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Model Family Law Arbitration Act

Approved by the American Academy of Matrimonial Lawyers
Board of Govenors March 12, 2005

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MODEL FAMILY LAW ARBITRATION ACT

2004 AMERICAN ACADEMY OF MATRIMONIAL

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EXECUTIVE SUMMARY

On March 12, 2005 the American Academy of Matrimonial Lawyers Board of Governors adopted a Model Family Law Arbitration Act based on the Revised Uniform Arbitration Act (RUAA), as recommended by its 2004 Arbitration Committee. The Committee had also examined the Proposed Model Marital Arbitration Act, the Uniform Arbitration Act (UAA) and legislation in jurisdictions that allow family law arbitration in making its recommendation.

The AAML, in adopting the Arbitration Committee report, also recommends model forms and rules, largely based on the American Arbitration Association (AAA) commercial arbitration rules, perhaps the most widely used arbitration rules in the United States. The AAA international commercial arbitration rules, the AAA Separation Agreement rules, the National Association of Securities Dealers rules, and the AAML Matrimonial Arbitration Rules also suggested ideas for rules.

The Model Act is not intended to amend substantive law. It offers an additional procedure for resolving family law issues besides, *e.g.*, litigation, settlement, mediation, collaborative procedures or other alternative dispute resolution (ADR) techniques. Once parties sign an agreement to arbitrate, they must carry out its terms in accordance with arbitration legislation and forms and rules they select. The Model Act and its rules also provide for other ADR methods if parties contract for them.

There may seem to be exceptions to the principle of nonmodification of substantive law. The Model Act recites "substantial change of circumstances," reflecting one State's standards for changing alimony, postseparation support, child support and child custody, in special provisions for modifying awards involving these factors. Depending on a jurisdiction's rules on punitive damages and attorney fees, the Model Act may vary from those rules. *Commentaries* on these provisions note these possibilities and offer options. There may be other variances in the Model Act and suggested forms and rules between their texts and a jurisdiction's law; drafters must be alert to this possibility. There is, however, no intent in the Model Act and its forms and rules to introduce substantive law changes. That is a job for the courts and the legislature of a particular jurisdiction.

As is the case with most uniform or model acts, all of the provisions of this Model Act will not be appropriate in every jurisdiction. A jurisdiction considering adoption of such an Act should critically examine each provision and determine whether that provision is appropriate for that jurisdiction. The same is true for the suggested forms and rules; some may not be appropriate for a particular jurisdiction. Other suggested forms or rules may be appropriate but must be modified to fit the law and practice needs of a particular jurisdiction.

Less than a dozen jurisdictions have legislation for family law arbitration, perhaps provisions added to their versions of the UAA. One of the more recent enactments is the North

Carolina Family Law Arbitration Act, comprehensive, UAA-based legislation in force since 1999. Special family law arbitration legislation is necessary because of the usual rule in federal and State statutes that arbitral awards are final and binding. The result in family law cases has been courts' refusal on public policy grounds to enforce awards involving, e.g., child or spousal support or child custody, issues always open for review and modification by the courts. The Model Act carries forward the approach of prior state legislation superseding these cases.

The Model Act adopts the North Carolina approach, a complete, separate statute published in that State's legislation that enacts standards for family law substance and procedure.

The RUAA-based Model Act incorporates corrective legislation included in the Revised Uniform Arbitration Act. There have been 14 problem areas with respect to arbitration under the old Uniform Act:

(1) who decides arbitrability of a dispute and by what criteria;
(2) whether a court or arbitrators may issue provisional remedies;
(3) how a party can initiate an arbitration proceeding;
(4) whether arbitration proceedings may be consolidated;
(5) whether arbitrators must disclose facts reasonably likely to affect their impartiality;
(6) to what extent arbitrators or arbitration organizations are immune from civil actions;
(7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding;
(8) whether arbitrators or representatives of arbitration organizations have discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process;
(9) when a court may enforce a preaward ruling by an arbitrator;
(10) what remedies an arbitrator may award, especially in regard to attorneys' fees, punitive damages or other exemplary relief;
(11) when a court can award attorneys' fees and costs to arbitrators and arbitration organizations;
(12) when a court can award attorneys' fees and costs to a prevailing party in court review of an arbitrator's award;
(13) which sections of the Revised Uniform Act would not be waivable, which is important to ensure that fundamental fairness to parties will be preserved, particularly where one party may have significantly less bargaining power than another; and
(14) use of electronic information (E-mail, etc.) and other modern technology in the arbitration process.

The Revised Uniform Arbitration Act addresses these issues. The Model Act includes a provision considered in early RUAA drafts but dropped in the final version, authority for parties to contract for court review of errors of law in arbitral awards.

The Model Act follows the RUAA, enacted in a small but increasing number of jurisdictions, by its original section numbers, and addresses the 14 issues perceived as defects in the UAA. There is a special provision dealing with court review of arbitral awards involving postseparation support, alimony, child support and child custody. The Model Act also publishes provisions to allow parties to contract for court review of errors of law in arbitral awards. At least 8 states now have the Revised Uniform Act; 15 more have had it before their legislatures. If history is a guide, it is likely that jurisdictions will replace the UAA with the RUAA in the future.

Some jurisdictions may choose to engraft special provisions in their version of the UAA or the RUAA as some have done in the past. The Model Act can be used as a checklist of ideas for those jurisdictions, although the Committee recommended, and the Board of Governors approved, a separate, stand-alone statute, preferably in a jurisdiction's family law legislation for convenience of parties and counsel.

Like any other kind of dispute resolution, family law arbitration has advantages and disadvantages.

One major advantage is privacy; the Model Act and its rules provide explicitly for this, not only in the process but also if an award must be confirmed by a court for enforcement proceedings, if the parties agree to this. For the minority of states allowing jury trial in family law cases, trial by jury is gone with arbitration; hearings are private. If parties arbitrate and fulfil an award's requirements, there is no court record at all, except the record of the divorce.

Some say arbitration is more expensive than litigation, citing "runaway" arbitrator fees. However, parties can negotiate with an arbitrator over the fee and may negotiate other costs, except those the law mandates. Others say arbitration is less expensive, particularly if transactional costs (*e.g.*, appearances in court that must be continued because of a court's being required to take up other matters, *e.g.*, new criminal cases requiring priority attention because of speedy trial requirements; time during the work week (and perhaps baby sitter expenses) taken to appear in court; and the like) are considered. If the arbitrator and the parties agree, time limits can be set for arbitration, thereby reducing fees, and hearings and other proceedings can be held at mutual convenience, perhaps on weekends or in the evening, so that job times are not lost.

Although there are many family court judges, or generalist judges with considerable family law experience, there is a risk of a complex case's being given to a newcomer to the bench with a risk of a less than fair result for all. Parties may choose their arbitrator, perhaps a retired family court judge, an experienced family law specialist or a well-respected member of the bar.

The Model Act does not require arbitration, unlike court-annexed arbitration or mediation, where parties must arbitrate or mediate, subject to a court's exempting a case. There is no "re-trial" if a party is dissatisfied with the result in court-annexed arbitration; awards are final, subject to correction, modification or vacatur under the Act. If a jurisdiction elects

statutory authority for parties to seek review and appeal of errors of law by arbitrators, those issues, along with traditional reasons for appeal from judgments on arbitral awards, can be reviewed and appealed.

The Model Act offers a complete ADR option. Parties can choose to use the Model Act, supplemented by forms and rules, instead of negotiated settlement, mediation, the collaborative law process, court-annexed ADR, or litigation.

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I. INTRODUCTION: REASONS FOR THE LEGISLATION

On March 12, 2005 the American Academy of Matrimonial Lawyers (AAML) Board of Governors, acting on a report of its 2004 Arbitration Committee (the Committee) approved a Model Family Law Arbitration Act (Model Act) based on the Revised Uniform Arbitration Act.[1] The National Conference of Commissioners on Uniform State Laws (NCCUSL)[2] had developed the RUAA. The Committee had also examined the 1997 Proposed Model Marital Arbitration Act.[3]

The Committee also recommended, and the AAML endorses, model forms and rules, based largely on the American Arbitration Association (AAA) commercial arbitration rules, perhaps the most widely used arbitration rules in the United States. The AAA international commercial arbitration rules, the AAA Separation Agreement rules, the AAML Matrimonial Arbitration Rules and the National Association of Securities Dealers rules also suggested ideas for rules.[4]

The Model Act is not intended to amend substantive law. It offers an additional

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[1] Unif. Arbitration Act (2000), 7(1) U.L.A. 1 (2003 Cum. Ann. Pocket Pt.) (hereinafter Revised Uniform Arbitration Act, Revised Uniform Act, RUAA, or the Act). In 2004 the Committee proposed two Model Act versions, one based on the RUAA and another on Unif. Arbitration Act, 7(1) U.L.A. 1 (1997) (hereinafter Uniform Act, the Act, or UAA). *See generally* 1 & 2 American Academy of Matrimonial Lawyers Arbitration Committee, Model Family Law Arbitration Act (Sept. 10, 2004) (hereinafter 2004 AAML Arbitration Comm. Rep.), on file with the AAML. In late 2004 the AAML Executive Committee decided to proceed with a RUAA-based version with suggested forms and rules. A 2005 Revision, also on file with the AAML, resulted. This revision has been amended to reflect AAML Board of Governors approval of the Model Act and associated forms and rules on March 12, 2005. For the Model Act text, *see* Part II.A; for text and analysis, *see* Part III.A.

[2] The NCCUSL is a nonprofit organization of judges, lawyers and academics nominated from all U.S. jurisdictions that has close liaison with the American Bar Association. *See generally* Uniform Arbitration Act (2000), 7(1) U.L.A. at 1 (2003 Cum. Ann. Pocket Pt.); James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 Ohio St. J. Disp. Res. 795, 796-99 (1998); Brudney, *The Uniform State Law Process: Will the UMA and RUAA Be Adopted by the States?*, 8 Disp. Res. Mag. 3 (No. 4, 2002).

[3] (Proposed) Model Marital Arbitration Act, 14 J. Am. Acad. Matrimonial Law. 403 (1997) (hereinafter Proposed Act), appended to Frank L. McGuane, Jr., *Model Marital Arbitration Act: A Proposal*, 14 *id.* 393, 400-01 (1997), who encourages a separate family law act rather than appending family law provisions to general arbitration legislation like the UAA.

[4] *See* Parts II.B, II.C, III.B and III.C.

procedure for resolving family law issues besides, *e.g.*, litigation, settlement, mediation, collaborative procedures or other alternative dispute resolution (ADR) techniques. Although once parties sign an agreement to arbitrate, they are bound to carry out its terms in accordance with arbitration legislation and forms and rules they select, the Model Act and its rules also provide for other ADR methods if the parties contract for them.

There are three possible exceptions to the principle of nonmodification of substantive law. The Model Act recites "substantial change of circumstances," reflecting one State's principles for changing alimony, postseparation support, child support and child custody, in the special provisions for modifying awards involving these factors.[5] Depending on a jurisdiction's[6] rules on punitive damages and attorney fees, the Model Act may vary from those rules.[7] *Commentaries* on these provisions note these possibilities and offer options. There may be other variances in the Act and the forms and rules between their texts and a jurisdiction's law; drafters should be alert to this possibility. There is no intent in the Model Act and its forms and rules to introduce substantive law changes. That is a job for the courts and the legislature of a particular jurisdiction.

Less than a dozen jurisdictions have legislation for family law arbitration, perhaps provisions added to their versions of the UAA.[8] One of the more recent enactments is the North

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[5] Model Act § 124A, following N.C. Gen. Stat. § 50-56 (2003); *see also* Part III.A.24A; 2004 AAML Arbitration Comm. Rep., note 1, Part III.A.16.

[6] "Jurisdiction" is used throughout the analysis, rather than "State," which appears in Model Act texts taken from the RUAA; there are U.S. territories that are not states which may choose to adopt the Model Act, *e.g.*, the District of Columbia.

[7] Model Act §§ 121(a), 121(b); *see also* Part III.A.21.

[8] Colo. Rev. Stat. § 14-10-128.5 (Lexis/Nexis 2003) (incorporates by reference UAA, note 1; court retains ultimate control of custody, support issues, In re Marriage of Popack, 998 P.2d 464, 467-69 [Colo. App. 2000]); Mo. Ann. Stat. § 435.405.5 (West 2004 Cum. Ann. Pocket Pt.) (UAA amendment); Domestic Relations Arbitration Act, Mich. Comp. Laws Serv. §§ 600.5070-600.5082 (LexisNexis 2004 Supp.), construed in Harvey v. Harvey, 680 N.W.2d 835, 838-39 (Mich. 2004) (per curiam) (although Domestic Relations Arbitration Act allows arbitrating child custody, child support or parenting issues, circuit court retains authority to modify award to insure best interests of child; property settlement not before court); N.H. Rev. Stat. Ann. § 542:11 (1997); Okla. Stat. Ann. tit. 43, § 109H (West 2001); S.D. Codified Laws § 21-25B-2 (Lexis/Nexis 2003 Pocket Supp.); Tenn. Code Ann. §§ 36-6-402(1), 36-6-409 (LexisNexis 2001 Repl., 2003 Supp.); Tex. Fam. Code §§ 6.601, 153.0071 (Vernon 1998, 2002); Wash. Rev. Code §§ 7.06.020(2), 26.09.175 (West 1992, 2004 Cum. Ann. Pocket Pt.) (court-annexed arbitration); Wis. Stat. Ann. §§ 766.58(10), 802.12 (West 2001, 2003 Cum. Ann. Pocket Pt.) (arbitration under UAA). A New York bill would require mediation or arbitration in child

Carolina Family Law Arbitration Act, comprehensive, UAA-based legislation in force as amended since 1999.[9] Special family law arbitration legislation is necessary because of the usual rule in federal and state statutes that arbitral awards are final and binding.[10] The result in family law cases has been courts' refusal on public policy grounds to enforce awards involving, e.g., child or spouse support or child custody, issues always open for review and modification by the courts.[11] The Model Act carries forward the approach of prior state legislation superseding these

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custody disputes. Mark Boyko, *State Legislatures See Flood of ADR Bills in First Quarter of 2003*, 9 Disp. Res. Mag. 29 (No. 3, 2003). Fla. Stat. Ann. § 44.104(1-14) (West 2003) forbids voluntary binding arbitration of child custody, visitation or child support disputes.

[9] N.C. Gen. Stat. §§ 50-41 - 50-62 (2003) (hereinafter Family Law Act, FLAA or the Act). The Reporter for this AAML project published *Arbitrating Family Law Cases by Agreement*, 18 J. Am. Acad. Matrimonial Law. 429 (2003) (hereinafter Walker, *Arbitrating*), discussing family law arbitration by agreement of the parties, primarily in the context of the FLAA. The NCBA Family Law Section published George K. Walker, Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act (1999), *available at* www.ncbar.org/legal_prof/sections/fl/indoc.asp (hereinafter Handbook), which publishes and comments on the Act and suggested forms and rules for FLAA arbitrations. There are two misprints in the website version. N.C. Gen. Stat. § 50-53 (2003) now reads in part (new material *italicized*): "*Unless the parties agree otherwise, u*pon a party's application, the court shall confirm . . . " *Id.* § 50-60(c) (2003) was omitted: "(c) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." A Handbook supplement will incorporate these corrections and forms and rules amendments. The NCBA Section contemplates publishing a revised Handbook, if the General Assembly enacts the proposed statutory amendments, to incorporate revised forms and rules. Domestic Relations Arbitration Act, Mich. Comp. Laws Serv. §§ 600.5070-600.5082 (LexisNexis 2004 Supp.), is another comprehensive statute that generally follows the UAA format.

[10] *See generally* 9 U.S.C. §§ 2, 208, 307 (2000); RUAA §§ 11(a), 22, 25(a); UAA §§ 1, 11, 14.

[11] *Compare, e.g., Harvey*, 680 N.W.2d at 838-39 (Mich. 2004) (per curiam) (although Michigan Domestic Relations Arbitration Act, Mich. Comp. Laws Serv. §§ 600.5070-600.5082 [LexisNexis 2004 Supp.], allows arbitrating child custody, child support or parenting issues, circuit court retains authority to modify award to insure best interests of child; property settlement not before court); Kelm v. Kelm, 749 N.E.2d 299, 302-04 (Ohio 2001) (parties cannot agree to contractually waive, by agreeing to arbitrate, court's parens patriae right to protect child's best interest in custody, visitation decisions); Masters v. Masters, 513 A.2d 104, 110-14 (Ct. 1986) (custody, support arbitrable, but court has final responsibility for child's best interests); Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982) (disapproving child custody, support arbitration on public policy grounds); Schneider v. Schneider, 216 N.E.2d 318, 319-20 (N.Y. 1966) (support arbitrable, custody nonarbitrable); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d

cases.[12] Unlike other states, however, the North Carolina legislature did so in a comprehensive, separate statute, the FLAA.[13]

The Model Act adopts the North Carolina approach, a complete, separate statute, but following the format of national uniform legislation, *i.e.*, the RUAA's statutory sequence.

The Model Act incorporates nearly all of the corrective legislation the NCCUSL included in the RUAA. NCCUSL found 14 problem areas in the UAA:

(1) who decides arbitrability of a dispute and by what criteria;
(2) whether a court or arbitrators may issue provisional remedies;
(3) how a party can initiate an arbitration proceeding;

957, 959-61 (App. Div. 1997) (same); Spencer v. Spencer, 494 A.2d 1279, 1285 (D.C. 1985) (child custody, support remain within court's jurisdiction despite agreement to arbitrate); Cohoon v. Cohoon, 770 N.E.2d 885, 890-95 (Ind. App. 2002) (child custody, support, visitation not subject to binding arbitral award); Ex parte Messer, 509 S.E.2d 486, 487-88 (S.C. App. 1998) (parties may agree to arbitrate all issues except those relating to children); Reynolds v. Whitman, 663 N.E.2d 867, 868-69 (Mass. App. 1996) (award subject to judicial review); Miller v. Miller, 620 A.2d 1161, 1163-64 (Pa. Super. 1993) (although agreement not void on public policy grounds, court can review award to determine if custody award in child's best interests) *with* Masterson v. Masterson, 60 S.W. 301, 302-03 (Ky. 1901) (support, custody arbitrable; trial court still had custody issue before it); Bloch v. Bloch, 693 A.2d 364, 367-70 (Md. App. 1997) (alimony arbitrable); Bandas v. Bandas, 430 S.E.2d 706, 707-08 (Va. App. 1993) (approving arbitration for spouse support), *but see* Patin v. Patin, 45 Va. Cir. 519, 1993 WL 972221 (Va. Cir. 1998) (*Bandas* distinguished; cannot contract away best interests of child); Faherty v. Faherty, 477 A.2d 1257, 1259-65 (N.J. 1984) (approving arbitration); *see also* Cyclone Roofing Co. v. David M. LaFave Co., 321 S.E.2d 872, 877-78 (N.C. 1984) (dictum) (explaining, approving *Crutchley*); RUAA, note 2, § 23, *Comment* to § 23, ¶ C.4, 7(1) U.L.A. 43. 48 (2003 Cum. Ann. Pocket Pt.); 2 Thomas H. Oehmke, Commercial Arbitration § 49:04 (rev. ed. 2002); 1 Gabriel M. Wilner, Domke on Commercial Arbitration § 13:09 (rev. ed. 2002); Alfred R. Belinkie, *Matrimonial Arbitration*, 65 Ct. B.J. 309 (1991); Elizabeth A. Jenkins, Annot., *Validity and Construction of Provisions for Arbitration of Disputes As To Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5th 69 (1996) (collecting cases, statutes); Melissa Douthart Philbrick, Note, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 Colum. J.L. & Soc. Probs. 419 (1985); Symposium, *Arbitration and the Protection of the Child*, 21 Arb. J. 215 (1966). Courts' differing policies in family law cases are also illustrated by cases holding offer of judgment practice rules, *e.g.*, modeled on Fed. R. Civ. Proc. 68, not applicable in family law cases. *See, e.g.*, Mohr v. Mohr, 573 S.E.2d 729, 731-32 (N.C. App. 2002).

[12] Model Act § 124A; *see also* Part III.A.24A; notes 8-9, 11.

[13] *See* notes 9-10 and accompanying text.

(4) whether arbitration proceedings may be consolidated;

(5) whether arbitrators must disclose facts reasonably likely to affect their impartiality;

(6) to what extent arbitrators or arbitration organizations are immune from civil actions;

(7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding;

(8) whether arbitrators or representatives of arbitration organizations have discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process;

(9) when a court may enforce a preaward ruling by an arbitrator;

(10) what remedies an arbitrator may award, especially in regard to attorneys' fees, punitive damages or other exemplary relief;

(11) when a court can award attorneys' fees and costs to arbitrators and arbitration organizations;

(12) when a court can award attorneys' fees and costs to a prevailing party in court review of an arbitrator's award;

(13) which sections of the RUAA would not be waivable, which is important to ensure that fundamental fairness to parties will be preserved, particularly where one party may have significantly less bargaining power than another; and

(14) use of electronic information (E-mail, etc.) and other modern technology in the arbitration process.

RUAA §§ 6, 8, 9, 10, 12, 14(c), 14(a)-14(b), 14(d), 17, 18, 21, 14(e), 25(c), 4 and 29 respectively, address these issues.[14]

The RUAA-based Model Act follows the RUAA, enacted in a small but increasing number of jurisdictions, by its original section numbers, and addresses the 14 issues perceived as

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[14] *See also* Parts III.A.4, III.A.5, III.A.8, III.A.9, III.A.10, III.A.12, III.A.14, III.A.17, III.A.18, III.A.21, III.A.24, III.A.25, III.A.29. The FLAA-based Model Act would have accomplished the same result by melding these provisions into Model Act sections covering the same or similar matters. The North Carolina Bar Association (NCBA) Family Law Section Drafting Committee has recommended similar amendments for enactment by that State's legislature. North Carolina Bar Association Family Law Section Drafting Committee [NCBA Committee], Amendments for the Family Law Arbitration Act and Associated Forms and Rules (2004) (hereinafter 2004 FLAA Amendments), available through the NCBA Committee Chair, Lynn P. Burleson. The Model Act Reporter also serves as Reporter for the NCBA project. The NCBA Committee presented its proposals to the Association Board of Governors in the fall of 2004 with a view to seeking enactment in the 2005 General Assembly. The proposed forms and rules amendments will not need legislative action.

defects in the UAA.[15] There is a special provision dealing with court review of arbitral awards involving postseparation support, alimony, child support and child custody, or their equivalents under the law of other jurisdictions.[16] The Model Act also publishes provisions allowing parties to contract for court review of errors of law in arbitral awards.[17] The NCCUSL considered such an option in early drafts but dropped it in the final RUAA version.

At least 8 states now have the Revised Uniform Act; 15 more have had the RUAA before their legislatures.[18] If history is a guide, it is likely that jurisdictions will replace the UAA with

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[15] *See* Parts III.A.4, III.A.5, III.A.8, III.A.9, III.A.10, III.A.12, III.A.14, III.A.17, III.A.18, III.A.21, III.A.24, III.A.25 and III.A.29. Because 2004 AAML Arbitration Comm. Rep., note 1, published a UAA-based Model Act and assigned section numbers from 1 to 22 for that version, the RUAA-based Model Act was given section numbers from 101 to 134 to promote clarity. This March 12, 2005 revision retains this format.

[16] Model Act § 124A; *see also* Part III.A.24A.

[17] Model Act §§ 124(a)(7), 128(b); *see also* Parts III.A.24, III.A.28.

