcome of the arbitration or an existing or past relationship with a party, counsel, or witness (Section 12(a)(1) and (2)).

If a party objects to an arbitrator based on a disclosure and the arbitrator continues to serve, the party may then use the objection as grounds for vacating an award under Section 23(a)(2), which allows vacatur for evident partiality (by a neutral), corruption or misconduct. Likewise, where a required disclosure is not made, a party "upon timely objection" may seek vacatur under Section 23(a)(2). The Comments to the RUAA state that the failure to disclose could constitute misconduct for vacatur purposes under Section 23.

As discussed above with respect to Section 11, Section 12(e) has a special provision addressing nondisclosure by neutrals. When a neutral arbitrator fails to disclose a "known, direct, and material interest in the outcome" or a "known, existing, and substantial relationship" with a party, the arbitrator will be presumed to act with evident partiality under Section 23(a)(2).

The RUAA's waiver provisions (Section 4) are significant here. The parties may waive the disclosure requirements governing non-neutral arbitrators. They may also waive the disclosure requirements governing neutral arbitrators after a controversy arises. However, before a controversy arises, as set forth in Section 4(b)(3), the parties may not "unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator."

The RUAA attempts to set a fair, middle-ground position that would not require disclosure of de minimis relationships and interests. The disclosure provisions would have obvious benefits. There is value in having a neutral third arbitrator know of co-arbitrators' relationships to the parties and interests in the dispute. There is also value in having a statute that sets a uniform standard for disclosure.

While the ADR Committee endorses the RUAA approach, areas of concern include:

1. Will the section have the unintended result of generating vacatur of awards for technical disclosure violations? It appears that vacatur could be granted where an arbitrator failed to disclose a conflicting relationship (as a form of "corruption" or "misconduct" under Section 23) but where partiality could not be affirmatively demonstrated or where the parties had no expectation that the non-neutral arbitrator was acting impartially.

2. Should there be different consequences in situations where an arbitrator failed to disclose an interest in the outcome of the arbitration versus the situation where a personal relationship was not disclosed? Section 12(a) treats the situations identically.

3. Section 12(d) requires that a motion to vacate based on an arbitrator's failure to disclose be made in a "timely" fashion. Some ADR Committee members raised the concern that a party may not learn of the undisclosed relationship or interest until long after the arbitration is completed. Note, however, that Section 23(b) may extend the time to seek vacatur.

4. Certain practical problems also may arise. What, for instance, would be the inquiry and disclosure obligation for arbitrators who work at large law firms or in large corporations? What would happen in instances where witnesses are not known until after the arbitration commences?

5. This section also raises questions about the obligations of party-designated arbitrators (i.e., "non-neutrals"). Is such an arbitrator free to be an advocate for the party that made the appointment or does such an arbitrator have the duty to be an impartial decision-maker? Section 12 implicitly endorses the idea that a non-neutral may serve even if he or she has a material interest in the outcome (see Section 12(e)).

CURRENT NEW YORK LAW

No CPLR provision calls for disclosure. However, CPLR § 7511 allows a party to challenge an award where partiality has been shown by a neutral.

RUAA

SECTION 12. DISCLOSURE BY ARBITRATOR.

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

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

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

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

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

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

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

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

SECTION 13: ACTION BY MAJORITY

This section raises no significant issues. Under Section 13, majority rule will apply to multiple-arbitrator panels unless the parties have agreed otherwise. The section can be waived under Section 4.

CURRENT NEW YORK LAW

The CPLR does not address the question of whether the power of the arbitrators is to be exercised by a majority where there is more than one person on a panel.

RUAA

SECTION 13. ACTION BY MAJORITY.

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

SECTION 14: ARBITRATORS' IMMUNITY AND COMPETENCY TO TESTIFY

Section 14 grants immunity to arbitrators and arbitration organizations to the same extent as a judge or court. It also limits the circumstances under which arbitrators, arbitration organizations, and representatives of the organizations can be compelled to testify. Essentially, with respect to arbitrations they conduct, arbitrators are not competent to testify about the arbitration and cannot be compelled to produce documents concerning it except in cases where (a) they are the plaintiff or claimant in an action against a party or (b) where a party has moved to vacate the award on the basis of misconduct, corruption, or similar basis and made a prima facie showing that grounds for vacatur exist. Section 4(c) of the RUAA prohibits waiver of Section 14.

While the ADR Committee and the Joint Committee do not suggest amendments to Section 14, it is necessary to call attention to concerns that some members of the ADR Committee had about the provisions.

Scope of Immunity

The rationale for conferring immunity from civil liability on an arbitrator is that there is "functional comparability" between the role arbitrators play and the role judges play. It does not require very much analysis to come to the conclusion that a significant part of what an arbitrator does is similar enough to what a judge does to warrant application of the same policy considerations to both in determining whether they should be immune from civil liability.

However, there does not seem to be the same kind of "functional comparability" between what judges and arbitration organizations do. It is difficult to see the justification for conferring immunity from civil liability upon arbitration organizations. If an arbitration organization is, for instance, negligent in its administration of a particular dispute and a party is damaged by that negligence, why should the arbitration organization not be subject to civil liability?

The right to sue a judge or an arbitrator for not doing as good a job as a disgruntled party may think they should have done would come at the price of causing judges and arbitrators perhaps to take into consideration factors that society would prefer not distract them, such as a desire for self-protection rather than objective decision-making. Accordingly, society arguably benefits when judges and arbitrators are made immune from civil liability.

However, none of the significant attributes shared by judges and arbitrators is also shared by arbitration organizations. An arbitration organization performs an administrative function in return for a fee. It does not have the same kind of relationship to the decision-making process as judges and arbitrators. Moreover, potential liability for misfeasance or nonfeasance can have a prophylactic effect and improve the standards to which arbitration organizations hold themselves, which would benefit society.

Competency of Arbitrators and Organizations to Testify

On the basis of the same logic regarding the appropriateness of immunity from civil liability for arbitration organizations, the ADR Committee questions whether representatives of arbitration organizations should be declared incompetent to testify in all situations, although it makes sense to exempt arbitration organizations from having to produce records about something "occurring during the arbitration proceeding" so that a litigant could not get from an arbitration organization what the litigant could not get from the arbitrator.

The ADR Committee also has concerns about ambiguities in the drafting of the language of Section 14. Section 14(d) states that (1) neither an arbitrator nor a representative of an arbitration organization is competent to testify; and (2) an arbitrator or a representative of an arbitration organization cannot be required to produce records, as to anything that occurred "during the arbitration proceeding" to the same extent as a state court judge.

First, is it intended that an arbitration organization, as opposed to an arbitrator or a representative of an arbitration organization, can be required to produce records? That is arguably an equally valid reading of Section 14(d), but such a reading is probably contrary to the intent of the drafters.

Second, as a matter of drafting, it would seem that the word "about" should be added after the phrase "not competent to testify" in Section 14(d) if it is intended that what an arbitrator or representative of an arbitration organization is not competent to testify about is coextensive with what an arbitrator or representative of an arbitration organization cannot be required to produce records about. Section 14(d) appears to make an arbitrator and representative of an arbitration organization not competent to testify about anything at all (other than what is set forth in Section 14(d) (1), (2) and (3)), but an arbitrator and a representative of an arbitration organization can be required to produce anything that does not come within the phrase "as to any statement . . . during the arbitration proceeding . . . ."

The way Section 14(d) is currently drafted, an arbitrator arguably could not be called to testify about anything, but could be required to produce his or her notes about what the arbitration organization told the arbitrator about the dispute when the arbitration organization first contacted the arbitrator about serving because that conversation did not take place "during the arbitration proceeding." In fact, under the definition in Section 1(2) of the RUAA, the individual in question would not even be an "arbitrator" at the time of that conversation because he or she had not yet been "appointed."

Third, there is also a question as to the meaning of the phrase "during the arbitration proceeding." Is a telephone call to the clerk's office about a filing fee something "occurring during" a lawsuit? If not, then a telephone call to an arbitration organization about a filing fee, by a parity of reasoning, would not be something "occurring during the arbitration proceeding" and could be the subject of testimony and/or document discovery. A party might be interested, for instance, in obtaining admissions against interest made by the other side in explaining why a higher or lower filing fee was justified. Are such communications intended to be discoverable

because they did not occur during the arbitration proceeding? The drafting should make clear the scope of the clause.

Competency in Cases of Corruption, Fraud, and Undue Means

The RUAA allows arbitrators and representatives of arbitration organizations to testify where misconduct by arbitrators is alleged but only if the movant establishes prima facie that a ground for vacating the award exists without using any testimony from the arbitrator or a representative of an arbitration organization.

While some movants who have meritorious claims may not be able to make the prima facie showing without such testimony, the drafters' had a concern that without some statutory limitations arbitrators and organizations would be regularly drawn into litigation. On balance, the limitation set in Section 14 represents a sound policy. The provision is also consistent with current New York law.

Attorney's Fees for Arbitrators

Section 14(e) provides that if anyone (1) commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization "arising from the services of" any of them; or (2) seeks to compel any of them to testify or produce records "in violation of" Section 14(d); and (3) the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or is not competent to testify, then the court shall award "reasonable attorney's fees" and "other reasonable expenses of litigation" to the arbitrator, arbitration organization, or representative of an arbitration organization.

This section misses the point and is based on the false assumption that the arbitrator, for instance, is likely to spend money for attorney's fees to resist an attempt to have him or her testify or produce documents. An arbitrator does not really care in most instances if he or she is subpoenaed to give testimony or produce documents. Most arbitrators, if called upon to testify, will tell the truth and will produce documents, as directed by the courts. The arbitrator's real concern is that he or she be compensated at his or her normal hourly rate for time spent complying. Moreover, Section 14(e) does not provide for even attorney's fees in instances where the subpoena is upheld and testimony or document production is required.

CURRENT NEW YORK LAW

Immunity of arbitrators and arbitration organizations from civil liability. New York law holds that arbitrators are "absolutely immune from liability in damages for all acts within the scope of the arbitral process." Wally v. General Arbitration Council of the Textiles and Apparel Industries, 165 Misc. 2d 896, 898 (Sup. Ct. N.Y. Co. 1995), quoting Austern v. Chicago Bd. Options Exch., 898 F.2d 882, 886 (2d Cir. 1990). Only where the arbitrator has acted in the "clear absence of all jurisdiction" can he or she be subject to liability. Sullivan v. Elliott, 157 Misc.2d 456, 457 (1993); see also Colin v. County of Suffolk, 181 A.D.2d 653, 654 (2d Dep't 1992). The courts have held that arbitral immunity parallels judicial immunity (see

Austern, 898 F.2d at 886), and judicial immunity has been construed to apply even where a judge has acted in excess of his or her jurisdiction and engaged in malicious or corrupt conduct. Stump v. Sparkman, 435 U.S. 349 (1978). The law is unclear as to whether similar immunity applies to arbitral organizations, although cases from other jurisdictions have granted such immunity.

Competency of arbitrators to testify. A long line of older New York cases holds that an arbitrator's testimony intended to contradict or impeach an award is inadmissible. See In the Matter of Martin Weiner Co., 2 A.D.2d 341, 342 (1st Dep't 1956), aff'd w/o opn., 3 N.Y.2d 806 (1957). While no later case has explicitly attacked that holding, some subsequent decisions have stopped short of terming such testimony inadmissible while rejecting the testimony. In Cavallaro v. AllState Ins. Co., 124 A.D.2d 625, 626 (2d Dep't 1986), the prevailing party in an arbitration later submitted to the court an affirmation from the arbitrator in which the arbitrator stated that he had intended to award interest. The Second Department declined to consider the affirmation, saying "consideration of statements of an arbitrator with respect to his intentions or his interpretation of the award is a practice which has been disapproved in the past."

In Dahlke v. X-L-O Automotive Accessories, Inc., 40 A.D.2d 666, 667 (1st Dep't 1972), the court considered arbitrator affidavits that reaffirmed the award. The First Department termed the submission of such statements "a practice not to be encouraged" and said it regarded the statements as "surplusage and unnecessary." As in Cavallaro, the court did not address admissibility.

All of these cases – which involve testimony designed to interpret or modify an award – should be distinguished from instances in which, in a proceeding to vacate, an arbitrator is asked to testify as to alleged misconduct, fraud, or partiality in rendering an award. Those cases are summarized in the next section.

Compelled testimony by arbitrators. The general rule in New York law is that an arbitrator can be compelled to testify about alleged misconduct, fraud, or partiality in the arbitration, but only after the party seeking the testimony has demonstrated a basis for alleging impropriety. In the Matter of Temporary Comm. of Investigation, 68 A.D.2d 681, 689-90 (1st Dep't 1979); Davis v. Esikoff, 105 Misc.2d 955, 956 (Sup. Ct. N.Y. Co. 1980). It is unclear what standard is to be employed to judge the prima facie showing of impropriety. In Temporary Commission, the court said that "mere suspicion" is not enough. It held that the applicant for the subpoena had failed to make even a "minimum showing" of impropriety and thus was not entitled to discovery of the arbitrator. In Davis, on the other hand, the court allowed a limited deposition of the arbitrator after finding that there had been a "preliminary showing of impropriety." There is no discussion in the decision of the evidence provided. In cases governed by federal law, the Second Circuit has stated that there must be "clear evidence of impropriety" before questioning of an arbitrator will be allowed. In the Matter of Andros Compania Maritima, 579 F.2d 691, 702 (2d Cir. 1978).

A more lenient rule may apply, however, when the later proceeding does not involve an attack on the arbitrators' conduct. In a Southern District case, Frere v. Orthofix, Inc., 2000 U.S. Dist. Lexis 17467 at *15-16 (S.D.N.Y. Dec. 6, 2000), the court stated that the Andros Compania Maritima standard applied "only when the goal is to impugn the validity of the arbitrator's

decision." In Frere, disgruntled shareholders of a company were seeking evidence of "party misconduct" – i.e., that the company's officers had acted fraudulently or contrary to the shareholders' interests in the arbitration – in an effort to vacate the award. The court ultimately denied discovery of the arbitrator and noted that the liberal discovery standards applicable in civil litigation needed to be modified in the "special circumstances of a challenge to an arbitral award."

RUAA

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

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

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

(c) If an arbitrator does not make a disclosure required by Section 12, the nondisclosure does not cause a loss of immunity under this section.