[18] Haw. Rev. Stat. Ann. §§ 658A-1 - 658A-29 (2003 Cum. Supp.); Nev. Rev. Stat. Ann. §§ 38.206-38.248 (2002 repl. vol.); N.J. Stat. Ann. §§ 2A:23B-1 - 2A:23B-32 (West 2004 cum. Ann. Pocket Pt.); New Mex. Stat. Ann. §§ 44-7A-1 - 44.7A-32 (2003 Cum. Supp.); N.C. Gen. Stat. § 1-569.1 - 1-569.31 (2003); N.D. Cent. Code §§ 32-29.3.01 - 32-29.3.29 (2003 Pocket Supp.); Or. Rev. Stat. §§ 36.600 - 36.740 (2003); Utah Code Ann. §§ 78-31a-101 - 78-31a-131 (2002 repl. vol.). North Carolina's RUAA was effective January 1, 2004 and applies to agreements to arbitrate made on or after then. The North Carolina UAA, N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001), governs agreements made before January 1, 2004, subject to N.C. Gen. Stat. § 1-569.3(b) (2003), 2003 N.C. Sess. Laws ch. 2003-345, § 4. Section 1-569.3(b) allows parties to agreements made before January 1, 2004 to agree in a record that the RUAA applies. For definition of "record," *see id.* § 1-569.1(6) (2003); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 J. Dispute Res. 28, 29-30, 36 (2001). These jurisdictions have had RUAA bills pending: Alabama, Alaska, Arizona, Connecticut, District of Columbia, Idaho, Illinois, Indiana, Minnesota, Missouri, Ohio, Oklahoma, Vermont, Virginia and West Virginia. Boyko, note 8, at 29; Sarah Rudolph Cole, *The Revised Uniform Arbitration Act: Is It the Wrong Cure?*, 8 Disp. Res. Mag. 10 (No. 4, 2002); National Conference of Commissioners on Uniform State Laws, *Arbitration Act: Legislative Activity by Act (2002-2003)* in NCCUSL Publications and Drafts (June 18, 2002), *available at* www.nccusl.org/nccusl/LegByAct.pdf (visited Aug. 5, 2003). For general RUAA analysis, *see* Cole, at 10; Carl H. Johnson & Pete D.A. Petersen, *Is the Revised Uniform Arbitration Act a Good Fit for Alaska?*, 19 Alaska L. Rev. 339 (2002) (advocating adoption); Stephen J. Hayford & Carroll E. Neesemann, *A Response to RUAA Critics: Codifying Modern Arbitration Law, Without Preemption*, 8 Disp. Res. Mag. 15 (No. 4, 2002); Steven L. Hayford & Alan D. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175 (2002); Heinsz, at 10. Professor Heinsz was

the RUAA in the future. Some jurisdictions may choose not to enact the RUAA, however, or may not elect to do so for many years. This is why the Committee originally proposed two Model Act versions.[19]

Some jurisdictions may choose to engraft special provisions in their version of the RUAA as some states have done in the past.[20] The Model Act can be used as a checklist of ideas for those jurisdictions, although the Committee recommends a separate, stand-alone statute, preferably in a jurisdiction's family law legislation for convenience of parties and counsel.

As is the case with most uniform or model acts, all of the provisions of this Model Act will not be appropriate in every jurisdiction. A jurisdiction considering adoption of such an Act should critically examine each provision and determine whether that provision is appropriate for that jurisdiction. The same is true for the suggested forms and rules; some may not be appropriate for a particular jurisdiction. Other suggested forms or rules may be appropriate but must be modified to fit the law and practice needs of a particular jurisdiction.

Part II.A publishes a "clean draft" version of the RUAA-based Model Act; Part III.A supplies analysis for each section. Jurisdictions that already have family law arbitration statutes[21] might examine the Model Act for replacing their statutes with comprehensive legislation or might use Part II.A for amending their legislation.

The Committee also recommended, and the AAML Board of Governors approved, model forms and rules, published in "clean draft" form in Parts II.B and II.C and analyzed in Parts III.B and III.C, for examination and possible adoption in those jurisdictions that enact family law arbitration legislation.

Part IV offers general conclusions and recommendations.

NCCUSL's reporter for the RUAA project. Heinsz, at 28. For general analysis in the context of the NCBA proposal for enactment in North Carolina, *see* George K. Walker, Rptr., 1 & 2 North Carolina Bar Association International Law & Practice Section Revised Uniform Arbitration Act Practice Group, Proposal for Enacting the Uniform Arbitration Act 2000 (Revised Uniform Arbitration Act or RUAA) to Replace North Carolina's Uniform Arbitration Act; Recommended Conforming Amendment for the North Carolina International Commercial Arbitration and Conciliation Act (Sept. 10, 2002) (hereinafter Group Proposals).

[19] For analysis of both, *see* 1 & 2 2004 AAML Arbitration Comm. Rep., note 1.

[20] *See* note 8.

[21] *See* notes 8-9 and accompanying text.

II. THE MODEL FAMILY LAW ARBITRATION ACT; RECOMMENDED FORMS AND RULES

Part II publishes a "clean text" of sections of the AAML Model Family Law Arbitration Act and recommended arbitration forms and rules associated with practice under the Act with amendments and deletions inserted. For detailed analysis, see Part III. The Model Act and suggested forms and suggested rules are not designed to alter the substantive law of family law practice but to offer an additional ADR method of resolving family law disputes.

A. AAML Model Family Law Arbitration Act

Part II.A publishes a "clean text" of an AAML Model Family Law Arbitration Act, following the RUAA as recommended by the NCCUSL and enacted in a small but growing number of jurisdictions. For detailed analysis, including *italicized* amendments recommended for a national Model Act and underlined amendments to the RUAA as enacted in North Carolina or *italicized* deletions recommended for a national Model Act indicated by *italicized* brackets (*[ ]*) and deletions from the North Carolina version of the RUAA indicated by brackets ([ ]), and commentary, see Part III.A. All of these signals have been removed, except where brackets in the RUAA as recommended by the NCCUSL remain, or where jurisdictions adopting this Model Act must insert citations to State statutes.

Jurisdictions considering this version of the Model Act might examine variants on the RUAA enacted in other jurisdictions.

1. § 101. Purpose; definitions

(a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support. Pursuant to this policy, the purpose of this Act is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with family law legislation of this State and similar legislation, to provide default rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.

(b) 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.

2. § 102. 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 the 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 be the person as a place of delivery of such communications.

3. § 103. 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 [delayed date], this [Act] governs an agreement to arbitrate whenever made.

4. § 104. 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 provided 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 Sections 105(a), 106(a), 108(a), 108(b), 117(a), 117(b) or 126;

(2) agree to unreasonably restrict the right under Section 109 to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 112 to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 116 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 shall not vary the effect of, the requirements of this section or Sections 103(a) or 103(c), 107, 108(c), 108(d), 108(e), 114, 118, 120(d), 120(e), 122, 123, 124, 124A, 125(a), 125(b), 128, 129, 130, 131, or 132.

5. § 105. [Application] for judicial relief

(a) Except as otherwise provided in Section 128, 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[22] must be given in the manner prescribed by law or rule of court for serving [motions] in pending cases.

6. § 106. Validity of agreement to arbitrate

(a) During or after marriage, parties may agree in a record to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in a record to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. Such 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 revocation of a contract.

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

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

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue

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[22] Not bracketed in the RUAA § 5 version.

pending final resolution of the issue by the court, unless the court otherwise orders.

7. § 107. [Motion] to compel or stay arbitration

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

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

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

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

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

(d) The court shall 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 a 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 127.

(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.

8. § 108. Provisional remedies

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

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

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

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

(c) Availability of provisional remedies under this section may be limited by the parties' prior written agreement as provided in Section 104, except for relief pursuant to [insert jurisdiction's statutes and law granting immediate, emergency relief or protection for spouses or children]; federal law; or treaties to which the United States is a party, whose purpose is to provide immediate, emergency relief or protection.

(d) Arbitrators who have cause to suspect that any child is abused or neglected shall report the case of that child to the [director of the department of social services] of the [county] where the child resides or, if the child resides out of state, of the [county] where the arbitration is conducted.

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

9. § 109. 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) no later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack or insufficiency of notice.

10. § 110. 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 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.

11. § 111. 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.

12. § 112. 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 other 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 123(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 123(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 123(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 123(a)(2).

13. § 113. 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 115(c).

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

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

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

(c) The failure of an arbitrator to make a disclosure required by Section 112 does not cause any loss of immunity under this section.

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

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

(2) to a hearing on a [motion] to vacate an award under Sections 123(a)(1) or 123(a) (2) if the [movant] establishes prima facie that a ground for vacating the award

exists.

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

15. § 115. Arbitration process

(a) An arbitrator my conduct an arbitration in such a 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 did not appear. The court, upon 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 111 to continue the proceeding and to resolve the controversy.

16. § 116. Representation by lawyer

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

17. § 117. 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 protection 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.

18. § 118. 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 119. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 122, 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 123, 124 and 124A.

19. § 119. Award

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated as authorized by federal or State law 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 expand 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 that party gives notice of the objection to the arbitrator before receiving notice of the award.

(c) Unless the parties agree otherwise in a record, the arbitrator shall render a reasoned award.

20. § 120. 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 Sections 124(a)(1) or 124(a)(3);

(2) because the arbitrator had 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 Sections 122, 123, 124 or 124A, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Sections 124(a)(1) or 124(a)(3);

(2) because the arbitrator had 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 119(a), 122, 123, 124 and 124A.

21. § 121. 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 122 or for vacating an award under Section 123.

(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.

22. § 122. Confirmation of award

After a party to an arbitration 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 parties agree otherwise in a record that part or all of an award shall not be confirmed by the court, the award is modified or corrected pursuant to Sections 120, 124 and 124A, or the award is vacated pursuant to Section 123.

23. § 123. 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 115, 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 115(c) not later than the beginning of the arbitration hearing;

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 109 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(7) the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to vacate the arbitrator's award;

(8) the award included punitive damages, and the court determines that the award for punitive damages is clearly erroneous; or

(9) if the parties contract in an agreement to arbitrate for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

(b) A [motion] under this section must be filed within 90 days after the [movant] receives notice of the award pursuant to Section 119 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 120, 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 subsections (a)(1) or (2),

the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsections (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 119(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 pursuant to Sections 124 or 124A is pending.

24. § 124. Modification or correction of award

(a) Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 119 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 120, 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 on 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 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.

24A. § 124A. Modification of award for alimony, postseparation support, child support, or child custody based on substantial change of circumstances

(a) A court or arbitrators may modify an award for postseparation support, alimony, child support or child custody under conditions stated in [here insert a jurisdiction's provisions for postseparation support, alimony, child support and child custody] in accordance with procedures stated in subsections 124A(b) through 124A(f).

(b) Unless the parties have agreed in a record that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony pursuant to [here insert a jurisdiction's provisions for postseparation support and alimony] may be modified if a court order for alimony or postseparation support could be modified pursuant to [here insert a jurisdiction's provisions for court modification of postseparation support or alimony].

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified pursuant to [here insert a jurisdiction's provisions for child support or child custody].

(d) If an award for modifiable postseparation support or alimony, or an award for child support or custody has not been confirmed pursuant to Section 122, upon the parties' agreement in a record these matters may be submitted to arbitrators chosen by the parties as provided in Section 111, in which case Sections 120 and 122 through 124A apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child support or custody has been confirmed pursuant to Section 122, upon the parties' agreement in a record and joint motion the court may remit these matters to arbitrators chosen by the parties as provided in Section 111, in which case Sections 120 and 122 through 124A shall apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of Section 124 apply to modifications or corrections of awards for postseparation support, alimony, child support or child custody.

25. § 125. Judgment on award; attorneys' fees and litigation expense

(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 Sections 122, 123, 124 or 124A, 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.

(d) Notwithstanding [jurisdiction's statutes governing sealing court papers], the court in its discretion may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this [Act], or any part of such arbitration award or judgment or court order, to be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of such opened arbitration awards or orders or judgments or court orders. The court in its discretion may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this [Act], or any part of such arbitration award or order or judgment or court order, to be redacted, such redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of such previously redacted

arbitration awards or orders or judgments or court orders opened pursuant to the court's order.

26. § 126. Jurisdiction

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the 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].

27. § 127. Venue

A [motion] pursuant to Section 105 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.

28. § 128. 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) Unless the parties contract in an agreement to arbitrate for judicial review of errors of law as provided in Section 123(a)(9), a party may not appeal on the basis that the arbitrator failed to apply correctly the law under [statutory citation to family law of enacting jurisdiction].

(c) An appeal under this Section shall be taken as from an order or a judgment in a civil action.

29. § 129. Uniformity of application and construction

Certain provisions of this [Act] have been adapted from the [Uniform Arbitration Act or Revised Uniform Arbitration Act, whichever is in force in a jurisdiction] and [citation to appropriate parts of a jurisdiction's family law legislation]. This [Act] shall be construed to effect its general purpose, to make uniform provisions of these [Acts] and [citation to appropriate

parts of a jurisdiction's family law legislation].

30. § 130. 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, or as otherwise authorized by federal or State law governing these electronic records or electronic signatures.

31. § 131. Effective date

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

32. § 132. Repeal

Effective on [delayed date should be the same as that in Section 103(c)], the [applicable legislation in a jurisdiction] is repealed.

33. § 133. 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 [applicable legislation in a jurisdiction].

34. § 134. Short title

This [Act] may be cited as the [name of jurisdiction] Family Law Arbitration Act.

B. Suggestions for Forms Associated with Family Law Arbitration Act Practice

The suggested forms reprinted here follow those before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the North Carolina Family Law Arbitration Act. The forms follow those commonly employed in arbitration, *e.g.*, forms prepared by the AAA. It is not necessary to enact these forms as legislation. The promoters of the FLAA submitted them to the NCBA and the General Assembly in the interest of transparency, to acquaint those less familiar with arbitration with what forms for FLAA arbitrations would look like and to explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the forms were incorporated in a Handbook[23] that included the FLAA as enacted, and rules for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations analogous to the NCBA might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage.

The suggested forms should work in jurisdictions choosing the RUAA-based Model Act (Parts II.A, III.A). For analysis of suggested forms, *see* Part III.B. Forms drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of forms; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested forms were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere.

1. Basic Forms

a. Form A. Matters To Be Arbitrated; Number of Arbitrators (Two Options):

A. Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach of this contract, shall be settled by arbitration, and judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction, unless parties to the arbitration agree in writing pursuant to [Model Act § § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

A. Arbitration. We, the undersigned parties, hereby agree to submit to arbitration the following controversy: [here describe briefly the controversy]. We agree that the controversy

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[23] Handbook, note 9.

shall be submitted to one arbitrator. We agree that we will faithfully observe this Arbitration Agreement and the rules incorporated by reference or stated in this Arbitration Agreement, that we will abide by and perform any award the arbitrator renders, and that a judgment of a court having jurisdiction may be entered on the award, unless parties to the arbitration agree in writing pursuant to [Model Act § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

b. Form B. Rules for Arbitration (Six Options):

B.1. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.2. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement, except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply]. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.3. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.4. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that the parties agree shall not apply], shall apply to this Arbitration Agreement.

B.5. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.6. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that parties agree shall not apply].

c. Form C. Ethical Standards for Arbitrators:

C. Arbitrator Ethics. The [title of ethics code] shall apply to this Arbitration Agreement.

d. Form D. Site of Arbitration:

D. Place of the Arbitration. The arbitration shall be held at [here designate place of

arbitration, city, state, country if not within the United States].

e. Form E. Additional Provisions or Terms (Two Options):

E.1. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement, any provision in the Basic Rules or Optional Rules to the contrary notwithstanding: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a separate paragraph.]

E.2. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a separate paragraph.]

2. Optional Forms

a. Rules for the Arbitration:

AA. Rules in Force for Arbitration. Notwithstanding Rule 1, the rules in force for the arbitration shall be the [complete title of] Rules for Arbitrating Family Law Disputes in force as of [the date of this agreement] [or a specific date selected by the parties], except as modified by ¶ [B. ---].

b. Number of Arbitrators:

BB. Number of Arbitrators. This controversy shall be submitted to [here insert odd number, *e.g.*, three (3)] arbitrators. Each party shall choose one arbitrator, and the third arbitrator shall be chosen by the arbitrators chosen by the parties.

c. Consolidation:

CC. Consolidation of Arbitrations. This arbitration shall not be consolidated with other arbitrations.

C. Suggestions for Rules Associated with Family Law Arbitration Act Practice

The suggested rules reprinted here follow those that were before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the FLAA. The rules follow those commonly employed in arbitration, *e.g.*, rules prepared by the AAA. It is not necessary to enact these rules as legislation. The promoters of the FLAA submitted them to the NCBA and the General Assembly in the interest of transparency, to acquaint those less familiar with arbitration with what rules for FLAA

arbitrations would look like, and to explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the rules were incorporated in a Handbook[24] that included the FLAA as enacted, forms for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations analogous to the NCBA might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage.

The suggested rules should work in jurisdictions choosing the RUAA-based Model Act (Parts II.A, III.A). For analysis of suggested rules, *see* Part III.C. Rules drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of rules; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested rules were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere.

1. Basic Rules for Arbitration of Family Law Disputes

1. Agreement of Parties; Primacy of Rules. These [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules, or Rules) shall be a part of any arbitration agreement that states that these Rules shall apply to transactions covered by that agreement. If the parties execute two or more agreements to arbitrate, and other agreements to arbitrate declare that they are governed by other rules, these Rules shall govern if there is a conflict between the other agreements to arbitrate and other rules incorporated by reference in them. These Rules and any amendment of them shall apply in the form when a demand for arbitration or submission agreement is received by an opposing party. The parties may vary procedures set forth in these Rules by written agreement.

2. Number of Arbitrators. Unless the parties agree otherwise in writing, a single arbitrator shall be chosen by the parties to arbitrate matters in dispute.

3. Initiation Under Arbitration Provision in a Contract.

(a) Arbitration under an arbitration provision in a contract, *e.g.,* a premarital agreement, shall be initiated by the initiating party (the claimant), within the time specified in the contract(s), give written notice to the other party (the respondent) of claimant's intention to arbitrate (demand), which notice shall contain a statement setting forth the contract containing the agreement to arbitrate, the nature of the dispute, the amount involved, if any, the remedy or remedies sought, and the place of hearing designated in the contract. A respondent shall file with the claimant an answering statement, including any counterclaim, 30 days after receiving notice

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[24] *See* note 9 and accompanying text.

from claimant.

(b) If respondent asserts a counterclaim, the counterclaim shall set forth the nature of the counterclaim, the amount involved, if any, and the remedy or remedies sought. Claimant may make an answering statement to a counterclaim.

(c) Failure to make an answering statement within 30 days after receiving notice from claimant shall be treated as a denial of the claim. Failure to make an answering statement within 30 days after receiving a counterclaim shall be treated as denial of the counterclaim.

(d) If an arbitrator has been appointed, the parties shall file copies of the demand and answering statement, including any counterclaim, at the same time a demand or answering statement is filed with the other party.

4. Initiation Under a Submission. Parties to an existing dispute may begin an arbitration under these Rules by filing a copy of the arbitration agreement or submission to arbitrate under these Rules, signed by the parties, with the arbitrator they have chosen pursuant to the arbitration agreement or submission to arbitrate. The agreement or submission shall contain a statement of the matter in dispute, the amount involved, if any, the remedy or remedies sought, an agreement on the arbitrator's compensation and expenses, and the place of the hearing.

5. Changes of Claim. After a claim or counterclaim has been filed, if either party desires to make any new or different claim or counterclaim, this claim or counterclaim must be in writing and sent to the other party, who shall have 30 days from the date of mailing to file an answer. If an arbitrator has been chosen, the arbitrator shall be mailed a copy at the same time. After the arbitrator has been appointed, no new or different claim or counterclaim may be submitted without the arbitrator's consent.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

(a) At any party's request or at the arbitrator's discretion, an administrative conference with the arbitrator and the parties and/or their counsel shall be scheduled in appropriate cases to expedite arbitration proceedings. The arbitrator may approve holding a conference by conference telephone call or similar means.

(b) In a large or complex case, at any party's request or at the arbitrator's discretion, the arbitrator may schedule a preliminary hearing with parties and/or their counsel to specify issues to be resolved, to stipulate as to uncontested facts, or to consider other matters to expedite the arbitration proceedings. The arbitrator may approve holding a preliminary hearing by conference telephone call or similar means.

(c) Consistent with the expedited nature of arbitration, at an administrative conference or preliminary hearing the arbitrator may establish (i) the extent of and schedule for production of relevant documents and other information, (ii) the scheduling of depositions, (iii) the scheduling of third party discovery, (iv) the scheduling of other discovery, (v) the identification of witnesses to be called, and (vi) a schedule for further hearings to resolve the dispute.

(d) If economic issues are involved, each party in the arbitrator's discretion shall exchange and file with the arbitrator, before the administrative conference or other hearing as the arbitrator directs, a full and complete financial statement on forms specified by the arbitrator.

Each party shall update these statements as necessary, unless the parties otherwise agree and the arbitrator approves. The arbitrator may set the schedule for filing and exchange of these statements and may require production and exchange of any other such information as the arbitrator deems necessary. Corruption, fraud, misconduct or submission of false or misleading financial information, documents or evidence by a party shall be grounds for imposing sanctions by the arbitrator or the court, and for vacating an award by the arbitrator.

(e) With the parties' consent, the arbitrator may arrange a mediation conference under principles stated in the [courts of the jurisdiction's] mediation rules. The mediator may not be an arbitrator appointed to the case. A consent under this rule must provide for the rules to be followed in the mediation and compensation for the mediator.

7. Site of the Arbitration.

(a) Parties may mutually agree in writing on a place where the arbitration shall be held.

(b) If parties have not mutually agreed in writing on a place the arbitration shall be held, and where any party requests that the arbitration be held in a specific place and the other party files no objection within 30 days after notice of the request has been sent to the arbitrator, that place shall be the one requested. If a party objects to the place requested by the other party, the arbitrator may determine the place, and the arbitrator's decision shall be final and binding.

(c) If the parties have mutually agreed in writing on a place where the arbitration shall be held, and a party later requests that the arbitration be held in another specific place because of serious inconvenience of a party or parties or of a witness or witnesses such that justice in the arbitration cannot be had, the arbitrator may, after receiving the request and a response from the other party filed within 30 days after receiving the request, determine the other place requested by a party, or a neutral site or sites. The arbitrator's decision shall be final and binding.

8. Date, Time and Place of Hearing. The arbitrator shall set the date, time and place for each hearing, unless the agreement to arbitrate or other written agreement of the parties specifies otherwise. The arbitrator shall send a notice of hearing at least 20 days before the hearing, unless otherwise agreed in writing by the parties. Attendance at a hearing waives notice of the hearing.

9. Representation. Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the arbitrator of the name, postal and e-mail addresses and telephone and facsimile numbers of counsel at least 7 days before the date set for the hearing at which counsel is first to appear. When such counsel initiates an arbitration or responds for a party, notice is deemed to have been given.

10. Record of Arbitration.

(a) Unless the parties agree otherwise in writing, a party desiring a stenographic or other record shall make direct arrangements with a stenographer or other recording agency and shall notify other parties of these arrangements 7 days in advance of the hearing. Unless the parties agree otherwise in writing, the requesting party or parties shall pay the cost of the record.

(b) If the transcript or other recording is agreed by the parties to be, or is determined by

the arbitrator to be, the official record of the proceeding, the transcript or other recording must be made available to the arbitrator and to the other parties for inspection at a date, time and place determined by the arbitrator.

11. Attendance at Hearings. The arbitrator, the parties and their counsel shall maintain the privacy of the hearings unless the parties agree otherwise in writing, or the law provides otherwise. Any person having a direct material interest in the arbitration may attend hearings. The arbitrator shall otherwise have the power to require exclusion of any witness, other than a party or other essential person, during any other witness' testimony. The arbitrator has discretion to determine the propriety of attendance of any other person.

12. Postponements. The arbitrator, for good cause shown, may postpone any hearing upon a party's request in writing or upon the arbitrator's own initiative. The arbitrator shall grant a postponement upon written request of all parties. The arbitrator may impose costs incurred by parties or the arbitrator in connection with a postponement.

13. Oaths. Before proceeding with the first hearing, an arbitrator may take an oath or affirmation of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath or affirmation administered by any duly qualified person and, if required by law or requested by any party, shall do so. The arbitrator's oath or affirmation shall state names of parties to the arbitration agreement and shall be substantially in this form: [Name], being duly sworn or affirmed, hereby accepts this appointment, attests that the biography or other information submitted by the arbitrator to the parties [and the court] is accurate and complete; will faithfully and fairly hear and decide matters in controversy between the above-named parties, in accordance with their arbitration agreement, the [jurisdiction's code of arbitrator ethics, if any], and the rules incorporated into the parties' arbitration agreement; and will make an award according to the best of the arbitrator's understanding." The oath or affirmation shall be signed and dated by the arbitrator, who shall send copies to the parties and the court.

14. Majority Decision. All decisions of the arbitrators must be by a majority, unless the arbitration agreement provides otherwise. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

15. Order of Proceedings; Communication with Arbitrator.

(a) A hearing shall be opened by filing of the oath of the arbitrator, where required; by recording the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel, if any; and by the arbitrator's receipt of statement of the claim and answering statement, including any counterclaim, if any.

(b) At the beginning of the hearing the arbitrator may ask for statements clarifying the issues involved. In some cases part or all of these statements may have been submitted at the preliminary hearing conducted by the arbitrator pursuant to Rules 6(b), 6(c).

(c) The complaining party shall then present evidence to support that party's claim. The defending party shall then present evidence supporting its defense and counterclaim, if any, after

which the complaining party may present evidence supporting its response to the counterclaim. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for presentation of material and relevant evidence.

(d) The arbitrator may receive exhibits in evidence when offered by a party.

(e) All witnesses' names and addresses and a description of exhibits in the order received shall be made a part of the record.

(f) There shall be no direct communication between parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Parties and a neutral arbitrator may agree in writing to simultaneous postal mail, electronic mail (e-mail), facsimile, telegram, telex, hand delivery or similar means of simultaneous communication.

(g) In custody-related issues, the arbitrator is authorized to interview a child privately to ascertain the child's needs as to custodial arrangements and visitation rights. In conducting such an interview, the arbitrator shall avoid forcing the child to choose between parents or to reject either of them. The arbitrator shall conduct this interview in the presence of counsel for the child, if the child has separate counsel, but not in the presence of the parents or their counsel.