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

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

(2) if a party to the arbitration proceeding files a motion to vacate an award under Section 23(a)(1) or (2) [corruption, fraud, etc.] and establishes a prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, an arbitration organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is incompetent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

SECTION 15: ARBITRATION PROCESS

Section 15 contains several critical provisions. First, it authorizes arbitrators to grant "summary disposition." Second, it sets the procedures by which an arbitrator gives notice of a hearing. Third, it recognizes the parties' right to present evidence. Finally, it authorizes the parties to seek a substitute arbitrator when an arbitrator ceases or is unable to act.

Summary Disposition and the Joint Committee's Proposed Amendment

Section 15(b) provides that an arbitrator may decide an entire claim, or any particular issue or issues within a claim, by means of "summary disposition". The only stated requirements are that: (1) all parties agree to summary disposition or (2) if only one party wants summary disposition, that the other parties have "a reasonable opportunity to respond."

While we agree that arbitrators should have the power to decide cases without a hearing when no issue requiring live testimony is presented, we find the RUAA to be unnecessarily ambiguous. The main problem is that nowhere in the RUAA is "summary disposition" defined. As written, the RUAA leaves open whether the drafters intended for Section 15 to cover procedures akin to a motion to dismiss as a matter of law, summary judgment (i.e., no genuine issue of material fact exists) or a "hearing" based on documents, rather than on witness testimony.

The Joint Committee agreed that the RUAA should be amended to set a standard for summary disposition. Based on the traditional language used for summary judgment, the ADR Committee proposes that Section 15(b) be amended to state:

> A motion for summary disposition may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law upon the claim or issue.

The proposed language adds clarity to the summary disposition section. However, an arbitrator's grant or denial of summary judgment would not be subject to review by the courts on an error-of-law standard even under the proposed amendment. The same standards applicable to other motions to vacate under Section 23 would apply (evident partiality, misconduct, etc.).

Evidentiary Issues

While the ADR Committee has not recommended a change in the provisions governing evidentiary issues, there are potential problems raised by the loose drafting of parts of Section 15.

The RUAA provides as follows with regard to evidence (emphasis added):

1. Section 15(d) states that if there is a hearing, a party "has a right to present evidence material to the controversy."

2. Section 15(a) states that the "authority" conferred upon the arbitrator includes the power to determine (a) admissibility; (b) relevance; (c) materiality; and (d) weight of any evidence.

3. Section 23(a)(3) states that the court shall vacate an award if an arbitrator refuses to consider evidence material to the controversy so as to prejudice the rights of a party.

In sum, a party can "present" – i.e., offer any evidence the party wants to – but it is the arbitrator who decides admissibility, relevance, materiality and weight. However, under Section 23(a)(3), a court not only can, but must, vacate an award if an arbitrator refuses to consider material evidence and that refusal to consider substantially prejudices the rights of any party, not just the rights of the offering party. The CPLR does not have a provision directly comparable to Section 23(a)(3), although vacatur may be granted where an arbitrator's "failure to follow the procedure of [Article 75]" results in prejudice (CPLR § 7511(b)(iv)).

The bottom line seems to be that risk-averse arbitrators will be encouraged by Section 23 to let in more evidence than they otherwise might because they cannot be reversed by a court if they "consider" evidence even if they do not give it the weight to which it might reasonably be entitled. The consequence may be longer and more expensive arbitration proceedings than would be the case if the relevant language from Section 23(a)(3) were omitted.

Comment No. 4 to Section 15 may also contribute to confusion about the permissible basis for a decision. First, the comment points out that Section 15(c) provides that an arbitrator "may" but does not have to " . . . decide the controversy upon the evidence produced" even if a party who was notified did not appear. (It should be noted that the second paragraph of Comment No. 3 to Section 15 similarly states that "...arbitrators are not bound by rules of law and their awards cannot be overturned for errors of law.") However, there is no statement as to what the arbitrator's decision can be based upon if it is not based on the evidence produced and the rules of law. Comment No. 4 then states that the general rule in arbitration is that "the rules of evidence need not be observed," which is a softer than the statement in Comment No. 1 to Section 15 that "...the rules of evidence are inapplicable in an arbitration proceeding." The former seems discretionary and the latter seems mandatory, although that is probably not the drafters' intent.

Comment No. 4 then refers to the provision in Section 23(a)(3) that "the court shall vacate an award . . . if: an arbitrator ... refused to consider evidence material to the controversy . . . so as to prejudice substantially the rights of a party . . . ." Notwithstanding the mandatory nature of that provision, Comment No. 4 goes on to state ". . . courts have determined that arbitrators have broad discretion as to what evidence they will consider."

While the ADR Committee has not proposed amending language, we are concerned about the RUAA's failure to state affirmatively what standard arbitrators should use in making their decisions.

Absent Parties and Notice

Likewise, the ADR Committee has not proposed an amendment to the provisions governing notice, but again we are troubled by less-than-exact drafting.

Section 15(c) states that an arbitrator may "hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear." There is an ambiguity as to whether the word "appear" means (a) put in a response to the notice of the arbitration proceeding that initiated the arbitration pursuant to Section 9 or (b) showed up at a hearing. We understand that the drafters intended the language to mean that the arbitrator was free to decide the case in either instance, but the failure to express this important point more clearly could be problematic.

The language of the notice provision also deserves attention. Section 15(c) requires that the notice of hearing be given on "not less than five days" notice. However, "notice" is defined in Section 2 as "taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice." As currently written, Section 15(c) requires only that the notice be given five days before the hearing begins. In light of the shortness of the five-day period and the power of the arbitrator to decide a case in the absence of a party, a more rigorous notice requirement is appropriate.

The RUAA sets a higher standard for the notice of commencement under Section 9, which requires service by certified or registered mail or service identical to that required for commencing a civil action. Service by certified or registered mail should be required under this Section as well and the five-day period extended so that notice would actually be received by each party not less than five days before the hearing begins.

Orders for a Timely Arbitration

Section 15(c) provides that a party can go to court and get an order directing the arbitrator to conduct the hearing "promptly" and render a "timely" decision. The ADR Committee questions how that provision would work as a practical matter given the immunity extended by Section 14. If arbitrators refused to act within the time set by the court, would they not enjoy full immunity from any sanctions? Section 15(c) also raises the possibility of significant judicial management of the arbitration, a result at odds with the basic principles of arbitration. Ideally, Section 15(c), authorizing a court to set a timetable and limited the court's power to removal of an arbitrator (under Section 11(a)) in cases where an arbitrator has neglected his or her duties, could be eliminated.

CURRENT NEW YORK LAW

Summary disposition and evidence: CPLR § 7506(c) states: "The parties are entitled to be heard, to present evidence and to cross-examine witnesses." However, the question of whether an arbitrator can render a decision without a hearing (on a motion to dismiss on the law or by way of a summary judgment motion) has not been clearly resolved under New York law. Courts have held that the refusal to hear "relevant testimony" constitutes misconduct by an

arbitrator and is grounds for vacating an award. Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 400 (1954); Johnson v. Johnson, 161 A.D.2d 125, 128 (1st Dep't 1990). In protecting the parties' right to have their evidence heard, a New York court has held that arbitrators may be required to grant an adjournment to allow a party to provide relevant evidence. Howard v. State Farm Mutual Ins. Co., 72 A.D.2d 814 (2d Dep't 1979).