(h) With approval of both parties in writing, the arbitrator may obtain a professional opinion relevant to the best interests of the child. Such an opinion shall be submitted to both parties and to counsel for the child if the child has separate counsel, in sufficient time for them to comment on the opinion to the arbitrator before the hearings are closed. The cost of the opinion shall be shared by the parties as agreed by the parties in writing; absent such agreement, the arbitrator shall decide on apportionment of this cost.

16. Arbitration in the Absence of a Party or Counsel for a Party. Unless the law provides to the contrary, the arbitration may proceed in the absence of a party or counsel who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

17. Evidence and Procedure.

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce evidence that the arbitrator deems necessary to an understanding and determination of the dispute.

(b) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon a party's request or independently.

(c) The arbitrator shall be the judge of the relevance and materiality of evidence offered.

(d) The rules of evidence and civil procedure shall be general guides in conducting the hearing. The arbitrator has discretion to waive or modify these rules to permit efficient and expeditious presentation of the case. The rules of privilege shall apply as in civil actions.

(e) Evidence shall be taken in the presence of all arbitrators and all parties, except where a party is absent in default or has waived the right to be present.

18. Evidence by Affidavits; Post-Hearing Filing of Documents or Other Evidence.

(a) The arbitrator may receive and consider evidence of witnesses by affidavit but shall give this evidence only such weight as the arbitrator deems it entitled to after considering objections made to its admission.

(b) If the parties agree in writing or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

19. Inspection or Investigation. An arbitrator who finds it necessary to make an inspection or investigation in connection with the arbitration shall advise the parties. The arbitrator shall set the date, time and place and shall notify the parties. Any party desiring to do so may be present at such an inspection or investigation. If one or more parties are not present at the inspection or investigation, the arbitrator shall make a written report, unless the parties have agreed in writing to accept an oral report, to the parties and afford them opportunity to comment.

20. Provisional Remedies. The grant of provisional remedies shall be governed by the [name of jurisdiction] Family Law Arbitration Act.

21. Closing of Hearing.

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer, witnesses to be heard, or whether they wish to be heard in final argument. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If briefs are to be filed, the hearing will be declared closed as of the final date the arbitrator sets for receipt of briefs. If documents are to be filed as provided in Rule 18 and the date set for their receipt is later than that set for receipt of briefs, the later date shall be the date of closing the hearing.

(c) Unless the parties agree otherwise, the time limit within which the arbitrator must make the award shall begin to run upon the closing of the hearing.

22. Reopening Hearing. The hearing may be reopened on the arbitrator's initiative, or upon any party's application, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree in writing on an extension of time. When no specific date is fixed in the agreement to arbitrate or other written agreement, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

23. Waiver of Oral Hearing. The parties may provide by written agreement for waiver of oral hearings in any case. If the parties are unable to agree on the procedure, the arbitrator shall specify a fair and equitable procedure.

24. Waiver of Rules. A party who proceeds with the arbitration after knowledge that a

provision or requirement of these Rules has not been complied with and who fails to object in writing shall be deemed to have waived the right to object. An objection must be timely filed with the arbitrator with a copy sent to other parties.

25. Extensions of Time. The parties may modify any period of time by mutual agreement in writing. The arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The arbitrator shall notify parties in writing of any extension.

26. Serving Notice.

(a) Parties shall be deemed to have consented that any papers, notices or process necessary or proper for initiation or continuation of an arbitration under these Rules; for any court action in connection therewith; or for entry of judgment on any award made under these Rules may be served on a party by mail addressed to the party or the party's counsel at the last known address or by personal service, in or outside the State where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The arbitrator and the parties may also use facsimile transmission, telex, telegram, electronic mail (e-mail), or other written forms of electronic communication to give notices permitted or required by these Rules.

27. Time of Award. The arbitrator shall make the award promptly and, unless otherwise agreed in writing by the parties or specified by law, no later than 30 days from the date of closing the hearing. If oral hearings have been waived pursuant to Rule 23, the arbitrator shall make the award no later than the day the arbitrator receives the parties' final submissions.

28. Form and Scope of Award.

(a) The award shall be in writing and dated and shall be signed by a majority of the arbitrators, with a statement of the place where the arbitration was conducted and where the award was made. It shall be executed in the manner required by law.

(b) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' agreement, including but not limited to specific performance.

(c) Unless the parties agree otherwise in writing, the award shall state the reasons upon which it is based. Notwithstanding the parties' agreement in writing that an award shall not be reasoned, an arbitrator may determine that a reasoned award is appropriate, in his or her discretion.

(d) Unless the parties agree otherwise in writing, the arbitrators may not award punitive damages but may award interest and costs as permitted by law.

29. Award upon Settlement. If parties settle their dispute during the arbitration, the arbitrator may set forth the agreed settlement terms in an award, termed a consent award. A consent award shall allocate costs, including arbitrator fees and expenses.

30. Delivery of Award to Parties. Parties shall accept the placing of the award or a true copy of the award in first-class mail or electronic mail (e-mail) and addressed to a party or a party's counsel at the party's or counsel's last known address, personal service of the award, or filing of the award in any other manner permitted by law, as legal and timely delivery.

31. Release of Documents for Judicial Proceedings. The arbitrator, upon a party's written request, shall furnish to the party at that party's expense certified copies of any papers in the arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

32. Applications to Court; Exclusion of Liability.

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) The arbitrator or an arbitration institution in a proceeding under these Rules are not necessary parties in judicial proceedings relating to the arbitration.

(c) Parties to proceedings conducted pursuant to these Rules shall be deemed to have consented that the judgment upon the arbitration award may be entered in any federal or State court having jurisdiction, unless the parties have agreed otherwise in writing as permitted by [Model Act § 122].

(d) The arbitrator and an arbitration organization shall be entitled to immunity as provided by law.

33. Expenses, Costs and Fees.

(a) Expenses of witnesses shall be paid by the party producing such witnesses. The parties shall bear equally all other expenses of the arbitration, including required travel and other expenses of the arbitrator and any witness and the cost of any proof produced at the arbitrator's direct request, unless the parties agree otherwise, or the arbitrator assesses these expenses or any part of them against a specified party or parties.

(b) To the extent provided by law, fees and expenses of counsel shall be included among costs of the arbitration.

(c) Other expenses, fees and costs, and sanctions, shall be paid as required by the [name of jurisdiction] Family Law Arbitration Act or other law, unless agreed in writing by the parties as permitted by that Act or other law.

34. Arbitrator's Compensation. The compensation of the arbitrator shall be agreed upon in writing by the parties and the arbitrator when the parties select the arbitrator.

35. Deposits. The arbitrator may require the parties to deposit, in advance of any hearing, such sums of money as the arbitrator deems necessary to cover expenses of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the close of the case.

36. Interpretation and Application of Rules. The arbitrator shall interpret and apply these Rules and any Optional Rules or special rules incorporated in the arbitration agreement. If

there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, and any Optional Rules or special rules incorporated in the arbitration agreement, the decision on meaning or application shall be decided by majority vote.

37. Time. Time periods prescribed under these Rules or by the arbitrator shall be computed in accordance with [jurisdiction's procedural rules or statutes].

38. Judicial Review and Appeal. No judicial review of errors of law in the award [as Model Act §§ 123(a)(9) and 128(b) provide] is permitted.

2. Optional Rules for Arbitrating Family Law Disputes

101. Nationality of Arbitrator. Where the parties are nationals or residents of different countries, any neutral arbitrator shall, upon either party's request, be chosen from among the nationals of a country other than that of any of the parties. This request must be made 30 days before the time set for appointment of the arbitrator as agreed by the parties or set by these Rules.

102. Interpreters. A party desiring an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the interpreter, unless the arbitration agreement specifies otherwise.

103. Language. The language of the arbitration shall be that of the documents containing the arbitration agreement. The arbitrator may order that any documents submitted during the arbitration that are in another language shall be accompanied by a translation into the language of the arbitration. The proponent of the document shall bear the cost of the translation, which may be assessed as a cost in the arbitration.

104. Experts.

(a) The arbitrator may appoint one or more independent experts to report in writing to the arbitrator on specific issues designated by the arbitrator and communicated to the parties.

(b) The parties shall provide the expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. A dispute between a party and the expert as to relevance of the requested information or goods shall be referred to the arbitrator for decision.

(c) Upon receipt of an expert's report, the arbitrator shall send a copy to all parties and shall give the parties an opportunity to express their opinion on the report in writing. A party may examine any document upon which the expert has relied in the report.

(d) At any party's request, the arbitrator shall give the parties an opportunity to question the expert at a hearing. Parties may present expert witnesses to testify on the points at issue during this hearing.

105. Law Applied. Subject to any choice of law clause or clauses in an applicable contract or other agreement and any law governing choice of law, the arbitrator shall apply the

substantive law of [jurisdiction whose Model Act is invoked] exclusive of [jurisdiction whose Model Act is invoked] conflict of laws principles.

106. Class Actions. Arbitrations under this agreement shall not be subject to consolidation with any class action subject to arbitration.

III. ANALYSIS

Part III.A analyzes a Model Act based on the Revised Uniform Arbitration Act. Part III.B analyzes suggested forms for family law arbitrations under the Model Act. Part III.C analyzes suggested rules for family law arbitration under the Model Act.

A. AAML Model Family Law Arbitration Act

Part III.A publishes the text of a Model Act, following the RUAA as recommended by the NCCUSL, and enacted in a small but growing number of jurisdictions. The Model Act follows RUAA section numbering sequence, *e.g.*, §§ 1, 2, etc., except to number the Model Act as, *e.g.*, §§ 101, 102, to try to eliminate confusion in considering an earlier Model Act version based on the FLAA and the UAA, which had referred to primary numbers, *e.g.*, §§ 1, 2.[25] RUAA section numbers, *e.g.*, RUAA § 1, remain as primary numbers in the *Commentaries.*

The text of the RUAA-based Model Act follows the RUAA except for provisions perceived necessary for family law arbitration, *e.g.*, § 124A, providing for modifying support and custody orders, which has no RUAA equivalent, or deletions and revisions perceived necessary for family law arbitration, *e.g.*, omitting permission to agree on no appeal after a controversy has arisen and including right of appeal among those provisions for which no derogation is permitted, in § 104. *Commentaries*, which follow each Model Act section, may suggest variants from the language of the RUAA.

Brackets ([ ]) enclose material bracketed in the NCCUSL version of the RUAA. Amendments that are not in the RUAA but are recommended for the Model Act are *italicized.* Amendments to the RUAA or the FLAA, where incorporated in this Model Act, as enacted in North Carolina, are underlined. Deletions recommended for a national Model Act are indicated by *italicized parentheses* (*( )*); deletions from the North Carolina version of the RUAA are indicated by parentheses that are not italicized (( )).

1. § 101. *Purpose; d*efinitions

(a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support. Pursuant to this policy, the purpose of this Act *is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with* family law legislation of this State *and similar legislation, to provide default rules for the*

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[25] The AAML considered and rejected this version, published in 2004 AAML Arbitration Comm. Rep., note 1.

conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.

(b) 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.

Commentary

Section 101 combines the RUAA § 1 definitions with the North Carolina General Assembly policy statement in N.C. Gen. Stat. § 50-41(a) (2003). Model Act § 101(a) differs from § 50-41(a) in deleting reference to those North Carolina General Statutes, Chapters 50-52B, that are the family law legislation for that State. N.C. Gen. Stat. § 1-569.1 (2003) copies RUAA § 1 except for substituting "The following definitions apply in this Article" for "In this [Act]" in the chapeau to RUAA § 1 and Model Act § 101(a) and removing the brackets in RUAA § 1(3) in § 1-569.1(3) while keeping the bracketed language.

If it is thought desirable to include a policy statement, the proper spot for it is at the beginning or end of the Model Act. Model Act § 101(a) parallels Uniform Act § 1 and comparable North Carolina legislation, N.C. Gen. Stat. §§ 1-567.1 (2001), the former UAA as enacted in that State, and the North Carolina ICACA, *id.* § 1-567.30 (2003), in placing it at the beginning of the Act. The RUAA and the FAA have no similar statement, but cases like Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 684-89 (1996) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) declare the same strong policy for arbitration under the FAA. Placing a policy statement at the end of legislation as a sort of conclusion is acceptable, but readers may be more likely to miss it there or accord it less weight.

Section 101(a) copies the FLAA, N.C. Gen. Stat. § 50-41(a) (2003), reflecting that State's legislative policy. The Model Act would only apply to a breakup of a marriage and custody and support issues incident to that marriage. It would not apply to other situations, *e.g.,* where a brother and sister have joint custody of deceased parents' children, or single parent situations. If a jurisdiction would wish to expand the Model Act's scope, § 1(a) should be rewritten to cover those circumstances. *See* Walker, *Arbitrating*, note 9, at 520-21. The second point, applying

throughout the Model Act, is that drafters should be careful to employ language reflecting a particular jurisdiction's family law. For example, "substantial change of circumstances" in § 101(a) is a term of art from North Carolina family law, related to that State's family law statutes incorporated by reference in N.C. Gen. Stat. § 50-41(a) (2003). Although § 101(a) brackets a generic reference to a jurisdiction's family law, it recites "substantial change of circumstances." Different phrasing may be necessary, *e.g.*, perhaps "substantial and material change of circumstances" in another jurisdiction.

The FLAA, N.C. Gen. Stat. § 50-41(b) (2003), recites a short title for the Act. Part III.A.34, in keeping with the RUAA format, suggests § 134, which has no RUAA counterpart, as the place for a short title section. The short title could be inserted here as Model Act § 101(c). Either location is appropriate if enacting jurisdictions desire a short title for the legislation. Part III.A.34 notes that having an official short title is useful for citation in agreements to arbitrate.

Proposed Act, note 3, § 1 is a short title provision. *Id.* § 11 lists issues that are arbitrable. *Id.* § 31 defines "court" in language similar to the UAA.

N.C. Gen. Stat. § 1-569 (2003) copies RUAA § 1. Hawaii and Nevada vary from the official text slightly to reflect their court systems. New Mexico adds material reflecting that State's including the Model Fair Bargain Act (Mar. 5, 2002 draft), *available at* ssl.csg.org/dockets/23cycle/2003C/2003Cbills/08t23bo/model.doc, in its RUAA. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 7 (2003 Cum. Ann. Pocket Pt.).

See also 2004 FLAA Amendments, note 14, at 29-30; Handbook, note 9, *Comment* to § 50-41; *Comment* to RUAA § 1, 7(1) U.L.A., note 1, at 7 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 447.

2. § 102. 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 the 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 be the person as a place of delivery of such communications.

Commentary

N.C. Gen. Stat. § 1-569.2 (2003) enacted RUAA § 2 verbatim except for substituting "Article" for "[Act]" in RUAA § 2(a). The NCBA Family Law Section Drafting Committee

proposes amending the FLAA, N.C. Gen. Stat. § 50-42 (2003), to add the substance of RUAA § 2. *See also* Part III.A.2, 2004 AAML Arbitration Comm. Rep., note 1; 2004 Amendments, note 10, at 34-35; *Comment* to RUAA § 2, 7(1) U.L.A., note 1, at 8 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 455.

3. § 103. 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 [delayed date], this [Act] governs an agreement to arbitrate whenever made.

Commentary

Jurisdictions enacting family law arbitration for the first time should consider only § 103(a) for enactment; §§ 103(b) and 103(c) are transition provisions for jurisdictions with prior legislation. Section 103(b) would also govern if there are agreements to arbitrate family law issues that were signed before the Act's effective date. Those jurisdictions with prior legislation should consider enacting at least § 103(b) and perhaps § 103(c) if a transition period is thought necessary. *See Comment* to RUAA § 3, 7(1) U.L.A., note 1, at 8 (2003 Cum. Ann. Pocket Pt.). *See also* Parts III.A.31-III.A.33, discussing repealer and saving clause provisions.

N.C. Gen. Stat. § 1-569.3 (2003) copied RUAA §§ 1(a) and 1(b), substituting a January 1, 2004 effective date, "Article" for "[Act]" and deleting RUAA § 1(c). Among jurisdictions that have previously enacted the RUAA, Hawaii substitutes "After June 30, 2004" for "On or after [a delayed date]" in RUAA § 3(c), Nevada substitutes "October 1, 2003" for "[a delayed date]", and New Mexico, like North Carolina in N.C. Gen. Stat. § 1-569.3 (2003), omits RUAA § 103(c). *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 9 (2003 Cum. Ann. Pocket Pt.). Utah Code Ann. § 78-31a-104 (2002 repl.) recites that its chapter on arbitration "applies" to agreements to arbitrate and omits RUAA § 3(c).

The former North Carolina Uniform Act, N.C. Gen. Stat. § 1-567.19 (2001), as contrasted with the UAA, § 20, 7(1) U.L.A. at 465, declares the Act applies "only to agreements made on or after August 1, 1973." The UAA provides that it "applies only to agreements made subsequent to the taking effect of this act." The ICACA, N.C. Gen. Stat. § 1-567.31(g) (2003), declares it shall not apply to agreements executed before June 13, 1991; the FLAA, *id.* § 50-61 (2003), declares it applies to agreements made on or after October 1, 1999, unless parties by separate agreement after that date state that the FLAA shall apply to agreements dated before October 1, 1999. Proposed Act, note 3, § 3 recites the applicability of the Act to agreements. *See also* 2004 FLAA

Amendments, note 14, at 55-56; Handbook, note 9, *Comment* to § 50-61; *Comment* to RUAA § 3, 7(1) U.L.A., note 1, at 8 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 448.

4. § 104. 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 provided 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 Sections 105(a), 106(a), 108(a), 108(b), 117(a), 117(b) or 126; ( )

(2) agree to unreasonably restrict the right under Section 109 to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 112 to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 116 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 shall not vary the effect of, the requirements of this section or Sections 103(a) or 103(c), 107, 108(c), 108(d), 108(e), 114, 118, 120(d), 120(e), 122, 123, 124, 124A, 125(a), 125(b), 128, 129, 130, 131, or 132.

Commentary

Because § 108(c) declares that certain preaward relief for protection of spouses or children is nonwaivable, and § 108(d) is a reporting requirement for child abuse or neglect, § 104(b) lists only §§ 108(a) and 108(b) as waivable. Sections 108(c) and 108(d), which are not in RUAA § 8, are among § 104(c)'s nonwaivable provisions, as is § 108(e), which must be nonwaivable if there is a § 108(c) or § 108(d) issue. Similarly, § 124A, dealing with modifying awards for postseparation support, alimony, child support or child custody and which is not in the RUAA, should be nonwaivable under any circumstances. Because postseparation support, alimony, child support or child custody awards are always within the courts' review, § 104(b)(1) omits the possibility of waiver of appeal under § 128 after a controversy arises and includes § 128 among § 104(c)'s nonwaivable provisions. RUAA §§ 4(b)(1) would allow waiver of appeal after a controversy arises. *See also* Parts III.A.8, III.A.24A, III.A.28; Handbook, note 9, § 50-60 & *Comment*, which omits publication of N.C. Gen. Stat. § 50-60(c) (2003); *Comment* to RUAA § 4, 7(1) U.L.A., note 1, at 10 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 513-14. The Committee recommends substituting "shall" for "may" in RUAA § 4(c). Consideration

might be given to following the Hawaii model for RUAA § 4(b), changing "may" to "shall" in its chapeau paragraph.

Among jurisdictions that have previously enacted the RUAA, Hawaii substitutes "shall not" for "may not" in §§ RUAA 4(b), chapeau paragraph. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 10 (2003 Cum. Ann. Pocket Pt.). Except for deleting reference to RUAA §§ 3(c) and 32 in N.C. Gen. Stat. § 1-569.4(c) (2003) and substituting "shall" for "may" in that subsection, substituting appropriate sections and "Article" for "[Act]" in RUAA § 4(a), N.C. Gen. Stat. § 1-569.4 (2003) generally follows RUAA § 4. The North Carolina RUAA has no equivalent for RUAA § 32, a repealer provision. *See also* Part III.A.32.

The NCBA Family Law Section Drafting Committee has recommended amending N.C. Gen. Stat. § 50-41 (2003) to add waiver/nonwaiver provisions analogous to RUAA § 4 and Model Act § 104. *See* Part III.A.4, 2004 AAML Comm. Rep., note 1; 2004 FLAA Amendments, note 14, at 29-34.

The former Uniform Act, N.C. Gen. Stat. § 1-567.6 (2001), provides that parties must have five days' notice, like the FAA, 9 U.S.C. § 4 (2000), but parties can waive the five days. The FAA is silent on the waiver point.

The FLAA, N.C. Gen. Stat. § 50-44(g) (2003) provides that

> (g) Availability of interim relief or interim measures under this section may be limited by the parties' prior written agreement, except for relief pursuant to G.S. 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50-B3, Chapter 52 of the General Statutes; federal law; or treaties to which the United States is a party, whose purpose is to provide immediate, emergency relief or protection.

Cited State statutes refer to protection of spouses and children. N.C. Gen. Stat. § 50-48 (2003) follows the former Uniform Act, *id.* § 1-567.7 (2001) and the ICACA, § 1-567.42(b) (2003) in declaring that waiver of the right of a party to counsel before a proceeding or hearing is ineffective. The FLAA, *id.* § 50-51(g) (2003) provides in part that "A party waives objection that an award was not made within the time required unless that party notifies the arbitrators of his or her objection prior to delivery of the award to that party." The Proposed Act, note 3, § 5 allows parties to contract out of its provisions, except §§ 15(a) (requiring arbitrators to treat parties with equality and fairness), 15(f) (extension of time limits), 27 (vacatur), and 29 (judgment on decree on award).

5. § 105. [Application] for judicial relief

(a) Except as otherwise provided in Section 128, 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[26] must be given in the manner prescribed by law or rule of court for serving [motions] in pending cases.

Commentary

There are slight variations in the Hawaii and Nevada statutes. *Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 12 (2003 Cum. Ann. Pocket Pt.). *See also* Proposed Act, note 3, § 30; 2004 FLAA Amendments, note 14, at 53; Handbook, note 9, *Comment* to § 50-58; *Comment* to RUAA § 5, 7(1) U.L.A., note 1, at 12 (2003 Cum. Ann. Pocket Pt.). Except for removing brackets, substituting N.C. Gen. Stat. § 1-569.28 (2003) for "Section 28" and "Article" for "Act," *id.* § 1-569.5 is the same as RUAA § 5.

The former Uniform Act, N.C. Gen. Stat. § 1-567.16 (2001), copied UAA § 16, 7(1) U.L.A. 685, word for word. The ICACA and the FLAA, N.C. Gen. Stat. §§ 1-567.66, 50-58 (2003) follow *id.* § 1-567.16 (2003). Proposed Act, note 3, § 30 follows the UAA.

6. § 106. Validity of agreement to arbitrate

(a) *During or after marriage, parties may agree in a record to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in a record to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. Such a*n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revocation of a contract.

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

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

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

Commentary

The former Uniform Act, N.C. Gen. Stat. § 1-567.2(a) (2001); the ICACA and the FLAA,

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[26] Not bracketed in the RUAA § 5 version.

id. §§ 1-567.37(c), 50-42(a) (2003), echo the substance of RUAA § 6(a), including the italicized limit on prenuptial agreements, which is in the FLAA, N.C. Gen. Stat. § 50-42(a) (2003), with "in a record" substituted for "in writing." Proposed Act, note 3, § 2 is similar. The North Carolina General Assembly added the limit on prenuptial agreements; other jurisdictions may wish to allow prenuptial agreements to cover these issues as a matter of policy. The remainder of RUAA § 6 covers a gap in the UAA as to who decides particular issues. The NCBA Family Law Section Drafting Committee has recommended that the substance of RUAA §§ 6(c)-6(d) be added to N.C. Gen. Stat. § 50-43(b) (2003). *See also* 2004 FLAA Amendments, note 14, at 34-36; Handbook, note 9, *Comment* to § 50-42; *Comment* to RUAA § 6, 7(1) U.L.A., note 1, at 13 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 514.

7. § 107. [Motion] to compel or stay arbitration

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

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

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

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

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

(d) The court shall 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 a 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 127.

(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.

Commentary

RUAA § 7 essentially copies the Uniform Act, § 2, 7(1) U.L.A. 109, which former N.C. Gen. Stat. § 1-567.3 (2001) followed. The FLAA, *id.* § 50-43 (2003), follows *id.* § 1-567.3; *see also* Proposed Act, note 3, § 4, similar to the FLAA.

Aside from removing brackets, changing "may" to "shall" in N.C. Gen. Stat. §§ 1-569.7(c) and 1-569.7(d), adding "to arbitrate" after "agreement" in *id.* § 1-569.7(c), referring to *id.* § 1-569.27 (2003) in *id.* § 1-569.7(e) (2003) is the same as RUAA § 7. The Committee recommends the §§ 1-569.7(c) and 1-569.7(d) amendments for the Model Act.