Nonetheless, the courts have recognized that the rule of Gervant does not require a hearing where there are no triable issues of fact. See Olympia & York 2 Broadway Co. v. Produce Exch. Realty Trust, 93 A.D.2d 465, 471-72 (1st Dep't 1983) (appraisal board was not required to hold appraisal proceeding so long as plaintiff had opportunity to present its views). In a securities arbitration, the First Department has acknowledged that an evidentiary hearing is not invariably required to resolve a dispositive statute of limitations issue. Dean Witter Reynolds, Inc. v. Eno, 247 A.D.2d 314, 315 (1st Dep't 1998). Both of those cases should be viewed with certain caution. Olympia arises in the special context of appraisal hearings, rather than in the context of general arbitration under Article 75 of the CPLR, and in Dean Witter the parties had consented to the arbitrators' determination of the limitations question without a hearing. There appears to be no New York case either approving or rejecting the use of a summary judgment proceeding to resolve factual issues in an Article 75 arbitration.

By contrast, the federal courts in New York have accepted summary judgment as a procedure under the FAA. In Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corp., 146 F.R.D. 64 (S.D.N.Y. 1993), the court declined to set aside an arbitral decision that had been made solely on documentary evidence. While the court expressed its reluctance to approve of such a process, it held that the arbitrator's decision was reasonable and did not constitute misconduct and that hearings are "not required just to see whether real issues surface." 146 F.R.D. at 74. Similarly, in British Ins. Co. of Cayman v. Water Street Ins. Co. Ltd., 93 F. Supp.2d 506, 517 (S.D.N.Y. 2000), the court concluded that the arbitrators were not required to hold a hearing. The court reasoned that the "touchstone" of arbitral misconduct under the FAA was "fundamental fairness," which required only that each party have an adequate opportunity to present its evidence and argument. The court went on to hold that, as long as an arbitrator's choice to rely solely on documentary evidence was reasonable, the arbitrator had acted within the scope of his or her permissible discretion. The court noted, however, that only a preliminary ruling (on provision of security) was at issue and strongly suggested that a hearing would be required to support a final award, given the factual issues involved.

Absent parties and notice: CPLR § 7506(c) states: "Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced." Section 7506(b) requires that the parties be given notice "in writing personally or by registered or certified mail not less than eight days before the hearing."

RUAA

SECTION 15. ARBITRATION PROCESS.

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

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

(1) if all interested parties agree; or

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

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

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

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

SECTION 16: REPRESENTATION BY LAWYER

Section 16 recognizes a party's right to be represented by a lawyer. Under Section 4(b)(4), a party may waive Section 16 only after "a controversy arises" – i.e., the parties may not agree in their arbitration agreement to proceed without counsel.

Waiver of the Right to Counsel and the Joint Committee's Proposed Amendment

After discussion, the Joint Committee and now the ADR Committee propose that Section 4(b)(4) be eliminated so that parties could not waive their right to counsel. This would make the RUAA consistent with CPLR § 7506(d), which bars such a waiver.

Comment No. 2 to Section 16 states that Section 16 does not intend to preclude "where authorized by law" representation in an arbitration proceeding by individuals not licensed to practice law anywhere. In an era of multi-jurisdictional practice and with continuing issues about unauthorized practice, the RUAA might have been an appropriate vehicle for setting a uniform standard for representation.

CURRENT NEW YORK LAW

CPLR § 7506(d) states: "A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived." See Nastasi v. Artenberg, 130 A.D.2d 469 (2d Dep't 1987) (refusing to confirm award where party signed required waiver of right to attorney).

RUAA

SECTION 16. REPRESENTATION BY LAWYER.

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

SECTION 17: WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY

Section 17 of the RUAA has several notable components. First, it expressly permits arbitrators to order discovery. Second, it streamlines the process by which parties can enforce subpoenas and take discovery of out-of-state non-parties. Third, it clarifies that the subpoena power is available in discovery, not just for hearings. Fourth, it recognizes the power of the arbitrator to order a deposition to be used at the hearing.

The procedural clarifications are important improvements over current New York law, although the ADR Committee proposes certain additional amendments. At the same time, Section 17's text also raises concerns as to whether it goes too far in encouraging litigation-like discovery. A majority of the Joint Committee supported the current text of the RUAA addressing discovery and the use of depositions at hearings, but the section deserves close scrutiny.

Attorney-Issued Subpoenas and the Joint Committee's Proposed Amendment

As currently written, Section 17(a) allows the arbitrator, but not attorneys of record, to issue subpoenas. The ADR Committee along with the Joint Committee recommend that the RUAA be amended to recognize the right of attorneys to issue subpoenas, which has long been an important feature of New York practice.

Subpoena Process Amendment

The RUAA's streamlining of the subpoena process is an improvement over current law, which is both cumbersome and confusing. Currently, to subpoena an out-of-state witness, a party must follow a multi-step process of getting the subpoena authorized by a court in the state where the arbitration is taking place and then having it converted into an order in the state where the witness is located. Section 17(g) would alter that process and allow a court in the state where a witness resides to enforce a subpoena issued by an arbitrator in another state.

The ADR Committee endorses the one amendment the Joint Committee proposed to Section 17(g). It should apply not only to arbitrations in other states but also to arbitrations in other countries. In other words, under the amendment, a New York court would be empowered to enforce an arbitration subpoena issued in a foreign arbitration for a New York witness.

Waiver

While no amendment has been proposed, the ADR Committee has concerns about the waiver provisions of Section 4 applicable to this section. Section 4 allows parties to waive subsection (e) (allowing protective orders for trade secrets and other information) and subsection (f) (allowing fees for non-party witnesses as set by law) of Section 17. Allowing parties to waive provisions that affect the rights of non-parties (to obtain fees or have their trade secrets protected by an arbitrator's order in an arbitration proceeding) is dubious. (The parties' ability to waive

subsection (g), which is also allowed by Section 4, is meaningless, as subsection (g) deals with the courts' power in respect to out-of-state arbitrations and not to the parties' arbitration.)

Sanctions

The final sentence of Section 17(d) empowers arbitrators to impose sanctions for non-compliance with discovery orders. Under that provision, the arbitrator enjoys the same sanction powers as a court. The ADR Committee understands that to mean that the arbitrator could impose such sanctions as dismissal of the claim, punitive damages, and directed judgment for the opposing party. While we did not propose alternate language, we did have concerns about abuse of the provision, especially in light of the limited power of review that the courts have with respect to discovery matters in arbitration.

Scope of Discovery

The fundamental issue raised by Section 17 is whether the RUAA implicitly encourages discovery. Subsections (b) and (c) of Section 17 establish the basic scheme of the RUAA: First, the arbitrator may permit a deposition to be taken for use as evidence at the hearing when necessary to make the proceeding "fair, expeditious, and cost effective." Second, the arbitrator may permit discovery when it is "appropriate in the circumstances."