Among other jurisdictions that have enacted the RUAA, Hawaii substitutes "shall not" for "may not" in RUAA §§ 7(c), 7(d); "shall be" for "must be" in RUAA § 7(e), first sentence; "shall be" for "must be" in RUAA § 7(e), second sentence. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 17 (2003 Cum. Ann. Pocket Pt.).

See also 2004 FLAA Amendments, note 14, at 35-36, noting proposed addition of RUAA §§ 6(c)-6(d) to N.C. Gen. Stat. § 50-43(b) (2003); Handbook, note 9, *Comment* to § 50-43; *Comment* to RUAA § 7, 7(1) U.L.A., note 1, at 17; (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 464-65; Part III.B.6, 2004 AAML Comm. Rep., note 1.

8. § 108. Provisional remedies

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

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

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

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

(c) Availability of provisional remedies under this section may be limited by the parties' prior written agreement as provided in Section 104, except for relief pursuant to [insert jurisdiction's statutes and law granting immediate, emergency relief or protection for spouses or children]; federal law; or treaties to which the United States is a party, whose purpose is to provide immediate, emergency relief or protection.

(d) Arbitrators who have cause to suspect that any child is abused or neglected shall report the case of that child to the [director of the department of social services] of the [county] where the child resides or, if the child resides out of state, of the [county] where the arbitration is conducted.

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

Commentary

Apart from removed brackets, N.C. Gen. Stat. § 1-569.8 is the same as RUAA § 8. The UAA did not provide for provisional remedies. The FLAA, N.C. Gen. Stat. § 50-44 (2003) and the ICACA, *id.* §§ 1-567.39, 1-567.47 (2003), the model for the FLAA, do. Enacting § 8 will remove doubt about courts' competence to award provisional remedies, an issue in some jurisdictions, and will establish standards for arbitrators and courts.

N.C. Gen. Stat. § 50-44 (2003), rather than taking RUAA § 8's generalist approach ("to the same extent and under the same conditions . . . "), is specific in its relief with catchalls; *see also* N.C. Gen. Stat. §§ 1-567.39(c) (2003), the inspiration for *id.* § 50-44(c) (2003). When the FLAA drafters proposed the Act, the choice was to follow a general approach to remedies like RUAA § 8(a) or a "laundry list" of preaward relief to guide lawyers and courts in the new procedure, N.C. Gen. Stat. § 50-44(c) (2003). The NCBA Family Law Section Drafting Commitee's experience has been that publishing a list has been helpful. Other jurisdictions liking the laundry list approach could recast RUAA § 8(a) thus:

> (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 including, but not limited to:

A list of available remedies like those in N.C. Gen. Stat. § 50-44(c) (2003) should follow.

Section 108 includes two subsections not found in RUAA § 8; these are taken from N.C. Gen. Stat. §§ 50-44(g) (interim relief that cannot be waived) and 50-44(h) (reporting child abuse or neglect). Section 108(c) generalizes the applicable law of a jurisdiction for nonwaivable relief but retains § 50-41(g)'s admonition concerning federal law or treaties. Section 108(d), following N.C. Gen. Stat. § 50-41(h) (2003), reflects North Carolina law on reporting abuse and neglect with likely needs for insertion of other jurisdictions' laws bracketed. Drafters should customize this subsection if a jurisdiction requires reporting abuse and its standards are different. For example, Alaska has boroughs, Louisiana has parishes, and Virginia has separate counties and cities as local political subdivisions instead of the county system in North Carolina and many States; it may be appropriate to refer to "service area" in some jurisdictions. Because of these

provisions, § 104 breaks up references to waivable and nonwaivable relief in § 104. *See* Part III.A.4.

With these insertions, RUAA § 8(c) would become § 108(e). The latter provision is necessary to avoid claims of waiver of arbitration if a party seeks relief under § 8 before arbitration begins.

See also 2004 FLAA Amendments, note 14, at 36-38; Handbook, note 9, *Comment* to § 50-44; *Comment* to RUAA § 8, 7(1) U.L.A., note 1, at 18 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 466-69.

9. § 109. 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) no later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack or insufficiency of notice.

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall describe" for "must describe" in RUAA § 9(a), first sentence. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 21 (2003 Cum. Ann. Pocket Pt.). Aside from substituting N.C. Gen. Stat. § 1-569.15(c) (2003) in RUAA § 9(b), N.C. Gen. Stat. § 1-569.9 (2003) is the same as RUAA § 9. The ICACA, N.C. Gen. Stat. § 1-567.51 (2003), is the only comparable provision in North Carolina for initiation of arbitration, although the FLAA arbitration rules, like the AAA rules from which they were derived, provide for initiating procedures. The NCBA Committee recommends adding the equivalent of RUAA § 9 as N.C. Gen. Stat. §§ 50-42(c) - 50-42(d) (2003); *see also* 2004 FLAA Amendments, note 14, at 34-35; Handbook, note 9, *Comment* to § 50-42; *Comment* to RUAA § 9, 7(1) U.L.A., note 1, at 20 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 515.

10. § 110. 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 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.

Commentary

Aside from adding "of this section" after "(c)" in RUAA § 10(a) and removal of brackets, *id.* § 10 is identical with N.C. Gen. Stat. § 1-569.10 (2003). The UAA does not provide for consolidation of arbitrations, although arbitration rules may. Section 10 provides statutory standards, which may be waived; *see* Part III.A.4. The FLAA, N.C. Gen. Stat. § 50-50 (2003) and the ICACA, *id.* 1-567.57(b) (2003), the model for the FLAA, provide for consolidation by court order, but only after agreement of the parties. Section 110 would allow a court to order consolidation under its terms if the parties cannot agree. The NCBA Family Law Section Drafting Commitee has recommended amending N.C. Gen. Stat. § 50-50 (2003) to track RUAA § 10. *See* Part III.A.10, 2004 AAML Comm. Rep., note 1; 2004 FLAA Amendments, note 14, at 43-44; Handbook, note 9, *Comment* to § 50-60; *Comment* to RUAA § 10, 7(1) U.L.A., note 1, at 22 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 477-78, 515.

11. § 111. 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.

Commentary

Aside from removed brackets, N.C. Gen. Stat. § 1-569.11 (2003) is identical with RUAA § 11. RUAA § 11(a) follows the former UAA, N.C. Gen. Stat. § 1-567.4 (2001) and is similar to Proposed Act, note 3, § 7. It is also similar in content to the FLAA, *id.* § 50-45 (2003) and the ICACA, *id.* § 1-567.41 (2003), the latter of which also provides for superior court appointment through an established arbitration institution, and establishes arbitrator fee standards. Among other jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 11(a), first sentence. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 25 (2003 Cum. Ann. Pocket Pt.).

There was no equivalent to RUAA § 11(b) in the Uniform Act. As enacted, for North Carolina arbitrations it displaces Canons of Ethics for Arbitrators, 350 N.C. 876 (2000), if incorporated by reference in an agreement to arbitrate and inconsistent with the general standard § 11(b) announces, and if the Canons standard would "unreasonably restrict" disclosure. *Cf.* §§ 104(b)(3), 112(f) and RUAA *Comment,* ¶¶ 3, 6 to RUAA § 12, 7(1) U.L.A., note 1, at 24 (2003 Cum. Ann. Pocket Pt.). North Carolina courts and arbitrators may examine the Canons, which apply as mandatory rules in court-ordered arbitration, to flesh out § 111(b) standards. Other jurisdictions may not have arbitrator ethics rules like the North Carolina Canons, whose primary purpose is regulating court-annexed arbitration. North Carolina FLAA-governed agreements to arbitrate may incorporate the Canons by reference in the agreement, *cf.* Form C, discussed in Part III.B.1.c.

The RUAA-based Model Act omits provisions from FLAA-based Model Act § 5(c)-5(e), which follows the FLAA, N.C. Gen. Stat. §§ 50-45(c) - 50-45(e) (2003) relating to court-appointed arbitrators, arbitration institutions and choice of rules for the arbitration. Jurisdictions wishing to provide for these in a RUAA-based Model Act might insert these subsections:

(c) In appointing arbitrators, a court shall consult with prospective arbitrators as to their availability and shall refer to each of the following:

(1) The positions and desires of the parties;

(2) The issues in dispute;

(3) The skill, substantive training, and experience of prospective arbitrators in those issues, including their skill, substantive training and experience in family law issues; and

(4) The availability of prospective arbitrators.

(d) The parties may agree in a record to employ an established arbitration organization to conduct the arbitration. If the agreement does not provide a method for appointment of arbitrators and the parties cannot agree on an arbitrator, the court may appoint an established arbitration organization the court considers qualified in family law arbitration to conduct the arbitration.

(e) The parties may agree in a record on rules for conducting the arbitration. If the parties cannot agree on rules for conducting the arbitration, the arbitrators shall select the rules for conducting the arbitration after hearing all parties and taking particular reference to model rules developed by arbitration organizations or similar sources. If the arbitrators cannot decide on rules for conducting the arbitration, upon application by a party the court may order use of rules for conducting the arbitration, with particular reference to model rules developed by arbitration organizations or similar sources.

Model Act §§ 111(c)-111(e) omit the first sentence of Model Act § 5(c) in § 111(c), substitute "in a record" in §§ 111(d) and 111(e) for "in writing" in Model Act §§ 5(d) and 5(e), and substitute "arbitration organization" in §§ 111(d) and 111(e) for "arbitration institution" in Model Act §§ 5(d) and 5(e). Section 111(b) includes the omitted first sentence of Model Act § 5(c). Amendments of §§ 111(b) and 111(c) to recite "organization" instead of "institution" and "in a record" instead of "in writing" reflect terms as defined in Model Act §§ 101(b)(1) and 101(b)(6). If a court appoints an arbitration organization to conduct the arbitration, that organization should provide for choosing the arbitrator in its rules, which would then bind parties. Section 111(e) recites a common-law rule; if parties cannot agree on arbitration rules and have not chosen an arbitration organization which has rules, the arbitrator can choose rules. Parties must be heard, and the arbitrator must consider model rules, *e.g.*, those analyzed in Part III.C. If an arbitrator cannot decide on rules, the court may choose rules but is required to refer to model rules like those in Part III.C. *See also* Part III.A.5, in 2004 AAML Comm. Rep., note 1; Walker, *Arbitrating*, note 9, at 461; Basic Rule 38, in Part III.C.1.

See also 2004 FLAA Amendments, note 14, at 38-41, recommending adding the equivalent of RUAA § 12 and that N.C. Gen. Stat. § 50-45 (2003) agreements be in writing; Handbook, note 9, *Comment* to § 50-45; *Comment* to RUAA § 11, 7(1) U.L.A., note 1, at 24 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 457.

There is no equivalent in the RUAA version of the FLAA for a single arbitrator as in the default provision of the FLAA, N.C. Gen. Stat. 50-45(a) (2003). If a jurisdiction wishes to enact a default provision, Model Act § 111 is the appropriate place; it might read:

> (a) Unless the parties otherwise agree in a record, a single arbitrator shall be chosen by the parties to arbitrate all matters in dispute.

Model Act §§ 111(a) and 111(b) would be renumbered §§ 111(b) and 111(c); if a jurisdiction chooses to enact the equivalent of Model Act §§ 5(c)-5(e) and § 111(a), what is suggested above as §§ 111(c)-111(e) would become 111(d)-111(f). *See also* Part III.C, Forms and Basic Rule 2; Handbook, note 9, at 38-41.

12. § 112. 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 other 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 123(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 123(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 123(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 123(a)(2).

Commentary

Aside from substituting N.C. Gen. Stat. § 1-569(a)(2) (2003) for "Section 23(a)(2)" in N.C. Gen. Stat. §§ 1-569.12(c) - 1-569.12(f) (2003) and adding "of this section" in *id.* § 1-569.12(c) (2003) after "(b)" in RUAA §§ 12(c)-12(f), *id.* § 12 and N.C. Gen. Stat. § 1-569.12 (2003) are identical. The NCBA Drafting Committee has recommended enacting RUAA § 12 as N.C. Gen. Stat. § 50-45(h) - 50-45(m). *See* 2004 FLAA Amendments, note 14, at 39-41. There are no disclosure requirements in the FLAA at the present time. Model Act § 5, based on the UAA, would have included them. *See* Part III.A.5, in 2004 AAML Comm. Rep., note 1.

The AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (1977) were the primary guide for Canons of Ethics for Arbitrators, 350 N.C. 876 (2000), which, if considered appropriate, can be incorporated by reference in an agreement to arbitrate and would be followed where not inconsistent with the standards § 112 announces, and if Canons standards would not "unreasonably restrict" disclosure. *Cf.* Part III.A.4, RUAA §§ 4(b)(3), 12(f) and RUAA *Comment*, ¶¶ 3, 6 to RUAA § 12, 7(1) U.L.A., note 1, at 26. North Carolina courts and arbitrators may examine the Canons, which apply as mandatory rules only in North Carolina court-ordered arbitration, to flesh out § 112 standards. *See also* Part III.A.11; Handbook, note 9, *Comment* to § 50-45; *Comment* to RUAA § 12, 7(1) U.L.A., note 1, at 25 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 459-61, 517.

The ICACA, N.C. Gen. Stat. § 1-567.42(a) (2003), also recites disclosure standards.

13. § 113. 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 115(c).

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 13; Nevada substitutes "If there are two or more arbitrators" for "If there is more than one arbitrator." *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 29 (2003 Cum. Ann. Pocket Pt.). N.C. Gen. Stat. § 1-569.13 (2003) tracks RUAA § 13, substituting "G.S. § 1-569.15(c)" for "Section 15(c)."

RUAA § 13 follows former the UAA and N.C. Gen. Stat. § 1-567.5 (2001), which does

not add a requirement of all arbitrators' conducting the hearing, which can be altered by the parties' agreement. The FLAA, N.C. Gen. Stat. § 50-46 (2003), tracks N.C. Gen. Stat. § 1-567.5 (2001), which is similar to RUAA § 13; *see also* Proposed Act, note 3, § 9. The ICACA, *id.* § 1-567.40 (2003) declares that there shall be only one arbitrator unless parties agree on a greater number, in effect requiring the parties to write majority rules into agreements to arbitrate. *Id.* § 1-567.59 (2003) repeats this point, saying that "Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, is authorized by the parties or all members of the arbitral panel."

Aside from recommending that N.C. Gen. Stat. § 50-46 (2003) be amended to require agreements to be in writing, 2004 FLAA Amendments, note 14, at 41 suggests no amendments; *see also* Handbook, note 9, *Comment* to § 50-46; *Comment* to RUAA § 13, 7(1) U.L.A., note 1, at 28 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 456.

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

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

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

(c) The failure of an arbitrator to make a disclosure required by Section 112 does not cause any loss of immunity under this section.

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

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

(2) to a hearing on a [motion] to vacate an award under Section*s* 123(a)(1) or 123(a) (2) if the [movant] establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the

organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees, *costs*, and other reasonable expenses of litigation.

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall not be" for "may not be" in RUAA § 14(d), first sentence. *See Action in Adopting Jurisdictions, infra* vol. II, at 31.

N.C. Gen. Stat. § 1-569.14 (2003) follows RUAA § 14, except for removing brackets, referring to N.C. Gen. Stat. § 1-569.12 (2003) in RUAA § 14(b) instead of "section 12," referring to N.C. Gen. Stat. § 1-569.23(a)(1) or 1-569.23(a)(2) (2003) in RUAA § 14(d)(2) instead of "section 23(a)(1) or (a)(2)," adding "of this section" after "(d)" in N.C. Gen. Stat. § 1-569.14(e) (2003), adding "costs" in *id.* § 1-569.14(e) (2003) and adding *id.* § 1-569(f) (2003), recommended by the NCBA Group that promoted the RUAA:

> (f) Immunity under this section shall not apply to acts or omissions that occur with respect to the operation of a motor vehicle.

Subsection 14(f) was added to conform to N.C. Gen. Stat. § 1-567.87(b) (2003) (conciliator immunity). Whether other jurisdictions would wish to exempt motor vehicle operation from arbitrator immunity is a matter of policy. The tendency in North Carolina is to exempt.

Legislated immunity for arbitrators or other neutrals varies in North Carolina and perhaps other jurisdictions. Arbitrators and arbitration institutions under the FLAA, N.C. Gen. Stat. § 50-45(f) (2003), have immunity in conducting the arbitration. There was no statutory immunity in the Uniform Act. Arbitrators in North Carolina court-ordered arbitration have immunity, *id.* § 7A-37.1(e) (2003). ICACA conciliators have immunity, but not for operating a motor vehicle. *Id.* § 1-567.87(b) (2003). There is no immunity for ICACA arbitrators. Proposed Act, note 3, § 8 is its arbitrator immunity provision.

See also 2004 FLAA Amendments, note 14, at 38-41, recommending no changes for N.C. Gen. Stat. § 50-45 (2003)'s immunity rules; Handbook, note 9, *Comment* to § 50-45; *Comment* to RUAA § 14, 7(1) U.L.A., note 1, at 29 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 457-59.

15. § 115. Arbitration process

(a) An arbitrator may conduct an arbitration in such a 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 did not appear. The court, upon 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 111 to continue the proceeding and to resolve the controversy.

Commentary

RUAA § 15 and N.C. Gen. Stat. § 1-569.15 (2003) are virtually identical; *id.* § 1-569.15(a) (2003) deletes "such a," *id.* § 1-569.15(d) (2003) adds "of this section" after "(c)," and substitutes *id.* § 1-569.11 (2003) for "Section 11" in *id.* § 1-569.15(f) (2003). The only difference of any substance is N.C. Gen. Stat. § 1-569.15(f) (2003), which is not in RUAA § 15:

(f) The rules of evidence shall not apply in arbitration proceedings, except as to matters of privilege or immunities.

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall not postpone" for "may not postpone" in RUAA § 15(c), third sentence, and "shall be" for "must be" in RUAA § 15(d). *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 33 (2003 Cum. Ann. Pocket Pt.).

Former N.C. Gen. Stat. §§ 1-567.6(1) - 1-567.6(3) (2001), following the Uniform Act, §

5, 7(1) U.L.A. 173, provide for the substance of RUAA §§ 15(c)-15(e), differing from § 15(e) in that the latter requires appointment of a replacement arbitrator instead of allowing a hearing to proceed with those remaining, as N.C. Gen. Stat. § 1-567.6(3) (2001) and the Uniform Act, § 5(c) have it. Former N.C. Gen. Stat. § 1-567.6(4) (2001) added: "Upon the request of any party or any arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing."

The equivalent of former N.C. Gen. Stat. § 1-567.6(4) (2001) was not included in the North Carolina proposal for RUAA § 15. This can be left to arbitration rules; *see, e.g.*, Handbook, note 9, at 41. If it is thought appropriate, this might be added as § 115(g):

> (g) Upon the request of any party or any arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced. If the parties cannot agree on payment for the record, the arbitrators shall decide on payment.

The second sentence removes a possible ambiguity in former N.C. Gen. Stat. § 1-567.6(4) (2001). Arbitrators have inherent authority to decide this issue, but including the sentence warns a party asking for a recording that if that party and other parties cannot agree on paying the bills, perhaps by dividing the cost, the arbitrator(s) will decide the issue, perhaps be visiting the entire cost on the requesting party.

There was no provision for prehearing conferences or summary disposition in the UAA; arbitration rules may authorize this. *See* RUAA § 15 *Comment*, ¶ 2, below.

The FLAA, N.C. Gen. Stat. § 50-47 (2003), follows the former Uniform Act, *id.* § 1-567.6 (2001); the FLAA rules allow prehearing conferences and summary disposition unless parties exclude these provisions from the standard rules. The FLAA repeats the principle that the rules of evidence do not apply in arbitration, adding a privilege exception. Handbook, note 9, at 17, 32, 38-39, 43-45. Apart from recommending that agreements be in writing, the NCBA Committee suggests no amendments for N.C. Gen. Stat. § 50-47 (2003). 2004 FLAA Amendments, note 14, at 41-42. *See also* Handbook, note 9, *Comment* to § 50-47; *Comment* to RUAA § 15, 7(1) U.L.A., note 1, at 32 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 471.

The ICACA, N.C. Gen. Stat. §§ 1-567.52 - 1-567.54 (2003), provides for statements of claim and defense, language to be used, and for hearings, subject to the parties' agreement on these matters. Use of the plural "hearings" contemplates the possibility of a prehearing conference. Summary disposition, RUAA § 15(b), is covered by N.C. Gen. Stat. § 1-567.54(a) (2003). *Id.* § 1-567.49 (2003) provides for rules of procedure to be selected by the parties, in default of which the arbitral tribunal shall choose rules, and declares that the rules of evidence do not apply in arbitration proceedings, subject to immunities and privilege.

16. § 116. Representation by lawyer

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

Commentary

N.C. Gen. Stat. § 1-569.16 (2003) is the same as RUAA § 16, except that "an attorney or attorneys" has been substituted for "a lawyer." The Committee recommends adding "or lawyers" to make it clear that a party may be represented by more than one attorney.

All North Carolina arbitration statutes have provided for counsel, declaring that waiver of a right to an attorney before the arbitration proceeding is ineffective. N.C. Gen. Stat. § 1-567.7 (2001), following the Uniform Act, § 6, 7(1) U.L.A. 198; the FLAA, N.C. Gen. Stat. § 50-48 (2003) (representation by "counsel" to make it clear that parties may be represented by more than one lawyer); the ICACA; *id.* § 1-567.48(b) (2003). *See also* Proposed Act, note 3, § 10; 2004 FLAA Amendments, note 14, at 42; Handbook, note 9, *Comment* to § 50-48; *Comment* to RUAA § 16, 7(1) U.L.A., note 1, at 33 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 465, 513.

17. § 117. 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 protection 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.

Commentary

N.C. Gen. Stat. § 1-569.17 (2003) tracks RUAA § 17, except for adding "of this section" after "(c)" in N.C. Gen. Stat. § 1-569.17(d) (2003), removal of brackets and adding this provision at the end:

> (h) An arbitrator shall not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

This had been proposed by the NCBA Group and could be added to § 117 if thought appropriate for other jurisdictions. In the main RUAA §§ 17(a)-17(e) follow the procedures of former N.C. Gen. Stat. § 1-567.8 (2001); RUAA §§ 17(f)-17(g) procedures are new, to give more teeth, where appropriate, to discovery incident to arbitration.

Among other jurisdictions that have previously enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 17(a), second sentence, and "shall be served" for "must be served" in § RUAA 17(g), second sentence. Nevada substitutes "provided by rule of court" for "provided by law" twice in RUAA § 17(g). *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 36 (2003 Cum. Ann. Pocket Pt.). Utah Code Ann. § 78-31a-118(3) (2002 repl.) substitutes "any" for "such" in RUAA § 17(c).

Former N.C. Gen. Stat. § 1-567.8 (2001) tracked the Uniform Act, § 7, 7(1) U.L.A. 199. The FLAA, N.C. Gen. Stat. § 50-49 (2003), and the ICACA, *id.* §§ 1-567.47, 1-567.57(a) (2003) arrive at the RUAA § 17 result through different language. The FLAA blends § 1-567.8 methods

with court backup if there is no cooperation with the arbitrator, adding options under the State family law statutes. The NCBA Committee has recommended no amendments for N.C. Gen. Stat. § 50-49 (2003); *see* 2004 FLAA Amendments, note 14, at 42-43. The ICACA says little about discovery methods, leaving them to the parties' agreement. The arbitrator has authority to enforce party-chosen rules; if there is no cooperation, § 1-567.57(a) allows resort to the Superior Court for discovery, including sanctions. *See also* Proposed Act, note 3, §§ 12-16, 19, 21; Handbook, note 9, *Comment* to § 50-49; *Comment* to RUAA § 17, 7(1) U.L.A., note 1, at 34 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 475-76; Part III.A.9, 2004 AAML Comm. Rep., note 1.

18. § 118. 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 119. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 122, 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*s* 123, *( )* 124 *and 124A.*

Commentary

RUAA § 18 appears as N.C. Gen. Stat. § 1-569.18(a) (2003), with "(a)" preceding the text, brackets removed and references to *id.* §§ 1-569.19, 1-569.22 - 1-569.24 (2003) instead of RUAA §§ 19, 22-24. The NCBA Group recommended adding N.C. Gen. Stat. §§ 1-569.18(b) - 1-569.18(c) (2003):

> (b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review. A party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator may seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.
>
> (c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section.

Section 18(b), now N.C. Gen. Stat. § 1-569.18(b) (2003), was proposed to foreclose trial court review of § 18 denials of preaward arbitrator rulings. To foreclose appellate review of a trial court's confirming a § 18 preaward ruling in favor of a party, *e.g.*, under North Carolina's substantial right doctrine or because the award involves injunctive relief, *cf.* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (2003), what is now N.C. Gen. Stat. § 1-569.18(c) (2003) was proposed and enacted. These proposals track the RUAA § 18 *Comment,* ¶¶ 3, 4. For those jurisdictions where issues like these may arise, legislation similar to N.C. Gen. Stat. §§ 1-569.18(b) - 1-569.18(c) (2003) might be considered. This limit of appeal rights is separate from RUAA § 28 limits; *see* Part III.A.28.