Article 75 of the CPLR is silent on the subject of discovery. However, the CPLR does give the arbitrator power to issue subpoenas in an arbitration proceeding. The NASD has codified discovery available in its several guidelines for its arbitrators. The guidelines permit depositions of non-party witnesses at the arbitrator's discretion, when the witness will not be available at the hearing. The New York Stock Exchange's arbitration rules limit discovery to documents. The AAA Commercial Rules limit discovery to documents, but for complicated cases permit an arbitrator to order depositions or interrogatories to persons who possess information necessary to the arbitration case. The National Futures Association limits discovery to writings. While not explicitly authorized, interrogatories are available in these forums.

The language in the RUAA's concerning depositions, puts more emphasis on depositions than the arbitration schemes noted above. It probably puts more emphasis on depositions than intended in view of the comments to the RUAA, which express the view that Section 17 is intended to allow only limited discovery.

The broad language of Section 17 presents the danger of allowing an arbitration to be converted into a mini-litigation with all the trappings of discovery, and discovery abuse, attendant to litigation. The actual statutory language does not state that depositions are not to be the norm in arbitration. Arbitration has not traditionally been viewed as mini-litigation. As arbitration is supposed to be a faster, less expensive and more efficient alternative to litigation, it should not have the same broad discovery and deposition procedures of actual litigation. If it did, it would not be a particularly attractive cost-saving alternative to litigation. In effect, Section 17 puts the burden on the parties to limit discovery in their agreements. While the parties are free under Section 4 to waive Section 17(c) and thus not have party discovery, they

can waive subsections (a), which governs subpoenas, and (b), which governs depositions to be used as evidence at the hearing, only after a controversy arises.

There is the possibility that an arbitrator could abuse his or her discretion by permitting onerous depositions of parties without the safeguards of a court system to prevent abuses. For example, a claimant could plead very generally a fraud claim, without the specificity required in a pleading under the CPLR or FRCP, and then convince an arbitrator that the claimant needed depositions of a party in order to establish the existence of the fraud. Such a tactic is not permitted in litigation, but under the RUAA, an arbitrator could allow such an abuse. This is especially so where the parties have private arbitrations not a part of a system such as that established by the NASD or AAA. In such an instance, there would be no rule of an organization that in some way regulates the arbitrator's discretion to rectify the abuse. To the extent that the RUAA does not spell out the limits to depositions or other discovery, it can lend itself to an abuse of discretion without any safeguards.

The language of the RUAA could have set a higher standard for allowing depositions. For instance, here is one possible approach:

> *Depositions shall not be permitted by an arbitrator except in the following circumstances to make the proceedings fair, expeditious and cost effective:*
>
> > *(1) An arbitrator may permit the deposition of a non-party witness upon a showing of good cause by the party requesting the deposition.*
> > *(2) An arbitrator may permit the deposition of a non-party witness who cannot be subpoenaed for, or is unable to attend, a hearing.*
> > *(3) An arbitrator shall not permit a deposition of a party, or an employee of a party, except upon a showing of extraordinary circumstances by the party requesting the deposition.*
>
> *The arbitrator shall determine the conditions upon which any deposition shall be taken.*

These changes merit serious attention by the legislature.

CURRENT NEW YORK LAW

Article 75 has no provisions directly addressing discovery. As a matter of case law, arbitrators are allowed to permit discovery at their discretion, although the courts have warned that "disclosure is to be sparingly allowed" in arbitration. Jamaica Hosp. v. Vogel & Strunk, 57 A.D.2d 843 (2d Dep't 1977).

Article 75 authorizes arbitrators to issue subpoenas (CPLR § 7505). However, some courts have held that, while non-parties can be compelled to attend hearings, they cannot be compelled to testify at a deposition or produce documents prior to a hearing. See Integrity Ins. Co. v. American Centennial Ins. Co., 885 F. Supp. 69, 71 n. 3 (S.D.N.Y. 1995).

To obtain testimony or discovery from out-of-state non-party witnesses, a party must now obtain a commission or order from a New York state court and then go to the courts of the state where the witness is located to obtain a subpoena or order. If the witness fails to comply, an action must be brought in the jurisdiction of the witness.

RUAA

SECTION 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

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

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

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

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

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

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

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

SECTION 18: JUDICIAL ENFORCEMENT OF PREAWARD RULING BY ARBITRATOR

Section 18 grants the prevailing party the right to seek an expedited confirmation of a pre-award order. This is an important procedural step to allow judicial enforcement of injunctive relief and similar orders necessary to maintain the status quo.

Judicial Review of Unfavorable Ruling and Proposed Amendment

The ADR Committee is concerned that a losing party subject to the pre-award order has no right to take the matter up with the courts until the arbitration is completed. For instance, an arbitrator could award an injunction to one side and the opposing party would find itself unable to challenge the decision in court at that time unless the prevailing party sought confirmation. While the opposing party could refuse to comply and force the hand of the prevailing party, such a risky strategy should not be the norm. Indeed, such a refusal might jeopardize a party's membership in an organization or securities or commodities exchange that was sponsoring the arbitration.

The ADR Committee endorses the Joint Committee's proposal that the Section 18 be amended to allow either party the right to seek judicial review of pre-award equitable relief. The RUAA also should make clear that the arbitrator is required to render the pre-award ruling into an award to facilitate judicial review when equitable relief is involved. As currently written, Section 18 states only that the arbitrator "may" incorporate the ruling into an award. (Under the proposed amendment, the permissive rather than mandatory to getting an award from the arbitrator would remain in effect for non-equitable relief.)

The ADR Committee proposes the following language to address these concerns:

> (a) If an arbitrator makes a pre-award ruling as to a provisional remedy under Section 8, the arbitrator shall incorporate the ruling into an award under Section 19 at the request of any party to the arbitration proceeding whose interests are affected by the ruling. Any such party may make a [motion] to the court for an expedited order to confirm, vacate or modify the award under Sections 22, 23 or 24, in which case the court shall summarily decide the [motion].
>
> (b) If an arbitrator makes any other pre-award ruling, the party to the arbitration proceeding in whose favor the ruling was made may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the [motion]. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under Sections 23 or 24.

The standard for review for the party challenging equitable relief would be governed by Section 23. Thus, an error of law in granting an injunction would not be a basis for vacating the injunction.

CURRENT NEW YORK LAW

New York case law has recognized the authority of arbitrators to grant pre-award relief. There are no express provisions of the CPLR dealing with confirmation or vacatur of such orders.

RUAA

SECTION 18. JUDICIAL ENFORCEMENT OF PREAWARD RULING BY ARBITRATOR.

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

SECTION 19: AWARD

Section 19 largely tracks current state law (CPLR § 7507) and raises no issues of note. It would, however, eliminate certain of Section 7507's formalities concerning the form of the award and the form of notice while continuing to require that the award be recorded and that notice be given to the parties.

CURRENT NEW YORK LAW

CPLR § 7507 states in relevant part: "Except as provided in Section 7508 [addressing award by confession], the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders . . . .The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested."

RUAA

SECTION 19. AWARD.

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

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

SECTION 20: CHANGE OF AWARD BY ARBITRATOR

Section 20 grants an arbitrator the power to modify or clarify an award upon motion of a party and sets forth a procedure for the necessary motion practice. By so doing, it obviates the problem that has arisen at times in other jurisdictions where arbitrators are rendered powerless to act further once an award is rendered, even if the award has a technical or clerical error. Because CPLR § 7509 already provides a mechanism for modification, Section 20 does not constitute a significant change in current New York law.

Section 20, like the CPLR, requires a motion by a party; technically, the arbitrator on his or her own cannot change the award. While there may be times when only the arbitrator would know that an error was made, leaving the requirement of a motion in place is reasonable.

CURRENT NEW YORK LAW

CPLR § 7509 provides in relevant part: "On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511 . . ."

Section 7511(c), in turn, states:

(c) Grounds for modifying. The court shall modify the award if:
1. there was a miscalculation of figures or mistake in the description of any person, thing or property referred to in the award; or
2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the ward is imperfect in a matter of form, not affecting the merits of the controversy.

RUAA

SECTION 20. CHANGE OF AWARD BY ARBITRATOR.

(a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:
(1) upon a ground stated in Section 24(a)(1) or (3);
(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or
(3) to clarify the award.
(b) A [motion] under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award.
(c) A party to the arbitration proceeding must give notice of any objection to the [motion] within 10 days after receipt of the notice.
(d) If a [motion] to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:
(1) upon a ground stated in Section 24(a)(1) or (3);

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

(3) to clarify the award.

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

SECTION 21: REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING

The RUAA's Section 21 addresses two controversial issues: awards of punitive damages by arbitrators and awards of attorney's fees. Under Section 21, punitive damages may be awarded, but only if the arbitrator has specified "in the award the basis in fact justifying and the basis in law authorizing the award" and specified what part of the overall award is punitive. Similarly, an arbitrator may award attorney's fees "if such an award is authorized by law in a civil action involving the same claim or by agreement of the parties."

There was a difference of opinion among members of the Joint Committee as to whether New York should maintain its prohibition on punitive damages in arbitration governed solely by New York law. (Punitive damages are allowed in arbitrations governed by the FAA.) Ultimately, the Joint Committee decided to support awards of punitive damages, subject to a proposed amendment setting up a procedural safeguard. The DR Committee endorses this approach. This is discussed in the next section. Following that discussion is a background section that provides a summary of the history and policy behind the New York prohibition.

Procedure for Punitive Damages and Proposed Amendment

While Section 21 requires that the arbitrator justify the award by citing the facts and law that support punitive damages, the award cannot be challenged, on a motion to vacate, for legal error. In other words, Section 21 sets up a legal standard for granting punitive awards, but the vacatur provision of the RUAA, Section 23, does not recognize mere legal error as a grounds for vacating.

Accordingly, the ADR Committee, following the Joint Committee, recommends that Section 23 be amended to authorize vacatur of a punitive damages award on the basis of legal error. The text of the amendment is set forth below in the discussion of Section 23. It is important to note that an award of attorney's fees would continue to be governed by the customary standards for vacatur set forth in Section 23.

In addition, the requirement of a factual basis for the award could raise issues in arbitrations where no transcript is kept. The burden would be on the party seeking punitive damages to take whatever steps are necessary to assure that a sufficient factual record is created to support punitive damages.

Background on Punitive Damages

The New York rule barring arbitrators from awarding punitive damages was articulated in Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976).

In articulating Garrity's rule against the award of punitive damages in arbitration, Judge Breitel, writing for the Court, describes punitive damages as a "sanction reserved for the State." A major reason for this "strong public policy" is found in the power of the arbitrator, and lack of procedural safeguards against an erroneous arbitral decision. Unlike a judge, the arbitrator is not

bound by substantive law or rules of evidence, and thus errors of law or fact will not justify the vacatur of an arbitrator's award. Judge Breitel observes that:

> "These broad principles are tolerable so long as arbitrators are not thereby empowered to ride roughshod over strong policies in the law which control coercive private conduct and confine to the State and its courts the infliction of punitive sanctions on wrongdoers."

In addition to the concern that abuse by an arbitrator is neither (a) constrained by rules of law or evidence nor (b) subject to appellate review is the recognition that punitive damages are more than another private civil remedy – they are (c) a form of punishment of a far greater potential magnitude of severity that is wielded (d) to punish and deter a public wrong as a social exemplary remedy, not a private compensatory remedy.

Under the federal precedents, punitive damages are allowed in cases governed by the FAA, unless the parties' agreement prohibits such an award. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 115 S. Ct. 1212 (1995). At the heart of Mastrobuono,[1] is the principle that the FAA was designed to facilitate the parties' right to contract for arbitration under the rules and procedures by which they choose to be bound. Freedom of contract and pro-arbitration policy are at the core of this decision, and are used by the majority to harmonize the Court's decision in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1985) (reading a California choice of law clause to indicate party choice of that state's rules relating to arbitration) with its decisions in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (upholding the enforceability of a predispute arbitration agreement governed by Alabama law, despite provision of Alabama statute declaring arbitration agreements unenforceable) and in Mastrobuono, itself.

Yet, freedom of contract has its limits. It is not likely that the court would permit a victim and perpetrator to agree to arbitrate their differences and remove from the state the power to prosecute a crime. Punitive damages represents a hybrid of criminal and civil remedies, perhaps requiring special preservation of court supervision. To this end, Garrity quotes Matter of Publishers' Assn. of N. Y. City (Newspaper Union), 280 A.D. 500, 503 (1952):

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1 Mastrobuono addressed the question of whether to uphold an arbitrators award of punitive damages pursuant to an Illinois agreement which contained a New York choice of law clause and an arbitration clause selecting arbitration under either the NASD, NYSE or AMEX procedures, where New York law did not permit arbitrators to award punitive damages, but where the FAA represented a strong federal policy in favor of arbitration and supporting parties choices of arbitration process. In dicta, the Court indicated that in the absence of an express choice of law clause, under an agreement signed in New York and involving New York parties, the FAA would preempt application of Garrity and permit an arbitrator's award of punitive damages. Id. 514 U.S. at 59. Under the Mastrobuono facts, the Court found that the choice of law clause did not expressly prohibit an arbitrators' award of punitive damages and under NASD practice, and general rules of construing ambiguity against the drafter and of harmonizing conflicting clauses to give each meaning, the parties' were found to have intended to permit the arbitrators to award punitive damages, and pursuant to the federal policy supporting arbitrability, this intent was enforced under the FAA.

> The trouble with an arbitration admitting a power to grant unlimited damages by way of punishment is that if the court treated such an award in the way arbitration awards are usually treated, and followed the award to the letter, it would amount to an unlimited draft upon judicial power. In the usual case, the court stops only to inquire if the award is authorized by the contract; is complete and final on its face; and if the proceeding was fairly conducted.
>
> Actual damage is measurable against some objective standard -- the number of pounds, or days, or gallons or yards; but punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and courts do not accept readily the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs as well as actionable private wrongs, they have had rather close judicial supervision. If the usual rules were followed there would be no effective judicial supervision over punitive awards in arbitration.

Garrity, supra, at 358-59.

The majority decision in Mastrobuono presents a thunderous silence on the question of whether there is something in the nature of punitive damages that might merit special treatment and deference when considering whether to apply a pro-arbitration policy and support freedom of contract. Perhaps this is simply due to its focus on the interplay of federal and state arbitration law and on contract interpretation. But in preempting Garrity, it arguably trod upon the state's power to determine and control the mechanism by which its social policy will be enforced though punitive or exemplary damages.