Apart from provisions for interim relief, discussed in Part III.A.8, there is no comparable North Carolina provision specifically dealing with interlocutory arbitrator rulings. Under Uniform Act practice, a party had to have an award confirmed, including presumably a pre-final award, under former N.C. Gen. Stat. § 1-567.9 (2001). That award would then be subject to vacatur, modification or correction applications under former *id.* §§ 1-567.13, 1-567.14 (2001), and only those statutes. *See also, e.g.,* Crutchley v. Crutchley, 293 S.E.2d 793, 797 n.2 (N.C. 1982). Presumably the FLAA, N.C. Gen. Stat. §§ 50-53 - 50-56 (2003), and the ICACA, *id.* §§ 1-567.64 - 1-567.65 (2003) would follow the same path for pre-final awards. However, these statutes have interim relief provisions that should cover most, if not all, needs before the final award. There is no Uniform Act provision for interim relief, entitled Provisional Remedies under the RUAA. Therefore, the only way a Uniform Act-governed arbitration party can obtain relief before the final award is to seek an interim award from the arbitrator, have it confirmed with the possibility that an opponent may seek vacatur, etc., after which there is the possibility of appeal. Proposed Act, note 3, § 22(c) allows arbitrators to make interim awards.

See also Comment to RUAA § 18, 7(1) U.L.A., note 1, at 37 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 466-71; Part III.A.4.

19. § 119. Award

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated *as authorized by federal or State law* 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 expand 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 *that* party gives notice of the objection to the arbitrator before receiving notice of the award.

(c) Unless the parties agree otherwise in a record, the arbitrator shall render a reasoned award.

Commentary

N.C. Gen. Stat. § 1-569.19 (2003) follows RUAA § 19 except the italicized words above. The phrase "as authorized by federal or State law" limits authentication to methods federal or State law approve. Parties cannot agree on an authentication method different from those the law approves. This may help minimize proof of authentication problems for awards entering the court system, perhaps years later, through the RUAA §§ 18, 22 confirmation processes. "That" was substituted in N.C. Gen. Stat. § 1-569.19(b) (2003) for "the" for more precision in RUAA §

19(b).

RUAA § 19(a) follows the former Uniform Act, N.C. Gen. Stat. § 1-567.9 (2001), adding the requirement that an arbitration organization, if involved in the proceedings, must deliver a copy of the award. Presumably this would usually be covered by *id.* § 1-567.9(a)'s "or as provided by the agreement" option.

The Committee recommends § 119(c), patterned on the FLAA, N.C. Gen. Stat. 50-51(b) (2003), to require a reasoned award, analogous to a court's Rule of Civil Procedure 52 findings of fact and conclusions of law, unless the parties agree otherwise. The FLAA contemplates that in family law arbitration there will be, more often than not, alimony, custody or support issues subject to modification under N.C. Gen. Stat. § 50-56 (2003) by an arbitrator or a court, and for that reason *id.* § 50-51(b) requires a reasoned award. Model Act § 124A follows § 50-56; therefore, there is a similar need for a default rule of a reasoned award. Parties to an arbitration may agree on the opposite form of an award, i.e., that it need not be reasoned, analogous to a general jury verdict. *Id.* § 50-51(b) (2003).

There are Uniform Act counterparts in the ICACA, *id.* § 1-567.61 (2003), which also provides for awards in foreign currency and a detailed list of costs and who pays them and declares that arbitrators are not required to render a reasoned award unless the parties agree on such. The usual international arbitration practice is for a reasoned award, but because parties might, in the usual course of dispute resolution for North Carolina-based arbitrations, be satisfied to proceed without such an award and the expense of paying for arbitrator time in drafting a reasoned award, *id.* § 1-567.61(b) (2003) does not require it. U.S. arbitration practice allows the equivalent of a general verdict as the award, unless parties agree otherwise; § 1-567.61(b) engrafts U.S. practice into the ICACA. Parties to an international arbitration may agree on the opposite form of an award. *Id.* §§ 1-567.61(b) (2003). Parties proceeding under today's Uniform Act or Model Act § 119 must agree on a reasoned award or an award in other than U.S. currency. Arbitration rules can guide these choices. The only requirement for a reasoned award in the RUAA is for punitive or exemplary damages, which the parties can include or exclude FROM consideration. *See* RUAA §§ 4, 21(a), 21(e) and Parts III.A.4, III.A.21. RUAA § 21 also generally covers remedies, fees and expenses of the arbitration proceeding.

Proposed Act, note 3, § 22(c) allows arbitrators to make interim awards. Section 22 does not require a reasoned award except for issues related to minors (custody, visitation, child support, other matters) and all issues for which parties preserve a right of appeal under *id.* § 25; under *id.* § 23 a party may request "clarification" of an award.

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 19(a), second sentence, and in RUAA § 19(b), first sentence. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 38 (2003 Cum. Ann. Pocket Pt.).

See also 2004 FLAA Amendments, note 14, at 44-46, recommending amendments to

N.C. Gen. Stat. § 50-51 (2003) to require agreements to be in writing, that the award recite the place where the arbitration was conducted, and a clarification in *id.* § 50-51(f)(2)(b) regarding counsel fees; Handbook, note 9, *Comment* to § 50-51; *Comment* to RUAA § 19, 7(1) U.L.A., note 1, at 38 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 481-88.

20. § 120. 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*s* 124(a)(1) or *124*(a)(3);

(2) because the arbitrator had 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*s* 122, 123, *( )* 124 *or 124A,* 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*s* 124(a)(1) or *124*(a)(3);

(2) because the arbitrator had 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 119(a), 122, 123, *( )*124 *and 124A.*

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 20(b) and "shall give" for "must give" in RUAA § 20(c). *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 40 (2003 Cum. Ann. Pocket Pt.). Utah Code Ann. §§ 78-31a-120(a)(2), 78-31a-120(d)(2) (2002 repl.) substitutes "if" for "because," and "has" for "had," in RUAA §§ 20(a)(2) and 20(d)(2). N.C. Gen. Stat. § 1-569.20 (2003) follows RUAA § 20 except for removing brackets and adding "of this section" after "(a)" in N.C. Gen. Stat. § 1-569.20(b) (2003), and adding the full section numbers in *id.* §§ 1-569.20(a)(1) and 1-569.20(d)(1) (2003).

Former *id.* § 1-567.10 (2001) followed the Uniform Act § 9, 7(1) U.L.A. 244-45, which allows the RUAA § 20(d) procedure. The FLAA, N.C. Gen. Stat. § 50-52 (2003) follows the

RUAA § 20 procedures, including the *id.* § 20(d) option of allowing a court to remit to the arbitrators, but does not include the *id.* §§ 20(a)(2), 20(d)(2) grounds, incorporating only the former N.C. Gen. Stat. §§ 1-567.14(a)(1), 1-567.14(a)(3) (2003) grounds. The ICACA, N.C. Gen. Stat. § 1-567.63, follows the Uniform Act formula, adding a costs provision, but does not have the RUAA § 20(d) option. The Uniform Act and the FLAA follow the 20-10 day turnaround RUAA § 20 would impose. The ICACA, reflecting international practice, provides for longer times but has no response time for opponents, and includes a costs provision. Proposed Act, note 3, § 24 is comparable with Model Act § 120 and the FLAA, UAA and RUAA.

See also 2004 FLAA Amendments, note 14, at 46, recommending an amendment to conform to RUAA § 20(d), and an addition to refer to rules for the award and costs; Handbook, note 9, *Comment* to § 50-52; *Comment* to RUAA § 20, 7(1) U.L.A., note 1, at 39 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 491-93.

21. § 121. 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 122 or for vacating an award under Section 123.

(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.

Commentary

RUAA §§ 21(a) and 21(b) and N.C. Gen. Stat. §§ 1-569.21(a) and 1-569.21(b) (2003) differ significantly. *Id.* §§ 1-569.21(a) - 1-569.21(b) (2003) provide:

> (a) An arbitrator may award punitive damages or other exemplary relief if:
>
> (1) The arbitration agreement provides for an award of punitive damages or exemplary relief:
>
> (2) An award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim; and
>
> (3) The evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.
>
> (b) An arbitrator may award reasonable expenses of arbitration if an award of expenses is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorneys' fees if:
>
> (1) The arbitration agreement provides for an award of attorneys' fees, and

(2) An award of attorneys' fees is authorized by law in a civil action involving the same claim.

RUAA § 4, discussed in Part III.A.4, would allow parties to opt out of punitive damages and attorney fees; § 21 is not among the RUAA provisions subject to nonwaiver. The North Carolina version allows punitive damages or attorney fees, but only if the agreement to arbitrate provides for them, the law already allows them, and in the case of punitive damages, evidence produced at the arbitration hearing justifies punitive damages under legal standards otherwise applying to the claim.

Courts traditionally award attorney fees in many family law cases. If parties wish to keep the right to claim them, under RUAA §§ 4 and 21(b), they need do nothing; an arbitrator should award them as a court would. The same would be true for reasonable expenses of the arbitration, *e.g.*, an arbitrator's fee and expenses, usually recited in the agreement to arbitrate. Under the North Carolina version of *id.* § 21(b), N.C. Gen. Stat. § 1-569(b) (2003), parties must affirmatively agree to attorney fees and other arbitration expenses otherwise awardable under law, perhaps in the agreement to arbitrate.

The law of some jurisdictions may allow punitive damages in family law cases. If parties wish to keep the right to claim them, under RUAA §§ 4 and 21(a), they need do nothing; an arbitrator should award them as a court would. Under the North Carolina version of *id.* § 21(a), N.C. Gen. Stat. § 1-569(a) (2003), parties must affirmatively agree to award of punitive damages otherwise awardable under law, perhaps in the agreement to arbitrate, and the arbitrator must make the §§ 1-569(a)(3) and 1-569(e) findings.

Under the Model Act, an award must be a reasoned award unless parties agree otherwise; *see* Part III.A.19 and § 119(c). If the North Carolina version of § 21(a) is chosen, an arbitrator must comply specifically with §§ 21(a)(3)'s and 21(e)'s terms in preparing an award.

N.C. Gen. Stat. § 1-569.21(c) - 1-569(e) (2003) track RUAA §§ 21(c)-21(e), except for adding "of this section" after "(b)" in § 1-569(c) and after "(a)" in § 1-569(e), substituting "any" for "such" in § 1-569.21(c), substituting "shall" for "must" in § 1-569.21(d), and substituting North Carolina statutory references in RUAA §§ 21(c) and 21(e).

Among other adopting jurisdictions, Hawaii substitutes "shall be" for "must be" in RUAA § 21(d); Nevada omits RUAA §§ 21(a), 21(e), the punitive damages provisions. *Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 42 (2003 Cum. Ann. Pocket Pt.). Utah Code Ann. § 78-31a-121(c) (2002 repl.) substitutes "order any remedies" for "order such remedies" in RUAA § 21(c), and in RUAA § 21(c)'s second sentence, substitutes "a remedy could not" for "such a remedy could not."

The former Uniform Act, N.C. Gen. Stat. § 1-567.11 (2001), tracked Uniform Act § 10, 7(1) U.L.A. 250, including excluding attorney fees. Enacting RUAA § 21(b) would have

superseded cases like Nucor Corp. v. General Bearing Corp., 423 S.E.2d 747, 749-51 (N.C. 1992), which followed former N.C. Gen. Stat. § 1-567.11 (2001) in saying attorney's fees could be awarded only if the arbitration agreement so provided. Language from Uniform Act § 12(a), 7(1) U.L.A. 280-81, "but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award," also appeared in North Carolina's equivalent as part of former N.C. Gen. Stat. § 1-567.13(a)(5) (2001), substituting "however," for "but, " and not as an ultimate provision after Uniform Act § 12(a), referring to all of § 12(a).

N.C. Gen. Stat. § 6-21.2 (2003), which would allow attorneys fees, was held not applicable in cases like *Nucor*. *Nucor*, 423 S.E.2d at 749-51, said that an agreement to arbitrate could provide for attorneys fees to be awarded.

The ICACA, N.C. Gen. Stat. §§ 1-567.61(f) - 1-567.61(h) (2003), says an arbitral tribunal may award interest and costs, to include counsel fees, unless the parties agree otherwise, and it may award specific performance. There is no provision for punitive or exemplary damages. *Id.* § 1-567.68 (2003) requires arbitrators to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." If parties fail to choose the law, the tribunal must do so. The tribunal may decide a case "ex aequo et bono (on the basis of fundamental fairness) or as amiable compositeur (as an 'amiable compounder') but only if parties agree to it." The tribunal must take into account usages of trade applicable to the transaction. The ICACA therefore would disallow the kind of award contemplated by the former Uniform Act, *id.* § 1-567.13(a)(5) (2001), unless parties agree to it under *id.* § 1-567.58(c) (2003).

The FLAA follows the ICACA, *id.* § 1-567.61(f) - 1-567.61(h) (2003) pattern in *id.* §§ 50-51(d) - 50-51(f) (2003) but includes the potential for punitive damages if parties to an arbitration agreement agree to them. If arbitrators award punitive damages, they must state the award in a record and specify facts justifying the award and the amount of an award attributable to punitive damages, the RUAA §§ 21(a), 21(e) formula, and what is now N.C. Gen. Stat. §§ 1-569.21(a)(3) and 1-569.21(e) (2003). FLAA parties must opt into punitive damages instead of opting out of them as the RUAA would require. *Id.* § 50-54(a)(7) (2003) allows vacating a punitive damages award if it is clearly erroneous, a provision that is not in RUAA § 23, former N.C. Gen. Stat. § 1-567.13 (2001), or *id.* § 1-567.64 (2003), which incorporates *id.* § 1-569.23 (2003) by reference. *See also* Part III.A.11, 2004 AAML Comm. Rep., note 1; Handbook, note 9, *Comment* to § 50-51; *Comment* to RUAA § 21, 7(1) U.L.A., note 1, at 40 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 481-88.

2004 FLAA Amendments, note 14, at 44-45, recommends requiring agreements on costs to be in writing and rewriting N.C. Gen. Stat. § 50-51(f)(2) (2003)'s attorney fee provision.

22. § 122. Confirmation of award

After a party to an arbitration 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 parties agree otherwise in a record that part or all of an award shall not be confirmed by the court,* the award is modified or corrected pursuant to Sections 120, *( )* 124*( ) and 124A,* or *the award* is vacated pursuant to Section 123.

Commentary

N.C. Gen. Stat. § 1-569.22 (2003) follows RUAA § 22, except for removing brackets, adding a comma, "award, at", and substituting statutory references for RUAA citations to §§ 20, 23 and 24. The Model Act would add the italicized material, remove the brackets, add the comma, and add "s" to "Section" before "120." The italicized additions reflect North Carolina, and perhaps other jurisdictions', practice. The Committee recommends adding the italicized language to make it clear that parties may agree to keep confidential part of an award, *e.g.*, bank numbers and similar confidential data or parts of an award, *e.g.* dealing with sale of property. Model Act § 119(c) provides for reasoned awards unless parties agree otherwise; reasoned awards are frequently necessary so that a reviewing court or arbitrator, acting under Model Act § 124A, may determine if an award for postseparation support, alimony, child custody or child support should be modified. *See also* Parts III.A.19, III.A.24A; 2004 FLAA Amendments, note 14, at 46-47; Handbook, note 9, *Comment* to § 50-53; *Comment* to RUAA § 22, 7(1) U.L.A., note 1, at 42 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 488-91.

Former N.C. Gen. Stat. § 1-567.12 (2001) followed Uniform Act § 11, 7(1) U.L.A. 264, as does the FLAA, N.C. Gen. Stat. § 50-53 (2003), which adds a costs provision and which, since 2003, allows parties to agree to not submit an award for confirmation ("Unless the parties agree otherwise . . . "). The ICACA, *id.* § 1-567.65 (2003), has the substance of the Uniform Act. Proposed Act, note 3, § 26 follows the UAA's substance, adding a special provision for court review of issues related to child custody, visitation, child support or other matters related to minor children. It also provides that if parties have agreed that questions of fact, questions of law and mixed questions of fact and law may be appealed, the trial court must confirm the award relating to those issues, unless issues related to vacatur, modification or correction under *id.* § 27-28 exist. Section 26(c) provides parties may end an arbitration proceeding at any time and submit it to the court.

23. § 123. 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 115, 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 115(c) not later than the beginning of the arbitration hearing; *( )*

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 109 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(7) the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subdivision is on the party seeking to vacate the arbitrator's award;

(8) the award included punitive damages, and the court determines that the award for punitive damages is clearly erroneous; or

(9) if the parties contract in an agreement to arbitrate for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

(b) A [motion] under this section must be filed within 90 days after the [movant] receives notice of the award pursuant to Section 119 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 120, 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 subsections (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsections (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 119(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 *pursuant to Sections 124 or 124A* is pending.

Commentary

N.C. Gen. Stat. § 1-569.23 (2003) tracks RUAA § 23, with these exceptions: brackets in § 123 are removed; statutory references are substituted for RUAA section references; "moving party" is substituted for "movant" in § 1-569.23(b); "pursuant to G.S. 1-569.24" has been added

to § 1-569.23(d) before "is pending."

Apart from housekeeping amendments like removing brackets, Section 123 would add "*pursuant to Sections 124 or 124A*" in § 123(d) for clarity. Section 123 also would add § 123(a)(7), allowing vacatur if a court determines that the award for child support or child custody is not in the best interests of the child, following the FLAA, N.C. Gen. Stat. § 50-54(a)(6) (2003). Tex. Family Code § 153.0071 (2002) suggested the second sentence of § 50-54(a)(6), followed in Section 123(a)(7) on the burden of proof. Sections 123(a)(7) and 124A, which follows, are linchpins of validity for the Model Act. N.C. Gen. Stat. § 50-54(1)(6) (2003), its FLAA equivalent, supersedes Crutchley v. Crutchley, 293 S.E.2d 793 (N.C. 1982), which held that child support and child custody could not be the subject of an arbitral award for public policy reasons, because those issues were always open for review by a court under the best interests of the child standard. Section 123(a)(7) and its FLAA counterpart, § 50-54(a)(6), would allow court review of an arbitral award to determine if the award represented the best interests of the child as to custody or support. Jurisdictions considering allowing arbitration on the RUAA model must amend RUAA § 23 to add protection for child custody and child support issues if the law requires that judgments for these claims must always remain open for review in the best interests of the child. Drafters in other jurisdictions must also determine whether the burden of proof recited in § 123(a)(7)'s second sentence reflects that jurisdiction's law. A new, separate § 124A, with no RUAA equivalent, is discussed in Part 24A below.

Section 123 adds § 123(a)(8), allowing vacatur if the court determines an award for punitive damages, awarded as contracted for under Sections 121(a) and 121(e) under the RUAA opt-out formula or the North Carolina opt-in formula, was clearly erroneous. An argument could be made that this provision represents overabundance of caution, and that parties contracting for punitive damages by failing to opt out under RUAA §§ 4 and 21, or opting in under the N.C. Gen. Stat. §§ 1-569.4 and 1-569.21 (2003) formula, should be bound by their agreement. However, the Committee submits this draft for consideration by jurisdictions considering the Model Act.

Section 123 adds § 123(a)(9), allowing vacatur if parties contract in an agreement to arbitrate for judicial review of errors of law in the award, if the arbitrator committed an error of law prejudicing a party's rights. The North Carolina General Assembly agreed with the 1999 FLAA drafters on including an opt-in provision for court review of errors of law; *see also* N.C. Gen. Stat. § 50-60(b) (2003); Part III.A.20; Part III.A.14, 2004 AAML Comm. Rep., note 1. If a jurisdiction decides there should be no court review of errors of law, the rule for the North Carolina RUAA and the principle the NCCUSL followed, *see Comment*, ¶ B, 7(1) U.L.A., note 1, at 43 (2003 Cum. Ann. Pocket Pt.), § 123(a)(9) should be deleted.

Italicized parentheses after § 123(a)(6) represent a deleted "or." Jurisdictions electing not to add any but § 123(a)(7), an essential amendment, should insert "or" after the penultimate alternative in § 123(a).

Former N.C. Gen. Stat. § 1-567.13 (2001) followed Uniform Act § 12, 7(1) U.L.A. 280, as amended in 1956. "The 1956 amendment [to the Uniform Act] omitted 'or rendered an award contrary to public policy' from subd. (a)(3), and omitted provisions authorizing vacation of award where it is so indefinite or incomplete that it cannot be performed, or is so grossly erroneous as to imply bad faith on the part of the arbitrators." *Amendments*, 7(1) U.L.A. 281.

Besides other jurisdictions' recognition of the "best interest of the child" public policy exception RUAA *Comment*, ¶ C.4 below discusses, Crutchley v. Crutchley, 293 S.E.2d 793 (N.C. 1982) held child support and child custody issues not arbitrable because of the finality of awards under the Uniform Act; *see also* notes 9-14 and accompanying text. The FLAA, with its procedure for judicial review of awards for these and similar issues, was the response. The FLAA, N.C. Gen. Stat. § 50-54 (2003), follows former N.C. Gen. Stat. § 1-567.13 (2001), with these additions: *id.* § 50-54(a)(6) (2003), first sentence, added for child support or child custody issues; *id.* § 50-54(a)(6) (2003), second sentence, suggested by Tex. Family Code § 153.0071 (2002) on the burden of proof; N.C. Gen. Stat. § 50-54(a)(7) (2003), if the parties have agreed the arbitrator may award punitive damages under *id.* § 50-51(e) (2003); *id.* § 50-54(a)(8) (2003), vacatur for errors of law if the parties agree to such, suggested by a provision in the then Draft RUAA. As the RUAA *Comment*, ¶ B says, the NCCUSL eventually decided not to recommend enactment of the equivalent of N.C. Gen. Stat. § 50-54(a)(8) (2003).

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" twice in RUAA § 23(b); "shall be" for "must be" in RUAA § 23(c), second sentence; "shall render" for "must render" in RUAA § 23(c), fourth sentence. Nevada substitutes "movant" for "person" in RUAA § 23(a)(5) and "A motion under this section must be made" for "A [motion] under this section must be filed" in RUAA § 23(b). *See Action in Adopting Jurisdictions*, 7(1) U.L.A., note 1, at 49 (2003 Cum. Ann. Pocket Pt.). Utah Code Ann. § 78-31a-123(a)(4) (2002 repl.) substitutes "arbitrator's authority" for "arbitrator's powers" in RUAA § 23(a)(4).

The ICACA, N.C. Gen. Stat. § 1-567.64 (2003), has a similar vacatur provision, incorporating by reference *id.* § 1-569.23 (2003).

Apart from a conforming amendment for N.C. Gen. Stat. § 50-54(d) (2003) to parallel parties' option under *id.* § 50-53 (2003) to agree in writing that part or all of an award shall not be confirmed by a court, 2004 FLAA Amendments, note 14, at 47-49 recommends no amendments for N.C. Gen. Stat. § 50-54 (2003). *See also* Handbook, note 9, *Comment* to § 50-54; *Comment* to RUAA § 23, 7(1) U.L.A., note 1, at 43 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 493-500. Proposed Act, note 3, § 27 follows the UAA model, adding a 30-day deadline for applications to vacate.

24. § 124. Modification or correction of award

(a) Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 119 or within 90 days after the [movant] receives notice of a modified or

corrected award pursuant to Section 120, 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 on 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 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.

Commentary

Apart from substituting statutory section numbers for RUAA section numbers, removal of brackets, substitution of "the moving party" for "movant," adding a comma between "arbitrator" and "add," and adding "of this section" after "(a)" in RUAA § 24(b), N.C. Gen. Stat. § 1-569.24 tracks RUAA § 24. Former N.C. Gen. Stat. § 1-567.14(a)(2) (2001), the antecedent of RUAA § 24(a)(2), did not include the comma. The word "motion" in RUAA § 24(b)'s second sentence is not bracketed, a typographical error.

Former N.C. Gen. Stat. § 1-567.14 (2001) tracked the Uniform Act, § 13, 7(1) U.L.A. 409. The only difference between RUAA § 24 and the substance of the Uniform Act is the second sentence of § 24(b); RUAA § 23(d) also so provides. The FLAA, N.C. Gen. Stat. § 50-55 (2003), tracks the Uniform Act, *id.* § 1-567.14 (2001), adding *id.* § 50-55(d) (2003), a costs provision. The ICACA, *id.* § 1-567.63 (2003), allows the arbitral tribunal to correct its awards. *Id.* § 1-567.64 (2003) incorporates *id.* § 1-569.23 (2003) by reference. Proposed Act, note 3, § 28 is similar to the UAA model.

2004 FLAA Amendments, note 14, at 49-50, proposes no amendments for N.C. Gen. Stat. § 50-55 (2003); *see also* Handbook, note 9, *Comment* to § 50-55; Walker, *Arbitrating*, note 9, at 500-02.