Counterbalancing the due process and policy reasons for preserving court control over punitive damages are several readily apparent reasons for permitting arbitrators to award punitive damages:

1. This would bring New York into conformity with current federal law under the FAA, avoiding inconsistencies;

2. This would reduce the rift in remedies available in arbitration as opposed to court, and prevent multiplication of proceedings, creating greater judicial efficiencies where an arbitration clause would govern at least a portion of a dispute;

3. Affording punitive damages would respond to the assertion by claimants that arbitration is a mechanism to shield industry members from liability; and

4. It would simply carry New York in the direction of a trend found in its own courts' decisions after Mastrobuono.

On this last point, First Department decisions, particularly those relating to NASD arbitrations, show a broader reading of Mastrobuono's scope than that given by Justice Thomas in its dissent.[2] While not overruling Garrity, New York courts have held that the FAA preempts Garrity and have rejected attempts to stay arbitration of punitive damages.[3] Mastrobuono turned on the Court's determination that a mere New York choice of law clause did not evince intent by the parties to prohibit arbitrators from awarding punitive damages. This suggested that express language showing intent to preclude arbitrators from awarding punitive damages should result in the non-enforceability of any arbitral award of punitive damages. Yet even an express clause was rejected in Lian v. First Asset Management, Inc., 273 A.D.2d 163 (1st Dep't 2000), on the ground that it contained a misleading and one-sided statement of New York law.[4]

CURRENT NEW YORK LAW

Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976), prohibits arbitrators from awarding punitive damages and remains the law in cases governed solely by New York law. Absent a contrary provision in the parties' contract, punitive damages are allowed in cases governed by the FAA. Mastrobuono, 514 U.S. 52 (1995)).

RUAA

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

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

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

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

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2 In his final paragraph, Justice Thomas states: "Thankfully, the import of the majority's decision is limited and narrow. This case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois.... The majority's opinion has applicability only to this specific contract and to no other." Id., 514 U.S. at 72.

3 See, e.g., Americorp. Securities, Inc. v. Sager, 239 A.D.2d 115 (1st Dep't 1997); citing Mulder v. Donaldson, Lufkin & Jenrette, 224 A.D.2d 125; Matter of Layne Construction, Inc. [Stratton Oakmont, Inc.], 228 A.D.2d 45 (1996); Fletcher v. Kidder, Peabody & Co., 81 N.Y.2d 623; Matter of Smith Barney Harris, Upham & Co. v. Luckie, 85 N.Y.2d 193.

4 The clause in question stated that the customer "understands that under the [contract] (1) New York State law applies, (2) the highest court of the State has ruled that punitive damages are not available in arbitration proceedings, and (3) punitive damages will not be available to me in any proceedings." Id. 163-63.

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

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

SECTION 22: CONFIRMATION OF AWARD

The RUAA largely follows New York practice for confirmation. However, it sets no deadline for bringing a confirmation proceeding in court. By contrast, CPLR § 7510 requires that confirmation occur within one year of delivery of the award to the parties.

Deadline for Confirmation and Proposed Amendment

The Joint Committee agreed that the one-year under current New York law limit should remain and the ADR Committee endorses this view. The following amended text was proposed:

> Within one year after a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

CURRENT NEW YORK LAW

CPLR § 7510 requires a prevailing party to bring an action to confirm an award "within one year after its delivery to [the party]".

RUAA

SECTION 22. CONFIRMATION OF AWARD.

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

SECTION 23: VACATUR OF AN AWARD

Section 23 largely tracks CPLR 7511 in setting forth the grounds upon which vacatur can be granted. The principal change that would be effected by the RUAA is an extension of time for bringing a vacatur action in cases where the grounds have been concealed from the prejudiced party. Under New York law, a vacatur action must be brought within 90 days. The RUAA also imposes a 90-day limit; however, in the case of corruption, fraud or other undue means, the 90 days does not begin to run until "the ground is known or by the exercise of reasonable care would have been known by the movant."

It does not appear from the reported cases that the lapsing of the 90 days prior to knowledge of possible vacatur grounds is a significant issue in New York. The exception to the 90 days set forth in the RUAA undermines to some extent the finality of arbitration and raises a new issue for litigation (when did the party know or when should the party have known). On balance, however, the additional time probably makes sense in those extraordinary cases where it would be relevant.

Section 23 is probably most notable with respect to what topics are not addressed. Specifically, the drafters chose not to include provisions governing two high-profiles areas of arbitration law: the right of parties to "opt in" by agreement to expanded judicial review of an award and the power of courts to overturn awards on the basis of "manifest disregard" of the law or public policy.

Opt-in provisions implicate the two cornerstones of arbitration: the right of the parties to structure their own proceeding, on the one hand, and arbitration's proper role as an alternative to the courts, on the other. Proponents of the opt-in provisions see them as a natural extension of their right to shape the proceedings and a logical way to assure an effective right of appeal. Opponents view the provisions as inconsistent with the notion that an arbitration award should be vested with finality (except in exceptional circumstances). In some circumstances, the opt-in would render arbitration awards to be little more than a recommendation to a judge. The comments to Section 23 offer a good discussion of the arguments.

The comments to Section 23 also fairly explicate the issues implicated by manifest disregard. The courts have been divided on whether they are constrained to grant vacatur only on those grounds set forth in the statute or whether they have the inherent power to set aside awards where the law has clearly been ignored or public policy requires it. The greatest concern is that the "manifest disregard" theory invites greater review by the courts than either statutory scheme currently envisions. Indeed, none of the other recognized grounds for vacatur implicates the merits of the award. In applying the manifest disregard standard, courts have distinguished between arbitrators' that have a "mistaken interpretation of law," where there are no grounds for vacatur and arbitrators that have "simply ignore applicable law," where there are grounds for vacatur. See Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998); Halikias v. Warburg Dillon Read, 2000 N.Y. Misc. Lexis 280 (Sup. Ct. N.Y. Co. July 6, 2000). It has been held that manifest disregard is a basis for vacating an award where the law is "well-defined, explicit and clearly applicable." Stewart Tabori & Chang, Inc. v. Stewart, 282 A.D.2d 385, 386 (1st Dep't 2001). While some courts have suggested that manifest disregard of the evidence is also a basis

for vacating (see Halikias), there is little if any New York case law on the issue. The more common standard for vacatur based on legal or factual error has been a finding of "irrationality" – i.e., the arbitrator's decision cannot be squared with reason. In re New York State Correctional Officers and Police Benevolence Assn., Inc., 94 N.Y.2d 321, 326 (1999); Wicks Construction v. Green, 295 A.D.2d 527, 527 (2d Dep't 2002).

The RUAA is also silent on a recent trend involving public policy objections to arbitration agreements in the employment context. Courts have recently held that an employee cannot be forced to arbitrate where the agreement requiring arbitration was not negotiated and imposes upon the employee some obligation for the costs of arbitration. See, e.g., Ball v. SFX Broadcasting, 165 F. Supp. 2d 230, 239 (N.D.N.Y. 2001).

It was the judgment of the ADR Committee and the Joint Committee that, as the RUAA drafters also concluded, all of these topics should continue to be left to the courts at this time. It makes sense to allow decisional law to evolve and define the standards to be applied because the law in these areas remains unsettled.

Review of Punitive Damages Awards and Proposed Amendment

As stated in the discussion of Section 21, the ADR Committee following the Joint Committee has proposed an amendment to Section 23(a) to allow review for error of law in the granting of punitive damages. The amendment states: "If the arbitrators include punitive damages or other exemplary relief in an award under Section 21(a), and the court determines that such an award is not authorized by law in a civil action involving the same claim or that the evidence produced at the hearing does not justify the award under the legal standards applicable to the claim, then the court shall vacate that portion of the award that provides for punitive damages or other exemplary relief."

The Joint Committee also recommended an amendment that would make the language of Section 23 concerning the validity or invalidity of an arbitration agreement consistent with the language used in the Joint Committee's proposed amendments to Sections 6 and 7.

CURRENT NEW YORK LAW

CPLR 7511(b) sets forth the following grounds for vacatur: (a) corruption, fraud, or misconduct in procuring the award; (b) partiality of a neutral arbitrator; (c) an arbitrator "exceeded his power or so imperfectly executed it that a final and definite award" was not made; or (d) failure to follow the procedures of Article 75. In addition, as a matter of case law, New York courts have struck awards that were deemed "irrational." Wicks Construction v. Green, 295 A.D.2d 527, 527 (2d Dep't 2002). New York courts have at times also vacated awards on the basis of manifest disregard of the law. See Stewart Tabori & Chang, Inc. v. Stewart, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001). Courts have also held that an arbitration award can be set-aside on public policy grounds. See Bd. of Educ., Bloomfield Central v. Christa Construction, 80 N.Y.2d 1031 (1992).

The question of whether an opt-in provision is valid has not been litigated in New York. In one case, however, the Appellate Division affirmed a lower court's review of an arbitration award in which the parties had set the scope of the judicial review. NAB Construction Corp. v. Metropolitan Transportation Auth., 180 A.D.2d 436 (1st Dep't 1992).

CPLR 7511 requires a party to bring an action to vacate within 90 days of delivery of the award to the party. The courts appear to have treated the 90 days as a firm statute of limitations.

RUAA

SECTION 23. VACATING AWARD.

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

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

(2) there was:

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

(B) corruption by an arbitrator; or

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

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

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

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

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

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

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

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

SECTION 24: MODIFICATION OF AWARD

There are no significant differences between Section 24 of the RUAA and CPLR 7511(c). Section 24 allows for technical modification of the award. Under Section 20, the court may submit the award to the arbitrator for correction.

CURRENT NEW YORK LAW

CPLR § 7511(c) provides for modification when there is a miscalculation or similar error, when the award addresses a matter not presented to the arbitrators, or when the award is "imperfect in a matter of form."

RUAA

SECTION 24. MODIFICATION OR CORRECTION OF AWARD.

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

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

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

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

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

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

SECTION 25: ATTORNEY'S FEES FOR LITIGATION

Section 25 allows the courts to make an award of attorney's fees to the prevailing party when a motion to confirm, vacate, or modify is contested. The RUAA drafters hoped that the threat of an award of attorney's fees would discourage parties from contesting motions and thus encourage finality of awards given in arbitration. It should be noted that Section 25(e) is a default provision and the parties are free to waive Section 25(c) under Section 4(a). It should also be noted that the award of fees is discretionary for the courts and applies only to "contested" actions.

While no amendment of this section has been proposed, we would call attention to two areas of concern. First, no standard is set as to when the award of attorney's fees is appropriate. Second, it is unclear whether frivolous challenges to awards are really a problem. Losing parties in arbitration are generally discouraged from fighting an award in court because of the limited standard of review that the courts use in determining whether to set aside or modify an award. The most significant effect of this provision may be to discourage valid challenges.

CURRENT NEW YORK LAW

New York law generally requires a party to pay its own attorney's fees.

RUAA

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

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

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

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

SECTION 26: JURISDICTION

Section 26 of the RUAA states that a court with jurisdiction over the parties may enforce an agreement to arbitrate. It also grants "exclusive" jurisdiction to enter judgment on an award to the courts of the state in which the arbitration is to be held. There is no provision of the CPLR that specifically addresses jurisdiction for judgments arising from arbitration.

Exclusive Jurisdiction and Proposed Amendment

For purposes of enforcing the judgment, a party may want to seek entry in other states where the party resides or has property. The ADR Committee agrees with the Joint Committee and recommends striking the work "exclusive."

CURRENT NEW YORK LAW

The CPLR does not specifically address jurisdiction for judgments on an award.

RUAA

SECTION 26. JURISDICTION.

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

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

SECTION 27: VENUE

Section 27 would make a slight change in New York law. Currently, New York law has a series of fallback provisions to determine where venue is proper. The first choice for venue is the county designated by the parties through their agreement. If none is designated, then venue is proper in the county where the parties reside and do business. If there is no such county, then venue is to be the county where the arbitration is to be held.

Section 27 likewise sets up a series of fallbacks. It looks first, however, to the location of the arbitration. It then sets as a fallback the location of the adverse party. If neither of those possibilities exists within the state, then venue is proper in any county in the state. Obviously, there would need to be a basis for jurisdiction before the venue provision became relevant.

CURRENT NEW YORK LAW

CPLR § 7502(a) provides that applications to a court concerning an arbitration agreement or arbitration shall be brought "in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business; or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held.

RUAA

SECTION 27. VENUE.

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

SECTION 28: APEALS
SECTION 29: UNIFORMITY OF APPLICATION AND CONSTRUCTION
SECTION 30: RELATIONSHIP TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE
SECTION 31: EFFECTIVE DATE
SECTION 32: REPEAL
SECTION 33: SAVINGS CLAUSE

Because these sections provided largely for technical matters arising from enactment of the RUAA, the Subcommittee has not addressed them substantively.

RUAA

SECTION 28. APPEALS.

(a) An appeal may be taken from:

(1) an order denying a [motion] to compel arbitration;

(2) an order granting a [motion] to stay arbitration;

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a final judgment entered pursuant to this [Act].

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

SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 30. RELATIONSHIP TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.

The provisions of this Act governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act.

SECTION 31. EFFECTIVE DATE.

This [Act] takes effect on [effective date].

SECTION 32. REPEAL.

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

SECTION 33. SAVINGS CLAUSE.

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

CONCLUSION

The foregoing is a comprehensive analysis of the RUAA. Where the ADR Committee has significant concerns, modifications have been proposed. In other areas, issues have been raised for legislators and others who might eventually be subject to the RUAA to consider. As noted at the beginning of the Report, the RUAA is not a perfect or a comprehensive statue. It is, however, a piece of legislation that, if enacted with the modifications set forth herein, would benefit New York by codifying New York law, providing greater certainty and advancing fairness and efficiency in the practice of arbitration.

Nevertheless, the RUAA is only a beginning. It does not provide all the answers and does not fill many of the gaps that exist in the field of arbitration in New York. Arbitrators remain unlicensed and many have no formal ethical standards to guide them. Arbitration provider organizations are generally unregulated and there exists a patchwork of rules related to court-annexed arbitrations. Adopted in a vacuum, the RUAA could harm New York by leaving the misimpression that New York has a comprehensive statutory scheme dealing with arbitration. Therefore, the ADR Committee recommends enacting the RUAA, but with a legislative or judicial commitment, through the establishment of a task force, to address these other issues that are so vital to ensuring the growth of arbitration in New York in a fair and reasonable manner.