24A. § 124A. Modification of award for alimony, postseparation support, child support or child custody based on substantial change of circumstances

(a) A court or arbitrators may modify an award for postseparation support, alimony, child support or child custody under conditions stated in [here insert a jurisdiction's provisions

for postseparation support, alimony, child support and child custody] in accordance with procedures stated in subsections 124A(b) through 124A(f).

(b) Unless the parties have agreed in a record that an award for postseparation support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony pursuant to [here insert a jurisdiction's provisions for postseparation support and alimony] may be modified if a court order for alimony or postseparation support could be modified pursuant to [here insert a jurisdiction's provisions for court modification of postseparation support or alimony].

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified pursuant to [here insert a jurisdiction's provisions for child support or child custody].

(d) If an award for modifiable postseparation support or alimony, or an award for child support or custody has not been confirmed pursuant to Section 122, upon the parties' agreement in a record these matters may be submitted to arbitrators chosen by the parties as provided in Section 111, in which case Sections 120 and 122 through 124A apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child support or custody has been confirmed pursuant to Section 122, upon the parties' agreement in a record and joint motion the court may remit these matters to arbitrators chosen by the parties as provided in Section 111, in which case Sections 120 and 122 through 124A shall apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of Section 124 apply to modifications or corrections of awards for postseparation support, alimony, child support or child custody.

Commentary

There is no equivalent for § 124A in the RUAA or the UAA; it follows N.C. Gen. Stat. § 50-56 (2003) except for substituting Model Act section numbers, bracketed references to law in an adopting jurisdiction dealing with postseparation support, alimony, child custody or child support, and adding "in a record" after "agreed" in § 124A(b), and after "agreement" in §§ 124A(e) and 124A(f). Adding "in writing" to N.C. Gen. Stat. §§ 50-56(b), 50-56(e) and 50-56(f) (2003) after "agreed" or "agreement" is among proposed amendments to the FLAA being prepared for submission to the North Carolina legislature. *See* 2004 FLAA Amendments, note 14, at 50-51. Section 101(6) defines "record." *See also* Part III.A.1. Proposed Act, note 3, § 26 follows a different track, requiring a court to consider child custody, visitation, child custody and other issues related to minor children before confirming an award.

Section 124A, operating with § 123(a)(7), allows arbitrators or a court to modify awards

for postseparation support, alimony, child support or child custody under conditions stated in a jurisdiction's statutes by which a court may modify an award for alimony, postseparation support, child support or child custody after a case has been filed and has been litigated or settled. In the situation of young children, *e.g.*, there may be a succession of modifications throughout the time for custody and support. In each case a decision on modifying postseparation support, alimony, child support or child custody could be made by the court or by arbitrators (perhaps the same arbitrators, since they would have the file and be familiar with the case), in the court's discretion if the parties agree and file an appropriate motion under § 124A(e). If parties have not filed to confirm an initial arbitral award for postseparation support, alimony, child support or child custody under § 122, § 124A(d) allows them to agree to arbitrate substantial change of circumstances without getting the initial award confirmed under § 122 and moving the court for arbitration. The second, modified award could be confirmed under § 122 or not, with either party having the option to seek confirmation. Section 124A(f) incorporates § 124 by reference unless modified by § 124A. The catchline refers to "substantial change of circumstances," the benchmark for modifying postseparation support, alimony, child custody or child support under North Carolina law. If another jurisdiction has a different standard, that should be recited in the catchline. Proponents of the FLAA included "substantial change of circumstances" in the catchline to underscore to the legislature, counsel and courts that the FLAA introduced no substantive change in standards for modification. Section 124A introduces arbitrators as possible modifiers of these awards if the parties so agree or the court remits the issue(s) to the arbitrators. The court keeps ultimate authority over modifying these awards, precisely as a court has ultimate authority to modify them if there has been no arbitration. *See also* Handbook, note 9, *Comment* to § 50-56; Walker, *Arbitrating*, note 9, at 446-47, 502-04. The "alimony, postseparation support, child support or child custody" listing in the § 124A catchline, § 124A(a), § 124A(b), § 124A(d), § 124A(e) and § 124A(f) also reflects North Carolina law; drafters should be alert to insert their jurisdiction's phrases. For example, other jurisdictions may not have a separate category of postseparation support as North Carolina does.

The Reporter labeled this provision § 124A, rather than breaking the sequence of later sections, which follow the RUAA numbering sequence. *See also* Part III.A.23.

Proposed Act, note 3, § 25(b) addresses child custody, visitation, child support and other related issues differently, providing for court review before an award for these becomes "binding and non-appealable." In view of some jurisdictions' strong public policy for the possibility of continued adjustment of judgments under, *e.g.*, "substantial change of circumstances," this approach, if enacted, may be at variance with such a public policy. A State legislature might be quite watchful in this regard and refuse enactment.

25. § 125. Judgment on award; attorneys' fees and litigation expense

(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 122, 123, *( )* 124 *or 124A*, 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.

(d) Notwithstanding [jurisdiction's statutes governing sealing court papers], the court in its discretion may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this [Act], or any part of such arbitration award or judgment or court order, to be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of such opened arbitration awards or orders or judgments or court orders. The court in its discretion may order that any arbitration award or order or any judgment or court order entered as a court order or judgment pursuant to this [Act], or any part of such arbitration award or order or judgment or court order, to be redacted, such redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of such previously redacted arbitration awards or orders or judgments or court orders opened pursuant to the court's order.

Commentary

Apart from changing "Expense" to "Expenses" in the caption, changing "application to "motion" in RUAA § 25(b), removing brackets and substituting statutory numbers for RUAA section numbers, N.C. Gen. Stat. § 1-569.25 (2003) tracks RUAA § 25. Utah Ann. Code § 78-31a-125(a) (2002 repl.) substitutes "judgment conforming to the award" for "judgment in conformity therewith" in RUAA § 25(a).

Section 125(d) has no known counterpart in arbitration legislation. It is designed to protect, *e.g.*, innocent children from revelation of facts and circumstances in what would otherwise be the public record of a judgment on an arbitral award. It will also protect business secrets necessarily the subject of a reasoned award, the norm under § 119(c), a variant from RUAA § 119; *see* Part III.A.19. Section 125(d) makes it clear that this is an exception to other State legislation and law governing sealed records, *e.g.*, N.C. Gen. Stat. §§ 7A-109, 7A-276.1, 132-1 (2003) or similar North Carolina laws, and would do the same for other jurisdictions' law. The phrase "*or similar laws*" is a catchall for future legislation, other statutes elsewhere in a jurisdiction's code, or perhaps a common-law principle. (State statutes cannot supersede federal law, *e.g.*,Virmani v. Novant Health Inc., 259 F.3d 284, 293 [4th Cir. 2001]), constitutional provisions, *e.g.*, like the North Carolina Constitution's art. I, § 18 open courts provision, or cases interpreting them.) A court may order sealing of only part of an order or judgment. "Good cause" is a standard phrase; *see, e.g.*, Fed. R. Civ. P. 26(c). The last sentence of § 125(d) allows resealing if a court deems such action appropriate.

There are several reasons for § 125(d): (1) It continues the general policy of privacy of arbitration generally, *see* Basic Rule 11 in Parts II.C and III.C; (2) It protects innocent children and spouses from airing of some aspects of family law cases; (3) It protects against publicizing business secrets and the like, which may be an issue in the arbitration of dividing a marital estate. Besides these policies, *see also* the nonfiling, judicial in camera filing and protective order provisions of, *e.g.*, Fed. R. Civ. P. 5(d), 5(e), 26(c) and Fed. R. Crim. P. 16(d)(1), which may have counterparts elsewhere.

The issue of orders to seal court records has been controversial, as the following discussion of recent North Carolina litigation attests. The story doubtless has been the same elsewhere.

Virmani v. Presbyterian Health Serv. Corp., 515 S.E.2d 675, 685-86 (N.C. 1999) *aff'g in part, rev'ing in part* 493 S.E.2d 310, 314-321 (N.C. App. 1997), *cert. denied*, 529 U.S. 1033 (2000), held a court retains inherent power, balanced against other policy considerations, to control records disclosure, under N.C. Const., art. IV, § 1 and N.C. Gen. Stat. §§ 7A-109(a), 132-1 (2003), and that a "clear statutory exemption or exception" like *id.* § 131E-95 can require nondisclosure. On the other hand, if a State agency or a party to a lawsuit voluntarily places them in a public record, they are not subject to sealing. *Virmani*, 515 S.E.2d at 686-88. *Virmani*, 474-78, 515 S.E.2d at 692-94, further held the public has only a qualified right of access to court records under N.C. Const., art. I, § 18, and that the otherwise sealable hospital records in that case were not deserving of access. *Virmani*, 515 S.E.2d at 695-96, unlike the Court of Appeals opinion, also denied relief under U.S. Const., amend. I, noting the Supreme Court of the United States had never held the public has a right of access to civil court proceedings. Thus under *Virmani*, the hospital's records were protected, but those plaintiff appended to the complaint were not. (Unlike the Court of Appeals' invoking N.C. Gen. Stat. § 7A-276.1 [2003], the State Supreme Court paid that statute no attention.) Proposed N.C. Gen. Stat. § 50-57(b), *see* 2004 FLAA Amendments, note 14, at 51-53, would graft a statutory exception to the general statutory rule of N.C. Gen. Stat. §§ 7A-109, 7A-276.1 and 132-1 (2003) for the North Carolina FLAA. Filing under *id.* § 50-57 (2003) would not be a voluntary filing with a complaint as in *Virmani* but a filing that a statute, *id.* § 50-57, requires.

Ashcraft v. Conoco, Inc., 218 F.3d 301-03 (4th Cir. 2000) followed prior cases in holding, for the federal courts in the Fourth Circuit, that while a District Court has supervisory power over its records and may seal documents if the public's right of access is outweighed by competing interests, the presumption in such cases favors public access. *Ashcraft* recites principles for the federal courts within the Fourth Circuit, not the standards for the State courts, where divorce and other family law cases must be filed.

On the other hand, federal and State legislation like the U.S. E - Government Act of 2002 and implementing administrative regulations under them articulate a growing concern with information privacy. Model Act § 125(d), because of its general terms, would be compatible with privacy rules this kind of legislation requires.

The amendment also allows a judge to order redactions, to order that material previously redacted be opened, and to order material previously redacted and later ordered opened to be redacted anew. Redaction, *e.g.*, blotting out bank account or Social Security numbers, might be appropriate where sealing would not be appropriate. Redaction might be combined with partial sealing. Decisions to seal or redact would be in the judge's discretion.

Former N.C. Gen. Stat. § 1-567.15 (2001) followed the Uniform Act § 14, 7(1) U.L.A. 419, adding "and be docketed" after "therewith." Both are like RUAA § 25(a), which adds the phrase "vacating without directing a hearing," which RUAA § 25's *Comment* ¶ 1 below discusses. There is no equivalent in the North Carolina Uniform Act for RUAA §§ 25(b), 25(c), but the ICACA, N.C. Gen. Stat. § 1-567.65 (2003) allows "costs of the application and of the subsequent proceedings." The FLAA, *id.* § 50-57 (2003), follows former § 1-567.15 (2001), but incorporates *id.* § 50-51(f) (2003) (costs, attorneys fees, expenses), as do *id.* §§ 50-53 (2003) (confirmation of award), 50-54(d) (2003) (vacating award), 50-55(d) (2003) (modifying, correcting award), 50-56(f) (2003) (same, for alimony, postseparation support, child support, child custody). As with RUAA §§ 4(a), 25(c), parties may contract out of these fees, etc., N.C. Gen. Stat. § 50-51(f)(1) (2003), insofar as the law allows them to do so. Proposed Act, note 3, § 29 is similar to the UAA.

See also 2004 FLAA Amendments, note 14, at 51-53; Handbook, note 9, *Comment* to § 50-57; *Comment* to RUAA § 25, 7(1) U.L.A., note 1, at 50 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 488-91.

26. § 126. Jurisdiction

(a) A court of this State having jurisdiction over the controversy and the parties may enforce the 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].

Commentary

Apart from removing brackets and substituting "Article" for "Act" in RUAA § 26(b), N.C. Gen. Stat. § 1-569.26 (2003) is the same as RUAA § 26. *See also* § 101(3) and Part III.A.1 for the definition of "court." Parties may waive § 126's requirements after a dispute arises; *see* § 104(b)(1) and Part III.A.4.

Former N.C. Gen. Stat. § 1-567.17 (2001) tracked the Uniform Act § 17, 7(1) U.L.A. 429. The FLAA, *id.* § 50-59 (2003), tracks former § 1-567.17 (2001). North Carolina's District Courts are the proper, but not the exclusive, court for family law cases. *Id.* §§ 7A-240, 7A- 244 (2003). Divorce cases filed in Superior Court are subject to transfer to District Court. However, some enforcement provisions lie exclusively with Superior Courts. The result is that the two Courts,

with concurrent divorce jurisdiction but with the District Court designated as the "proper" court, can award complete protection for parties while leaving divorce issues to the District Courts. The Committee adds this comment for jurisdictions with similar jurisdictional issues to suggest that § 126's court jurisdiction language should be left as general as in the RUAA to avoid a problem of two cases, one for divorce and related issues, and another elsewhere for enforcement and similar issues.

By contrast, the ICACA does not have a comparable provision; N.C. Gen. Stat. §§ 1-567.32(a)(5), 1-567.36 (2003) underscore the State legislature's decision that international arbitration cases, most of which involve much more money than the nominal $ 15,000 dividing line between Superior and District Courts in North Carolina, must be heard in Superior Court.

See also 2004 FLAA Amendments, note 14, at 53-54, proposing no amendments for the equivalent of § 126, but adding a definitions subsection; Handbook, note 9, *Comment* to § 50-59; *Comment* to RUAA § 26, 7(1) U.L.A., note 1, at 51 (2003 Cum. Ann. Pocket Pt.).

27. § 127. Venue

A [motion] pursuant to Section 105 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.

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "circuit" for "[county]" throughout RUAA § 27 and in *id.* § 27, first and third sentences, substitutes "shall be made" for "must be made." *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 52 (2003 Cum. Ann. Pocket Pt.). Besides removing brackets and substituting N.C. Gen. Stat. § 1-569.5 (2003) for "Section 5," and capitalizing "State," N.C. Gen. Stat. § 1-569.27 tracks RUAA § 27.

As RUAA § 27 *Comment,* ¶ 2, 7(1) U.L.A., note 1, at 52 (2003 Cum. Ann. Pocket Pt.) notes, arbitration situs clauses have provoked controversy; legislation or case law may impact parties' choice. *E.g.*, N.C. Gen. Stat. § 22B-3 (2003) declares void and unenforceable as against public policy arbitration situs clauses, with certain exceptions. On the other hand, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533-39 (1995) gave presumptive validity to an out-of-country arbitration situs clause despite a Carriage of Goods by Sea Act provision, 46 U.S.C. App. § 1303(8) (2000), invalidating bill of lading clauses lessening liability. Jurisdictions considering enacting the Model Act must be aware of State and federal law on this

issue, particularly if the agreement to arbitrate would include issues outside the usual marriage dissolution, *e.g.,* breakup of a local family business or involving transactions in interstate and foreign commerce.

The North Carolina General Assembly did not enact Uniform Act § 18, 7(1) U.L.A. 435, the analogous provision for RUAA § 27. The FLAA follows the former North Carolina Uniform Act in not having an equivalent special venue statute. N.C. Gen. Stat. § 1-567.36 (2003) declares venue rules for ICACA-based arbitrations. Proposed Act, note 3, § 32 tracks the UAA; *see also Comment* to RUAA § 27, 7(1) U.L.A., note 1, at 52 (2003 Cum. Ann. Pocket Pt.).

28. § 128. 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) Unless the parties contract in an agreement to arbitrate for judicial review of errors of law as provided in Section 123(a)(9), a party may not appeal on the basis that the arbitrator failed to apply correctly the law under [statutory citation to family law of enacting jurisdiction].

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

Commentary

Among jurisdictions that have enacted the RUAA, Hawaii substitutes "shall be" for "must be" in RUAA § 28(b). *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 52 (2003 Cum. Ann. Pocket Pt.). Besides removing brackets and substituting "Article" for "Act" in RUAA § 28(a)(6), N.C. Gen. Stat. §§ 1-569.28(a) (2003) follows RUAA § 28(a). *Id.* 1-569.28(b) (2003) follows RUAA § 28(b), reprinted as § 28(*c*) above. In the original, RUAA § 28(c) does not capitalize "Section" as the NCCUSL draft does elsewhere.

Section 128(b) is not in RUAA § 28. As its text suggests, § 128(b) links with § 123(a)(9), which is not in RUAA § 23. These provisions would allow court review and appeal of that court review of errors of law, if a jurisdiction wishes to enact this variant. *See* Part III.A.23. If a jurisdiction does not wish to enact this option, §§ 123(a)(9) and 128(b) should be deleted, and § 128(c) above should be renumbered as § 128(b).

Former N.C. Gen. Stat. § 1-567.18 (2001) tracked Uniform Act § 19, 7(1) U.L.A. 437;

RUAA § 28 uses almost the same language. The FLAA, following an earlier RUAA draft, allows judicial review of errors of law as provided in N.C. Gen. Stat. § 50-54(a)(8) (2003) if parties have contracted for this; otherwise, *id.* § 50-60 (2003) tracks former § 1-567.18. The ICACA, N.C. Gen. Stat. § 1-567.67 (2003), tracks former § 1-567.18, substituting reference to ICACA provisions. Model Act §§ 104(b)(1) and 104(c) differ from RUAA §§ 4(b)(1) and 4(c); the Model Act would not allow parties to contract out of appeal rights after a controversy arises as the RUAA would. Model Act § 104(c) includes § 128 as one of its nonwaivable provisions. The reason for this difference is preservation of appellate rights of review for postseparation support, alimony, child custody and child custody issues by appeal after trial court determinations. 2004 FLAA Amendments, note 14, at 29-34, 54-55; *see also* Handbook, note 9, *Comment* to § 50-60; Walker, *Arbitrating*, note 9, at 493-500, 504-06.

Proposed Act, note 3, § 25, while otherwise following the UAA format for issues on appeal, allows appeals on questions of law, questions of fact and mixed questions of fact and law if parties contract for it. Section 25(b) would also provide for denying appeal of child custody, visitation and child support issues after court review of an award if the parties contract out of appeal. In some jurisdictions such a provision may thwart public policy requiring that these issues remain open for court review, including appellate review.

29. § 129. Uniformity of application and construction

Certain provisions of this [Act] have been adapted from the [Uniform Arbitration Act or Revised Uniform Arbitration Act, whichever is in force in a jurisdiction] and [citation to appropriate parts of a jurisdiction's family law legislation]. This [Act] shall be construed to effect its general purpose, to make uniform provisions of these [Acts] and [citation to appropriate parts of a jurisdiction's family law legislation].

Commentary

Section 129 follows the FLAA, N.C. Gen. Stat. § 50-61 (2003), format, rather than RUAA § 29, discussed below. Read with § 101(a), discussed in Part III.A.1, § 129 emphasizes that the Model Act's links with family law legislation are not meant to change substantive law. The Model Act would only introduce a new procedure. Section 129 also underscores the need to construe identical language in this Act and language in the UAA or the RUAA, whichever is in force in a jurisdiction, in the same way. 2004 FLAA Amendments, note 14, at 56, recommends inter alia incorporating the North Carolina UAA and RUAA versions in N.C. Gen. Stat. § 50-62 (2003).

If a jurisdiction is considering enacting the RUAA to replace the UAA, proponents of the Model Act might consider incorporating the RUAA by reference if it appears the RUAA will pass in the same legislative session. This assumes a risk that the RUAA as enacted in such a jurisdiction will not be the same as the NCCUSL version and may include provisions less compatible with the Model Act and its goals. For those jurisdictions that have not enacted either

uniform act, citation might be made to other, similar arbitration legislation.

Some jurisdictions enacting the RUAA, *e.g.*, Utah, omitted RUAA § 29. There is nothing wrong with this approach, although it may be seen as weakening a policy of uniformity that a legislative command might give. Besides substituting "Article" for "uniform act," "shall" for "must" and "states" for "States," N.C. Gen. Stat. § 1-569.29 (2003) copies RUAA § 29, which recites:

> 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.

Former N.C. Gen. Stat. § 1-567.20 (2001) copied Uniform Act § 21, 7(1) U.L.A. 467, the counterpart for RUAA § 29. The ICACA has no counterpart, except incorporating by reference parts of the RUAA in N.C. Gen. Stat. § 1-567.64 (2003), thereby derivatively incorporating uniformity principles.

See also Handbook, note 9, *Comment* to § 50-61; Walker, *Arbitrating*, note 9, at 447.

30. § 130. 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, *or as otherwise authorized by federal or State law governing these electronic records or electronic signatures.*

Commentary

N.C. Gen. Stat. § 1-569.30 (2003) follows RUAA § 30, except for substituting "Article" for "Act" (not bracketed in the RUAA version), adding the citation to the Electronic Signatures in Global and National Commerce Act, and adding the last provision to anticipate other or additional federal or State legislation. The final provision is recommended for the Model Act so that it can keep pace in a fast-moving field.

Among other jurisdictions that have enacted the RUAA, Nevada omits § 30. *See Action in Adopting Jurisdictions,* 7(1) U.L.A., note 1, at 53 (2003 Cum. Ann. Pocket Pt.). Utah adds the Statutes at Large reference to the Act. Utah Code Ann. § 78-31a-130 (2002 repl.).

2004 FLAA Amendments, note 14, at 56, recommends adding the substance of RUAA § 30 as enacted in N.C. Gen. Stat. § 1-569.30 (2003) to *id.* § 50-62 (2003). *See also Comment* to RUAA § 30, 7(1) U.L.A., note 1, at 53 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 518.

31. § 131. Effective date

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

Commentary

North Carolina and Utah omit RUAA § 31. 2003 N.C. Sess. Laws ch. 2003-345 § 4 declares that the North Carolina RUAA became effective January 1, 2004 and applies to agreements made after that date. Former N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001) governs agreements to arbitrate dated before January 1, 2004 unless parties agree, pursuant to *id.* § 1-569.3(b) (2003), that the RUAA governs their agreement. *See also* Parts III.A.3, III.A.32; *Comment* to RUAA § 31, 7(1) U.L.A., note 1, at 53 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 448. Model Act § 133 has a blank provision for an effective date.

32. § 132. Repeal

Effective on [delayed date should be the same as that in Section 103(c)], the [*applicable legislation in a jurisdiction*] is repealed.

Commentary

Section 132 is necessary if a jurisdiction has earlier applicable legislation governing family law arbitrations. If a jurisdiction does not choose to enact § 103(c) but chooses to enact § 132, the date in the first bracketed material should be the repealer date. The phrase "*applicable legislation in a jurisdiction*" has been substituted for "Uniform Arbitration Act," because some jurisdictions may have statutes other than the UAA governing family law arbitrations. The substitution is generic. The title of the legislation, or citations to it, should replace the generic substitution.

RUAA § 32 provides:

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

North Carolina and Utah did not enact RUAA § 32. 2003 N.C. Sess. Laws ch. 2003-345 § 1 repealed the former N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001). Although Uniform Act § 24, 7(1) U.L.A. 468, is a suggested repealer provision, the North Carolina General Assembly did not enact it. *See also* Parts III.A.3, III.A.31; *Comment* to RUAA § 32, 7(1) U.L.A., note 1, at 53 (2003 Cum. Ann. Pocket Pt.); Walker, *Arbitrating*, note 9, at 448.

33. § 133. 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 [*applicable legislation in a jurisdiction*].

Commentary

If a savings clause provision is thought necessary because of the analysis in *Comment* to RUAA § 33, 7(1) U.L.A., note 1, at 54 (2003 Cum. Ann. Pocket Pt.), RUAA § 33 might be followed, substituting "*applicable legislation in a jurisdiction*" for reference to "Uniform Arbitration Act" in RUAA § 33. *See also* Part III.A.32. RUAA § 33 provides:

> 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].

The North Carolina General Assembly did not enact RUAA § 33, but the FLAA, N.C. Gen. Stat. § 50-61 (2003), following former *id.* § 1-567.19 (2001) has a similar provision. 2004 FLAA Amendments, note 14, at 54-55, recommends no changes. *See also* Parts III.A.3, III.A.31, and III.A.32; Handbook, note 9, *Comment* to § 50-61; Walker, *Arbitrating*, note 9, at 488.

Among enacting jurisdictions, Utah Code § 78-31a-133 (2002 repl.) changed RUAA § 33's second sentence to read: "Subject to Section 78-31a-104 of this chapter, an arbitration agreement made before May 6, 2002 shall be governed by the arbitration act in force on the date the agreement was signed."

34. § 134. Short title

This [Act] may be cited as the [name of jurisdiction] Family Law Arbitration Act.

Commentary

Although the RUAA has no short title provision, N.C. Gen. Stat. § 1-569.31 (2003) provides: "This Article may be cited as the Revised Uniform Arbitration Act." Nevada, New Mexico and Utah publish the title at the beginning of their RUAA versions. Nev. Rev. Stat. Ann. § 38.206 (2002 repl.) ; New Mex. Stat. Ann. § 44-7A-1(a) (2003 cum. supp.); Utah Code Ann. § 78-31a-101 (2002 repl.).

The FLAA, N.C. Gen. Stat. § 50-41(b) (2003) provides: "This Article may be cited as the North Carolina Family Law Arbitration Act." The ICACA, *id.* § 1-567.30 (2003) also includes a short title provision. Uniform Act § 23 recommended a short title provision, 7(1) U.L.A. 468. The North Carolina UAA recited the short title in former N.C. Gen. Stat. § 1-567.1 (2001), thereby throwing off by one all UAA numbers. The Reporter for the North Carolina RUAA project inserted the short title provision at the end of that State's RUAA version, following the 1955 Act format, so that RUAA section numbers and those of the proposed North Carolina

legislation would be the same for research purposes. However, jurisdictions enacting a family law arbitration act could insert a subsection in § 101 instead of here, as, *e.g.*, § 101(c). Another option is to insert desired statutory language in § 101, Definitions, as § 1(7):

> *(7) "This Act" means the [name of jurisdiction] Family Law Arbitration Act currently in force in [name of jurisdiction].*

The Act title in § 134, § 101(c) or in a § 101(7) definition can be anything the enacting jurisdiction chooses, although language like "Family Law Arbitration Act" should be considered to differentiate the Act from other legislation like the UAA or the RUAA. If there is prior family law legislation in force, a date like "the Family Law Arbitration Act of 2005" like the RUAA's official title, Uniform Arbitration Act 2000, might be considered. Differentiating language like "the Revised Family Law Arbitration Act," on the model of the Revised Uniform Arbitration Act as enacted in several jurisdictions to differentiate the RUAA from the UAA, is an option.

The advantage of a short title provision lies in its use in connection with forms and rules in an agreement to arbitrate. Reciting statutory section numbers may risk confusion if a future legislature renumbers the statutes but keeps the title.

2004 FLAA Amendments, note 14, at 29, recommends no changes for N.C. Gen. Stat. § 50-41(b) (2003); *see also* Handbook, note 9, *Comment* to § 50-41; Walker, *Arbitrating*, note 9, at 488.

Conclusions for Part III.A

The Model Act attempts to follow the RUAA, with special provisions (*e.g.*, a statute for modification of alimony, postseparation support, child custody and child support; court review and appeal of errors of law if parties contract for it) or deletions (*e.g.*, removal of parties' right to contract against appeal).

For those jurisdictions that now have the RUAA, or it is reasonably foreseeable that it will be enacted soon, perhaps in the same legislative session that enacts the Model Act, the better course is to adopt the RUAA-based Model Act. For those jurisdictions that have the UAA, and prospects of enacting the RUAA are not foreseeable, the alternative Model Act based on the UAA and published in the 2004 AAML Arbitration Committee Report[27] might be a choice. There is nothing to stop a UAA jurisdiction from enacting the RUAA-based Model Act, however. Those jurisdictions that have neither the UAA nor the RUAA have a choice; they might wish to consider the RUAA if there is a possibility of adopting it, the newer uniform legislation, in the future.

Although jurisdictions may adopt a complete Model Act, perhaps inserting it in the

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[27] 2004 AAML Arbitration Comm. Rep., note 1.

family law statutes, the Model Act can serve as a checklist for family law-related provisions, *e.g.*, the special statute for modifying alimony, postseparation support, child support and child custody, for amending the UAA or the RUAA to cover family law arbitration.

The Model Act is not intended to amend substantive law. It offers another procedure for resolving family law issues besides, *e.g.*, litigation, settlement, mediation, collaborative procedures or other alternative dispute resolution techniques. Although once parties sign an agreement to arbitrate, they must carry out its terms in accordance with arbitration legislation and forms and rules they select, the Model Act and its rules also provide for other ADR methods if the parties contract for them.

There may seem to be three possible exceptions to the principle of nonmodification of substantive law. The Model Act recites "substantial change of circumstances," reflecting one State's principles for changing alimony, postseparation support, child support and child custody, in the special provisions for modifying awards involving these factors. Depending on a jurisdiction's rules on punitive damages and attorney fees, the Model Act may vary from those rules in some jurisdictions. *Commentaries* on these provisions note these possibilities and offer options. There may be other variances in the Act and suggested forms and rules between their texts and a jurisdiction's law; drafters should be alert to this possibility. There is, however, no intent in the Model Act and its forms and rules to introduce substantive law changes. That is a job for the courts and the legislature of a particular jurisdiction.

B. Suggestions for Forms Associated with Family Law Arbitration Act Practice

The suggested forms reprinted here follow those before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the FLAA in 1998-99. Commentaries follow each suggested form. Suggested amendments for forms prepared by the NCBA Committee are underlined. Brackets indicate material parties must insert or are used to show differences between the forms published here and those in the Handbook[27] for North Carolina family law practice.

The forms follow those commonly employed in arbitration, *e.g.*, forms prepared by the AAA. It is not necessary to enact these forms as legislation. The promoters of the FLAA submitted them to the NCBA and the General Assembly in the interest of transparency, to acquaint those less familiar with arbitration with what forms for FLAA arbitrations would look like, and to explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the forms were incorporated in a Handbook[28] that included the FLAA as enacted, rules for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations like the NCBA, perhaps the AAML, might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage. North Carolina forms may not be appropriate elsewhere.

The suggested forms should work in jurisdictions choosing the RUAA-based Model Act (Parts II.A, III.A). Forms drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of forms; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested forms were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere. Any form is but a suggestion for a particular case or arbitration. Forms that may be used in a particular jurisdiction may not be useful for a particular case or arbitration.

Legislation such as the Model Act discussed in Part III.A cannot cover all aspects of arbitration. To fill in the details of how, where and when arbitration will be held and conducted, who will participate, and what will be covered in the proceeding, parties may agree on their own rules. However, today most arbitration is conducted by incorporating a set of predrafted rules by reference into an arbitration agreement, sometimes with designation of an arbitration institution,

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[27] Handbook, note 9, at 32-35.

[28] *Id.*

e.g., the AAA. In this case the arbitration agreement will include certain basic decisions, *e.g.*, number of arbitrators, scope of the arbitration agreement, etc., leaving other matters to the rules. If parties cannot or do not agree on rules for the arbitration, case law provides that if parties do not select rules for an arbitration, in the absence of controlling statute the arbitrator may choose the rules.[29] An arbitrator might well decide to use the standard rules for a jurisdiction, like those published in Part III.C.

Except insofar as a Form or Rule might contravene law,[30] the Forms and Rules govern as part of the procedure of an arbitration, read in connection with law governing the arbitration. Parties would be otherwise free to use these Forms and Rules, to agree to use them as modified by the arbitration agreement, to copy them in whole or in part in an arbitration agreement, or to decline to use them at all. Use of these Forms and Rules is a matter of freedom of contract. *As with all forms and rules, drafters must consider the facts and circumstances of the client and the particular case and must decide that the suggested form(s) or rule(s) fit(s) the needs of the client and the case.* However, parties agreeing to arbitrate family law issues under the Model Act will leave many issues open for possible disagreement, and possible reference to an arbitrator for resolution if they cannot agree,[31] if they do not provide for matters covered by these forms and rules in a family law arbitration case. The result may be loss of time and money otherwise saved through resorting to arbitration.

Because family law issues subject to arbitration under the Act may be low-assets cases, the FLAA drafters decided to provide for reducing the number of choices that must be made to use the forms and rules. The Model Act follows this philosophy. For example, the FLAA-based Model Act had provided that parties may agree on one or more arbitrators. Rule 2, echoing the Act, repeats the statutory default principle: One arbitrator shall hear the case. Rule 2 will also

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[29] *Commentary* to Part III.A.11; Walker, *Arbitrating*, note 9, at 461. The Model Act version based on the FLAA provided that the arbitrators must select rules for the arbitration after hearing all parties and referring to model rules, perhaps rules like those in Part III.C. If the arbitrators cannot select rules for an arbitration, upon a party's application the court may order rules for conducting the arbitration, again perhaps model rules like those in Part III.C. *See, e.g.*, Model Act § 5(e), derived from N.C. Gen. Stat. § 50-45(e) (2003), in 2004 AAML Comm. Rep., note 1. There is no counterpart in the RUAA-based Model Act, but the *Commentary* to Model Act § 111, Part III.A.11, offers optional statutory language that jurisdictions might consider for enactment. *See also* Basic Rule 38, Part III.C.1; Part III.A.5, 2004 AAML Comm. Rep., note 1.

[30] Model Act § 104 would deny parties the right to waive certain provisions of the Model Act. *See generally* Part III.A.4. No form or rule may derogate from rights under federal or State law for immediate, emergency relief for children or spouses. *See also* Model Act § 104(g), copied from the FLAA, N.C. Gen. Stat. § 50-44(g) (2003), and Part III.A.4 in 2004 AAML Comm. Rep., note 1.

[31] *See* note 29 and accompanying text.

work as a valid choice under the RUAA-based Model Act.[32] Stating the number of arbitrators in a form that would become part of the arbitration agreement was another option. The drafters chose to keep the number of forms to a minimum, so that an arbitration agreement will be as brief as possible, thereby keeping files as slim as possible.[33] However, this means that counsel for parties, and parties if they are not represented by counsel, must read and be familiar with the Forms, the Rules and any additions or deletions from the Forms and Rules in addition to the Act and the arbitration agreement.

Part III.B.1 states Basic Forms, which are lettered, e.g., A. They should be considered for inclusion as part of an arbitration agreement under the Model Act. Part III.B.2 states Optional Forms, which are lettered, e.g., AA. They should be examined for possible use, particularly if variants from the Rules appear useful. A Comment follows every Form.

Forms, Basic Rules and Optional Rules in Parts III.B and III.C were derived from these sources: AAA, Arbitration Rules for the Interpretation of Separation Agreements, in CCH, Doyle's Dispute Resolution Practice North America ¶ 15-100, at 23,302 (1990) (AAA Separation Agreement R.); AAA, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes (July 1, 2003) (AAA R.), with updates a visit to the AAA website, http://adr.org/index2.1jsp (visited June 2, 2004), suggested; AAA, Drafting Dispute Resolution Clauses: A Practical Guide (1997) (AAA Guide); AAA, International Dispute Resolution Procedures (Including Mediation and Arbitration Procedures) (July 1, 2003) (AAA Int. R.), with updates a visit to the AAA website, suggested; AAML Matrimonial Arbitration Rules --- Financial Issues (AAML R.), reprinted in AAML, Marital Arbitration Handbook 6-2 (1st rev. ed. 1995); National Association of Securities Dealers, Code of Arbitration Procedure (Nov. 17, 2003), which publishes the National Association of Securities Dealers Rules (NASD R.), with updates a visit to the NASD website, http://www.nasdadr.com/ (visited June 2, 2004), suggested; P-A-C, Form Arbitration Agreement (1998) (P-A-C Agreement); P-A-C, Rules of Practice and Procedure (1998) (P-A-C R.).[34] Although the original format of these forms and rules often deal with matters outside the scope of family law disputes, their themes are similar to all arbitration rules. Commentaries to the Forms and Rules cite these

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[32] This follows N.C. Gen. Stat. § 50-45 (2003). Model Act § 111(a), following RUAA § 11(a), is not as specific, but Basic Rule 2, reciting agreement on a single arbitrator, would be within § 111(a). *See also* Part III.A.11; Part III.A.5, 2004 AAML Comm. Rep., note 1.

[33] Forms B.1-B.6 are options for selecting rules for the arbitration.

[34] Current AAA or NASD rules may be researched from the AAA or NASD websites, perhaps using a search engine like Google. The AAA Separation Agreement Rules are the latest version; AAA does not accept these kinds of cases today. The P-A-C rules are in Private Adjudication Center, Inc., Form Arbitration Agreement (1998); *id.*, Rules of Practice and Procedure (1998) (hereinafter P-A-C R.). Duke University School of Law's Private Adjudication Center (P-A-C) has shut down, but P-A-C procedures continue to offer useful suggestions.

sources. Arbitration forms and rules are in a constant state of evolution; these forms and rules are for illustration purposes only. Before any set of them is submitted for a jurisdiction's consideration, they should be updated and compared with that jurisdiction's law and the needs of practice.

1. Basic Forms

a. Form A. Matters To Be Arbitrated; Number of Arbitrators (Two Options):

A. Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach of this contract, shall be settled by arbitration, and judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction, unless parties to the arbitration agree in writing pursuant to [Model Act § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

A. Arbitration. We, the undersigned parties, hereby agree to submit to arbitration the following controversy: [here describe briefly the controversy]. We agree that the controversy shall be submitted to one arbitrator. We agree that we will faithfully observe this Arbitration Agreement and the rules incorporated by reference or stated in this Arbitration Agreement, that we will abide by and perform any award the arbitrator renders, and that a judgment of a court having jurisdiction may be entered on the award, unless parties to the arbitration agree in writing pursuant to [Model Act § 122] as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

Commentary

Alternative Forms A follow Alternative Forms A in the Handbook, note 9, at 32, with underlined amendments required if the North Carolina legislature enacts amendments to the FLAA, N.C. Gen. Stat. § 50-53 (2003). *See* 2004 FLAA Amendments, note 14, at 57-58. If a jurisdiction adopts Model Act § 122, these amendments to Alternative Forms A should be considered. *See also* Part III.A.22; Walker, *Arbitrating*, note 9, at 506.

The first Form A follows the AAA suggested form for contracts, Standard Arbitration Clause, omitting reference to rules to be followed. The second Form A follows the AAA suggested form for an existing dispute, Standard Arbitration Clause, *e.g.*, where parties have filed for divorce. *See also* Basic Rules 1-2; AAA Separation Agreement Rules, at 23,301. *See* Forms B.1-B.6 for choices among rules. Parties should pay close attention to describing the controversy to be inserted in the second Form A, *e.g.*, does the family law proceeding include only alimony, or is child support and child custody also an issue? The second Form A provides for a single arbitrator; it is consistent with Rule 2, a default provision for contracts that include an arbitration agreement, and which provides for a single arbitrator. If parties desire three or five arbitrators, they should change the second Form A. Multiple arbitrators may be a useful option in large,

complex cases involving, *e.g.,* a family business in addition to a divorce under a premarital agreement, but having three or five arbitrators triples or quintuples arbitrator compensation. *See also* AAML R. 2.b; Optional Form BB.

b. Form B. Rules for Arbitration (Six Options):

B.1. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.2. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement, except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply]. The [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

B.3. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules) and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.4. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that the parties agree shall not apply], shall apply to this Arbitration Agreement.

B.5. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that the parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

B.6. Rules for Arbitration. The [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules), except Basic Rules [here list numbered Basic Rules that parties agree shall not apply], and the [name of jurisdiction] Optional Rules for Arbitrating Family Law Disputes (Optional Rules), except Optional Rules [here list numbered Optional Rules that parties agree shall not apply].

Commentary

Forms B.1-B.6 follow the FLAA forms, Handbook, note 9, at 32-33, substituting "[name of jurisdiction]" for "North Carolina" in all forms. A jurisdiction's rules drafters may choose any title(s) for the rules, but the choice should be consistent with Alternative Forms B.1-B.6.

Forms B.1-B.6 are the six options from which parties must choose, depending on whether they want the Basic Rules (Part III.C.1), just some of them, the Basic Rules and the Optional Rules (Part III.C.2), the Basic Rules and some of the Optional Rules, some of the Basic Rules and all of the Optional Rules, or some of the Basic Rules and some of the Optional Rules. The Basic Rules cover most standard family law situations. The Optional Rules deal with other situations, *e.g.,* a multilingual family where it is useful to state the language for the arbitration proceeding. *See also* Basic Rule 1 and its Commentary; AAA Separation Agreement Rules, at 23,304; AAA, Standard Arbitration Clause; AAA R. R-1; Walker, *Arbitrating*, note 9, at 461, 506.

c. Form C. Ethical Standards for Arbitrators:

C. Arbitrator Ethics. The [title of ethics code] shall apply to this Arbitration Agreement.

Commentary

Form C follows FLAA Form C, in Handbook, note 9, at 33, substituting "[title of ethics code]" for "North Carolina Canons of Ethics for Arbitrators."

Some jurisdictions may not publish ethics standards for arbitrators; North Carolina has them for its court-annexed arbitration program by rule of the Supreme Court of North Carolina. If so, there is no need to use Form C. In jurisdictions with a similar arbitrator ethics code, however, Form C should be helpful.

The NCBA approved North Carolina Canons of Ethics for Arbitrators (Feb. 12, 1998) at a 1998 Board of Governors meeting and recommended them for adoption by the Supreme Court of North Carolina. The Court approved them by Order Adopting the North Carolina Canons of Ethics for Arbitrators, Sept. 9, 1999, 350 N.C. 877 (1999). They and the Comments following each Canon as part of the Order are now binding for court-ordered arbitrations under N.C. Gen. Stat. § 7A-37.1 (2003). Other government agencies, *e.g.,* the North Carolina Industrial Commission, which hears workers compensation claims, may declare them to be binding in certain cases, *e.g.,* court-ordered arbitrations in cases before the Commission. The Canons may be incorporated by reference in any arbitration agreement. They are not binding in arbitrations under the FLAA unless parties agree that they are binding. Subject to other provisions of law, *e.g.,* FLAA child abuse reporting requirements in N.C. Gen. Stat. 50-44(h) (2003) or arbitrator disclosure standards in Model Act § 112, parties adopting the Canons for arbitration under the FLAA may modify them for a particular arbitration. *See* Canon VIII.A. The Canons are modeled on the American Bar Association-American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes (1977) and other standards. This Code, and a recent revision, American Bar Association & American Arbitration Association, *2004 Revised Code of Ethics for Arbitrators in Commercial Disputes, available at* http://www.adr.org/index2.1.jsp?JSPssid=15722&JSPsrc=upload\LIVESITE\Featured%20Area\..

\Rules_Procedures\Ethics_Standards\codeofethics2004.htm, on the AAA website, are designed for commercial arbitration and not necessarily for family law disputes. *See generally* George K. Walker, *State Rules for Arbitrator Ethics,* 23 J. Legal Prof. 155 (1999), also published in American Bar Association Section of Dispute Resolution, Arbitration Now: Opportunities for Fairness, Process Renewal and Invigoration 241 (Paul N. Haagen ed. 1999), analyzing the Canons and appending a copy of them identical with the Court-adopted version except where the Court omitted lawyer-arbitrator standards in Canon I.D and material in Comments to Canons I and VIII.

See also Part III.A.12, discussing arbitrator disclosure standards; Handbook, note 9, at 33-34; Walker, *Arbitrating*, note 9, at 459-61, 506. AAA R. R-16 provides for transmitting disclosure notices. AAA R. R-17 establishes arbitrator disqualification standards. *See also* AAML R. 2.e.

d. Form D. Site of Arbitration:

D. Place of the Arbitration. The arbitration shall be held at [here designate place of arbitration, city, state, country if not within the United States].

Commentary

Form D copies FLAA Form D in Handbook, note 9, at 34; *see also* AAA R. R-10.

Form D is congruent with Basic Rule 7(a). Parties should be mindful of problems of conflict of laws and enforcement issues if they decide on an arbitration site outside the jurisdiction with family law arbitration legislation. Generally speaking, if parties elect an arbitration site outside the jurisdiction with a family law arbitration act like the Model Act and there is a need for recognition and enforcement of an award, there may be public policy issues like those in Crutchley v. Crutchley, 293 S.E.2d 793 (N.C. 1982), which held arbitration under the North Carolina UAA against public policy because of the finality of UAA awards. Judgments for child support or child custody are always open for review.

The arbitration site also controls for conflict of laws purposes unless parties provide for choice of law in the agreement to arbitrate. Statutes may impact arbitration site choices. *See, e.g.,* N.C. Gen. Stat. § 22B-3 (2003). *See also* Optional Rule 105; Walker, *Arbitrating*, note 9, at 461-64, 506.

e. Form E. Additional Provisions or Terms (Two Options):

E.1. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement, any provision in the Basic Rules or Optional Rules to the contrary notwithstanding: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a

separate paragraph.]

E.2. Additional Provisions or Terms. These additional provisions or terms shall apply to arbitration pursuant to this Agreement: [NONE; alternative:

[1. Here state additional provisions, etc., in numbered paragraphs, with each subject in a separate paragraph.]

Commentary

Alternative Forms E.1 and E.2 are copied from FLAA Forms E.1 and E.2, Handbook, note 9, at 34-35.

Form E.1 is a catchall and clause paramount if there are any special provisions or terms not covered in the Forms or Rules that are part of the Agreement. If there are no such special provisions or terms desired, "NONE" can be written in the form. If there are special provisions or terms, they may be recited in numbered paragraphs as suggested. If Form E.1 is included, and special terms are listed, these will trump any provisions in the Basic or Optional Rules that conflict. Form E.2 uses the same language without the clause paramount and can be included if there is no conflict between the special provisions or terms and the Forms and Rules. The Agreement can list the special provisions or terms as paragraphs without using Form E.2. However, Form E.2 does serve as an identifier.

2. Optional Forms

These Optional Forms might be included where parties wish to deviate from the Rules in particular circumstances. Forms B.1-B.6 give options for choices among the Basic Rules and Optional Rules.

a. Rules for the Arbitration:

AA. Rules in Force for Arbitration. Notwithstanding Rule 1, the rules in force for the arbitration shall be the [complete title of] Rules for Arbitrating Family Law Disputes in force as of [the date of this agreement] [or a specific date selected by the parties], except as modified by ¶ [B. ---].

Commentary

Optional Form AA is copied from FLAA Optional Form AA, Handbook, note 9, at 35.

Optional Form AA would freeze the Basic and Optional Rules to the date chosen by the parties, perhaps the date of the agreement or another date. Because of its reference to Rule 1, Form AA is dependent on use of one of the six options, Forms B.1 - B.6. The final clause should refer to that selection clause in the arbitration agreement; "B. --- " refers to the Form lettering in

Part II.B.1. If parties reletter the forms as paragraphs within an arbitration agreement, they should be sure that cross-references such as this match the paragraphs.

b. Number of Arbitrators:

BB. Number of Arbitrators. This controversy shall be submitted to [here insert odd number, *e.g.,* three (3)] arbitrators. Each party shall choose one arbitrator, and the third arbitrator shall be chosen by the arbitrators chosen by the parties.

Commentary

Optional Form BB copies FLAA Optional Form BB, Handbook, note 9, at 35-36.

Model Act § 5(a), copied from the FLAA, N.C. Gen. Stat. § 50-45(a) (2003), Alternative Form A (second choice), and Rule 2's default provisions are that there shall be a single arbitrator in these cases. The RUAA does not have a default rule for a single arbitrator; in a jurisdiction adopting the Model Act based on the RUAA, a form or a rule in the agreement must declare how many arbitrators will hear matters. Part III.A.11 suggests a default provision for Model Act § 111 for those jurisdictions wishing to enact a default rule. *See also* Handbook, note 9, at 14-16, 32, 35; Walker, *Arbitrating*, note 9, at 456, 506.

Form BB suggests a provision for a three-arbitrator panel. If five are desired, the Form should be rewritten so that each party chooses two, and the four arbitrators must choose the fifth panel member. *See also* AAA R. R-15 (presumptive number is one arbitrator; party can request three arbitrators, AAA has discretion to require one or three arbitrators).

Model Act § 111 applies to multiple arbitrator panels; if a party fails to choose an arbitrator, the court may do so. *See also* Form A and its *Commentary*; Part III.A.11.

The Act and Form BB do not preclude choosing an even number of arbitrators, although doing so raises the problem of a tie vote, which can be cured by a contract provision.

c. Consolidation:

CC. Consolidation of Arbitrations. This arbitration shall not be consolidated with other arbitrations.

Commentary

Opportunity for consolidating a family law arbitration with other arbitrations may be rare. However, if arbitration increases in usage, or if, *e.g.*, a family (husband-wife) business whose dissolution agreement has an arbitration clause, with arbitrations of both dissolutions (marriage, the business) in prospect, the possibility of two or more arbitration proceedings exists. The

problem with parallel arbitrations includes risk of inconsistent findings of fact and conclusions of law, perhaps leading to inconsistent judgments if awards are confirmed. In the case of a family law arbitration involving the marital estate, the problem may arise that some assets, perhaps needed for custody and support, may be involved in a business arbitration. This problem could arise for family law litigation if, *e.g.*, a business dissolution agreement has an arbitration clause and the family law case goes to court without arbitration. Having both proceedings in arbitration should result in more consistent results and perhaps better protection for spouses and children where business assets are key parts of support.

Model Act § 110 adopts the RUAA § 10 proactive approach of allowing a court to order consolidation of arbitrations unless parties to an arbitration agreement contract against consolidation. The FLAA, N.C. Gen. Stat. § 50-60 (2003), takes a more conservative approach, based on the North Carolina ICACA, to allow courts to order consolidation only if parties agree to consolidation and then refuse to do so. *See also* Part III.A.10.

Form CC follows the FLAA model. It also follows suggested Optional Rule 106, in Part III.C, which would deny consolidation with class actions. Parties who begin a family law arbitration can agree in writing to consolidation after that process begins. They can agree to consolidation in an initial agreement to arbitrate. If so, this is an alternative form:

> **CC. Consolidation of arbitrations.** This arbitration shall be consolidated with [here describe arbitration with which the family law arbitration will be consolidated, including at least parties, title and date of agreement to arbitrate, and short description of the subject matter of the arbitration].

This follows the alternative for Rule 106. Parties could also agree to consolidate certain issues in other arbitrations by varying the text of the bracketed material in clear, inclusive and exclusive language, adding, *e.g.*, "but limited to issues arising from disposition of the Family Farm," after the short description.

The AAA forms and those of other organizations do not seem to publish a form like Form CC. Note the primacy rule for Model Act rules and procedures, Basic Rule 1, which might require revision if arbitrations will be consolidated.

Conclusions on Forms and Use of Them

These are not the only forms that might be considered. Consult form books for ideas, particularly if business matters will be arbitrated. Family law practitioners should be cautious in boilerplate use of forms, particularly those incorporating by reference a set of arbitration rules, to be sure the forms or rules fit needs of family law arbitration and a particular case. For example, forms or rules for business arbitration may declare arbitral awards are final, a result being that the forms or rules reintroduce the *Crutchley* issue anew and might jeopardize an award upon application to a court. Other forms or rules, particularly older ones based on the UAA, may

waive or restrict parties' action in violation of RUAA § 4 or Model Act § 104. *See* Part III.A.4. Parties considering arbitration must think through procedures they wish to adopt through forms and rules carefully, mindful of State and federal legislation and public policy.

C. Suggestions for Rules Associated with Family Law Arbitration Act Practice

The suggested rules in Part III.C follow those before the NCBA Board of Governors and the North Carolina General Assembly when the NCBA promoted, and the General Assembly adopted, the FLAA. Commentaries follow each rule. Suggested amendments for the rules prepared by the NCBA Committee in 2004 are underlined; parentheses indicate omissions. Material in *italics* indicates language taken from standard arbitration rules, *e.g.*, the AAA Commercial Arbitration Rules. Brackets indicate material that parties must insert, or are used to indicate differences between the rule published here and those printed in the Handbook[35] for North Carolina family law arbitration practice.

The rules follow those commonly employed in arbitration, *e.g.*, rules prepared by the AAA, *i.e.*, its Commercial Arbitration Rules, International Commercial Arbitration Rules and Separation Agreement Rules, with a few suggested by the AAML, NASD and P-A-C Rules.[36] It is not necessary to enact these rules as legislation. The FLAA promoters submitted a version of them to the NCBA and the General Assembly in the interests of transparency, to acquaint those less familiar with arbitration with what rules for FLAA arbitrations would look like, and to help explain the process of arbitration by agreement.

After the General Assembly enacted the FLAA, the rules were incorporated in a Handbook[37] that included the FLAA as enacted, forms for arbitrations and other materials, to guide parties in a choice for arbitration under the Act. If the General Assembly enacts the FLAA amendments in 2005, the NCBA Family Law Section proposes publishing a revised Handbook.

Organizations analogous to the NCBA, *i.e.*, the AAML, might consider publishing similar materials to promote Model Act passage and to help parties considering family law arbitration under the Model Act after its passage.

The suggested rules should work in jurisdictions enacting the Model Act. Rules drafters should be aware of differences in their jurisdiction's Model Act version; developments in the law, *e.g.*, newer versions of rules; and practice needs of a particular jurisdiction. The North Carolina Handbook and its suggested rules were developed with family law practice of that State in mind and may not respond to family law arbitration issues elsewhere.

The Model Act Rules for Arbitrating Family Law Disputes include Basic Rules for

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[35] Handbook, note 9, at 36-52.

[36] *See also* Part III.B.

[37] Handbook, note 9, at 36-52.

Arbitrating Family Law Disputes (Basic Rules, or Rules), published in Part III.C.1 and numbered beginning with Rule 1, and Optional Rules for Arbitrating Family Law Disputes (Optional Rules or Rules), published in Part III.C.2 and numbered beginning with Rule 101. Other form books and sources should be consulted for additional rules governing the arbitration, particularly if business matters in a premarital agreement will be arbitrated.

1. Basic Rules for Arbitration of Family Law Disputes

1. Agreement of Parties; Primacy of Rules. These [name of jurisdiction] Basic Rules for Arbitrating Family Law Disputes (Basic Rules, or Rules) shall be a part of any arbitration agreement that states that these Rules shall apply to transactions covered by that agreement. If the parties execute two or more agreements to arbitrate, and other agreements to arbitrate declare that they are governed by other rules, these Rules shall govern if there is a conflict between the other agreements to arbitrate and other rules incorporated by reference in them. These Rules and any amendment of them shall apply in the form when a demand for arbitration or submission agreement is received by an opposing party. The parties may vary procedures set forth in these Rules by written agreement.

Commentary

Rule 1's source is AAA R. R-1, with important differences. Rule 1 contemplates the possibility of two or more agreements to arbitrate; this could occur, *e.g.*, where a couple have a business enterprise agreement which provides for arbitration upon dissolution of the business, and the couple later sign a premarital agreement under the FLAA or still later sign an arbitration agreement under the Act after filing for divorce. *See* Model Act §§ 106(a) and 110 and their Commentaries. These Rules will have primacy in any conflict between them and, *e.g.*, commercial arbitration rules that might apply to dissolution of a family business. The reason for this is protection of alimony, child support and child custody rights, for which the procedures in Model Act §§ 120, 122-24A, have been enacted. Rule 1 tracks AAA R. R-1 in providing for carrying forward the Rules as amendments to the Rules are made from time to time. Optional Form AA suggests an option to freeze the rules as of a certain date if the parties wish to do this in, *e.g.*, a premarital agreement that may be signed years before matrimonial discord erupts, and divorce is sought. Rule 1 also tracks AAA R. R-1 in providing for amendment of the Rules by written agreement. In the hypothetical of the premarital agreement signed years before divorce is sought, parties could agree that the then-current set of the Rules will apply to the divorce, etc. proceedings rather than the Rules in force when the premarital agreement was signed. The parties can modify the Rules they wish to apply, even if there is only one arbitration agreement. Forms B.1-B.6 suggests ways to do this. *See also* Optional Form CC, dealing with consolidating arbitrations.

2. Number of Arbitrators. Unless the parties agree otherwise in writing, a single arbitrator shall be chosen by the parties to arbitrate matters in dispute.

Commentary

Although many agreements to arbitrate state the number of arbitrators in the agreement, this default provision will apply if these Rules are incorporated by reference in an arbitration agreement. Parties wishing to use more than one arbitrator should consider inserting Form BB in the agreement. A three or five member arbitral panel might be appropriate if the case is large and complex, *e.g.,* concerning a premarital agreement and the dissolution of a family business. Having three or five arbitrators triples or quintuples arbitrator fees, and for most family law arbitrations a single arbitrator should suffice. Model Act § 111 says that if parties cannot agree on an arbitrator, the court upon application shall appoint one. Rule 2 follows AAA R. R-15, and AAA Int. R., Art. 5, the default provision for international arbitrations, in providing for a single arbitrator. Although agreements to arbitrate can name a specific person to be the arbitrator, agreements governing longterm relationships, *e.g.,* premarital agreements, usually do not, because the named individual may not be available when the matter goes to arbitration. Unless there is a default provision for selection in that case, the result can be that arbitrator selection becomes a matter for the court unless parties agree on an arbitrator. The second Form A provides for a single arbitrator where parties agree to arbitrate an existing dispute; Rule 2 covers the circumstance of a contract which includes an arbitration agreement, which might begin like the first Form A.

The agreement to vary from the Rule for a single arbitrator should be "in writing." This eliminates problems if parties begin the arbitration, agreeing on a single arbitrator, and late in the process a need for a three-arbitrator panel develops. This amendment should be in writing to eliminate misunderstandings.

3. Initiation Under Arbitration Provision in a Contract.

(a) Arbitration under an arbitration provision in a contract, *e.g.,* a premarital agreement, shall be initiated by the initiating party (the claimant), within the time specified in the contract(s), give written notice to the other party (the respondent) of claimant's intention to arbitrate (demand), which notice shall contain a statement setting forth the contract containing the agreement to arbitrate, the nature of the dispute, the amount involved, if any, the remedy or remedies sought, and the place of hearing designated in the contract. A respondent shall file with the claimant an answering statement, including any counterclaim, 30 days after receiving notice from claimant.

(b) If respondent asserts a counterclaim, the counterclaim shall set forth the nature of the counterclaim, the amount involved, if any, and the remedy or remedies sought. Claimant may make an answering statement to a counterclaim.

(c) Failure to make an answering statement within 30 days after receiving notice from claimant shall be treated as a denial of the claim. Failure to make an answering statement within 30 days after receiving a counterclaim shall be treated as denial of the counterclaim.

(d) If an arbitrator has been appointed, the parties shall file copies of the demand and answering statement, including any counterclaim, at the same time a demand or answering statement is filed with the other party.

Commentary

Rule 3 parallels AAA Separation Agreement R. 1; AAA R. R-4(a)(i), R-4(b), and AAA R. R-6. A principal difference is the 30-day time for responding to a demand or an answering statement that includes a counterclaim. AAA R. R-6 has a 15-day turnaround time and does not provide for an answering statement to a counterclaim. AAA Separation Agreement R. 1 has a 7-day turnaround time and no provision for response to a counterclaim.

Although parties may agree on shorter deadlines, the 30-day default rule follows the turnaround time for civil actions in the North Carolina courts and the 30-day standard in AAA Int. R., Art. 3. Other jurisdictions have different turnaround times for civil litigation; in federal practice, for example, it is 20 days. For those jurisdictions, more or less time than 30 days may be appropriate.

A critical difference between civil litigation practice and arbitration practice is that failure to respond to a complaint or counterclaim is admission of liability; the opposite is true for arbitration by agreement. *See* AAA R. R-4(c), R-5. A default hearing by an arbitrator is the usual practice. *See* Rule 16. *See also* NASD R. 10314 for a more complex procedure for initiating arbitration where cross-claims are involved. Most family law cases involve spouses or former spouses as principal parties; an arbitrator can use Rule 17(d)'s general authority to establish procedures analogous to the Rules of Civil Procedure for these cases.

4. Initiation Under a Submission. Parties to an existing dispute may begin an arbitration under these Rules by filing a copy of the arbitration agreement or submission to arbitrate under these Rules, signed by the parties, with the arbitrator they have chosen pursuant to the arbitration agreement or submission to arbitrate. The agreement or submission shall contain a statement of the matter in dispute, the amount involved, if any, the remedy or remedies sought, an agreement on the arbitrator's compensation and expenses, and the place of the hearing.

Commentary

Rule 4 parallels AAA R. R-5. While Rule 3 provides for "adversarial" notice, perhaps in a default situation, Rule 4 covers circumstances where parties already have a longstanding arbitration agreement and want to formally begin the procedure by separate document (the submission) or agree to arbitrate an existing dispute where there is no pre-dispute agreement.

5. Changes of Claim. After a claim or counterclaim has been filed, if either party desires to make any new or different claim or counterclaim, this claim or counterclaim must be in writing and sent to the other party, who shall have 30 days from the date of mailing to file an

answer. If an arbitrator has been chosen, the arbitrator shall be mailed a copy at the same time. After the arbitrator has been appointed, no new or different claim or counterclaim may be submitted without the arbitrator's consent.

Commentary

Rule 5 parallels AAA Separation Agreement R. 2 and AAA R. R-6. The 30-day turnaround time instead of 15 days stated in AAA R. R-6, or the 7 days in Separation Agreement R. 2, parallels Rule 3. An arbitrator faced with a party's request to file a new or different claim or counterclaim should be guided by the liberal amendment rules applicable in civil actions. *See generally, e.g.,* Fed. R. Civ. P. 15.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

(a) At any party's request or at the arbitrator's discretion, an administrative conference with the arbitrator and the parties and/or their counsel shall be scheduled in appropriate cases to expedite arbitration proceedings. The arbitrator may approve holding a conference by conference telephone call or similar means.

(b) In a large or complex case, at any party's request or at the arbitrator's discretion, the arbitrator may schedule a preliminary hearing with parties and/or their counsel to specify issues to be resolved, to stipulate as to uncontested facts, or to consider other matters to expedite the arbitration proceedings. The arbitrator may approve holding a preliminary hearing by conference telephone call or similar means.

(c) Consistent with the expedited nature of arbitration, at an administrative conference or preliminary hearing the arbitrator may establish (i) the extent of and schedule for production of relevant documents and other information, [(ii) the scheduling of depositions, (iii) the scheduling of third party discovery, (iv) the scheduling of other discovery, (v)] the identification of witnesses to be called, and [(vi)] a schedule for further hearings to resolve the dispute.

(d) If economic issues are involved, each party in the arbitrator's discretion shall exchange and file with the arbitrator, before the administrative conference or other hearing as the arbitrator directs, a full and complete financial statement on forms specified by the arbitrator. Each party shall update these statements as necessary, unless the parties otherwise agree and the arbitrator approves. The arbitrator may set the schedule for filing and exchange of these statements and may require production and exchange of any other such information as the arbitrator deems necessary. Corruption, fraud, misconduct or submission of false or misleading financial information, documents or evidence by a party shall be grounds for imposing sanctions by the arbitrator or the court, and for vacating an award by the arbitrator.

(e) With the parties' consent, the arbitrator may arrange a mediation conference under principles stated in the [courts of the jurisdiction's] mediation rules. The mediator may not be an

arbitrator appointed to the case. A consent under this rule must provide for the rules to be followed in the mediation and compensation for the mediator.

Commentary

Rule 6 parallels AAA Separation Agreement R. 3 and AAA R. R-8 and R-9; *see also* AAML R. 3.a, 3.b. Rule 6(a) follows practice in the State and federal courts for initial pretrial conferences. See, *e.g.,* Fed. R. Civ. P. 16(b), 26(f). Rule 6(b) follows practice in the State and federal courts for final pretrial conferences. *See, e.g.,* Fed. R. Civ. P. 16(d). The last sentence of Rules 6(a) and 6(b), not found in AAA R. R-8 and R-9, suggests use of conference calls, facsimile, E-mail, etc., as more expedited and economical means of holding the conference. Rule 6(c) applies these principles to administrative conferences and preliminary hearings; AAA R. R-9 applies them only to preliminary hearings. An AAML Arbitration Committee member suggested the bracketed material. Rule 6(d) follows AAA Separation Agreement R. 8, except that Rule 6(d) provides for arbitrator approval of any waiver of updates and for sanctions as an option to vacating the award. Rule 6(e) follows AAA R. R-8 but does not specify the title of the jurisdiction's mediation rules, since those may change if a single ADR procedure is created. Although Rule 6(e) refers to a court's mediation rules, parties can agree on other mediation rules. In that case the substance of Rule 6 must be amended by special terms. *See* Forms B and E. Rule 6(e) also requires a provision for compensating the mediator. *See also* P-A-C R. 4.02-4.03, 7.01. NASD R. 10321 provides for a more elaborate pre-hearing proceeding. Proposed Act, note 3, § 18 would bar arbitrators from mediation, conciliation or similar techniques during any phase of the arbitration proceedings.

7. Site of the Arbitration.

(a) Parties may mutually agree [in writing] on a place where the arbitration shall be held.

(b) If parties have not mutually agreed [in writing] on a place the arbitration shall be held, and where any party requests that the arbitration be held in a specific place and the other party files no objection within 30 days after notice of the request has been sent to the arbitrator, that place shall be the one requested. If a party objects to the place requested by the other party, the arbitrator may determine the place, and the arbitrator's decision shall be final and binding.

(c) If the parties have mutually agreed [in writing] on a place where the arbitration shall be held, and a party later requests that the arbitration be held in another specific place because of serious inconvenience of a party or parties or of a witness or witnesses such that justice in the arbitration cannot be had, the arbitrator may, after receiving the request and a response from the other party filed within 30 days after receiving the request, determine the other place requested by a party, or a neutral site or sites. The arbitrator's decision shall be final and binding.

Commentary

Rules 7(a)-7(b) follow AAA Separation Agreement R. 4 and AAA R. R-10. Form C might be used to implement Rule 7(a). Rule 7(b) covers the situation where parties do not designate a place in the arbitration agreement. Rule 7(c) follows the spirit of rules like AAA Separation Agreement R. 4 and AAA R. R-2 and R-5, which say that if parties choose the AAA to conduct the arbitration, this authorizes the AAA to administer the arbitration. The AAA may, in its discretion, assign administration of the arbitration to any of its regional offices. While these rules do not give the AAA direct authority to move the situs of an arbitration if the parties have chosen a particular place, their thrust is toward localizing administration for the convenience of disputants. Rule 7(c) states the policies of litigation venue transfer statutes like 28 U.S.C. § 1404 (2000). What was a convenient and fair situs to parties and witnesses may become unfair if time separates the situs choice and institution of arbitration. Parties and witnesses may move or become incapacitated, with a result that arbitration may become more expensive and time-consuming and therefore not as fair as originally contemplated. Arbitration agreement drafters who do not wish to give this authority to the arbitrator may exclude Rule 7(c) by using Forms B.2, B.5 or B.6. The 30-day request times reflect North Carolina practice; AAA R. R-10 has a 15-day deadline; rules for other jurisdictions could choose different turnaround times. Parties negotiating an arbitration situs agreement must be mindful of legislation that may void certain arbitration situs clauses. Rule 7 agreements must be in writing.

8. Date, Time and Place of Hearing. The arbitrator shall set the date, time and place for each hearing, unless the agreement to arbitrate or other [written] agreement of the parties specifies otherwise. The arbitrator shall send a notice of hearing at least 20 days before the hearing, unless otherwise agreed [in writing] by the parties. Attendance at a hearing waives notice of the hearing.

Commentary

Rule 8 follows AAA R. R-22, except for doubling the default notice time to 20 days; AAA Separation Agreement R. 9 has a 7-day default notice. Twenty days should give parties time to subpoena witnesses, etc., for the hearing. NASD R. 10315 suggested the last sentence. AAML R. 2.c provides that the parties and the arbitrator must agree on the time of an arbitration. Rule 8 agreements should be in written form to avoid future misunderstandings.

9. Representation. Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the arbitrator of the name, [postal and e-mail addresses and] telephone and facsimile numbers of counsel at least 7 days before the date set for the hearing at which counsel is first to appear. When such counsel initiates an arbitration or responds for a party, notice is deemed to have been given.

Commentary

Rule 9 follows AAA R. R-24, except for extending the notice time from 3 to 7 days before the hearing date and also requiring counsel's e-mail address and telephone and facsimile

numbers. AAA Separation Agreement R. 7 is similar to AAA R. R-24, except for a 3-day notice time. Rule 9 is consonant with Model Act § 116; *see also* AAML R. 2.g; NASD R. 10316; P-A-C R. 1.03; Part III.A.16.

10. Record of Arbitration.

(a) Unless the parties agree otherwise [in writing], a party desiring a stenographic or other record shall make direct arrangements with a stenographer or other recording agency and shall notify other parties of these arrangements 7 days in advance of the hearing. Unless the parties agree otherwise [in writing], the requesting party or parties shall pay the cost of the record.

(b) If the transcript or other recording is agreed by the parties to be, or is determined by the arbitrator to be, the official record of the proceeding, the transcript or other recording must be made available to the arbitrator and to the other parties for inspection at a date, time and place determined by the arbitrator.

Commentary

Rule 10 follows AAA R. R-26, adding provisos in Rule 10(a) that the parties can agree on other rules for, *e.g.*, arranging for recording and paying for a record, and stating a 7-day notice deadline, which gives time for parties to negotiate cost of a transcript or other recording. Rules 10(a) and 10(b) contemplate other than stenographic recording, *e.g.*, video. Parties considering alternatives to a transcript must be mindful of the time an arbitrator might take in reviewing a video recording of any length, compared with reading a transcript. Rule 10 agreements should be in writing. *See also* AAML R. 4.d(i).

11. Attendance at Hearings. The arbitrator, the parties and their counsel shall maintain the privacy of the hearings unless the parties agree otherwise [in writing], or the law provides otherwise. Any person having a direct material interest in the arbitration may attend hearings. The arbitrator shall otherwise have the power to require exclusion of any witness, other than a party or other essential person, during any other witness' testimony. The arbitrator has discretion to determine the propriety of attendance of any other person.

Commentary

Rule 11 follows AAA Separation Agreement R. 10 and AAA R. R-23, adding requirements that parties and counsel also preserve the privacy of hearings unless the parties agree otherwise. If the law provides otherwise, *e.g.*, through a subpoena to testify in a criminal case, the subpoenaed party must testify unless protected by other law, *e.g.*, the privilege against self-incrimination. *See also* Proposed Act, note 3, §§ 19, 20, the latter of which would impose sanctions on parties informing an arbitrator of settlement negotiations; AAML R. 4.b; P-A-C R. 1.06. Rule 11 agreements should be in writing.

12. Postponements. The arbitrator, for good cause shown, may postpone any hearing upon a party's request [in writing] or upon the arbitrator's own initiative. The arbitrator shall grant a postponement upon [written] request of all parties. [The arbitrator may impose costs incurred by parties or the arbitrator in connection with a postponement.]

Commentary

Rule 12 follows AAA R. R-28 and AA Separation Agreement R. 15; *see also* AAML R. 2.d. Requests for postponements should be in writing. The arbitrator has discretion to impose costs in connection with a postponement.

13. Oaths. Before proceeding with the first hearing, an arbitrator may take an oath or affirmation of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath or affirmation administered by any duly qualified person and, if required by law or requested by any party, shall do so. The arbitrator's oath or affirmation shall state names of parties to the arbitration agreement and shall be substantially in this form: "[Name], being duly sworn or affirmed, hereby accepts this appointment, attests that the biography or other information submitted by the arbitrator to the parties [and the court] is accurate and complete; will faithfully and fairly hear and decide matters in controversy between the above-named parties, in accordance with their arbitration agreement, the [jurisdiction's code of arbitrator ethics, if any], and the rules incorporated into the parties' arbitration agreement; and will make an award according to the best of the arbitrator's understanding." The oath or affirmation shall be signed and dated by the arbitrator, who shall send copies to the parties and the court.

Commentary

Rule 13 follows AAA R. R-25; the oath form follows those taken by AAA arbitrators. If a court appoints an arbitrator, *e.g.*, pursuant to Model Act § 111, the first bracketed material applies. If the court does not appoint the arbitrator, there is no need to send a copy of the oath to the court. If the arbitration agreement chooses ethics principles, those rules should be inserted in the oath. Similarly, if no biography or other information has been submitted, *e.g.*, where parties are satisfied with an arbitrator's general reputation, that clause should be omitted.

14. Majority Decision. All decisions of the arbitrators must be by a majority, unless the arbitration agreement provides otherwise. The award must also be made by a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

Commentary

Rule 14 follows Model Act § 113, adding the possibility that the arbitration agreement might provide for only majority decisions of the arbitrators before or when they render the award, or in both situations. *See* AAA Arb. R-40; *see also* AAA Arb. R. R-19(b). Multimember arbitral panels should be rare in family law arbitration; *see* Rule 2 and its *Commentary*.

15. Order of Proceedings; Communication with Arbitrator.

(a) A hearing shall be opened by filing of the oath of the arbitrator, where required; by recording the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel, if any; and by the arbitrator's receipt of statement of the claim and answering statement, including any counterclaim, if any.

(b) At the beginning of the hearing the arbitrator may ask for statements clarifying the issues involved. In some cases part or all of these statements may have been submitted at the preliminary hearing conducted by the arbitrator pursuant to Rules 6(b), 6(c).

(c) The complaining party shall then present evidence to support that party's claim. The defending party shall then present evidence supporting its defense and counterclaim, if any, after which the complaining party may present evidence supporting its response to the counterclaim. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for presentation of material and relevant evidence.

(d) The arbitrator may receive exhibits in evidence when offered by a party.

(e) All witnesses' names and addresses and a description of exhibits in the order received shall be made a part of the record.

(f) There shall be no direct communication between parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Parties and a neutral arbitrator may agree in writing to simultaneous postal mail, electronic mail (e-mail), facsimile, telegram, telex, hand delivery or similar means of simultaneous communication.

(g) In custody-related issues, the arbitrator is authorized to interview a child privately to ascertain the child's needs as to custodial arrangements and visitation rights. In conducting such an interview, the arbitrator shall avoid forcing the child to choose between parents or to reject either of them. The arbitrator shall conduct this interview in the presence of counsel for the child, if the child has separate counsel, but not in the presence of the parents or their counsel.

(h) With approval of both parties [in writing], the arbitrator may obtain a professional opinion relevant to the best interests of the child. Such an opinion shall be submitted to both parties and to counsel for the child if the child has separate counsel, in sufficient time for them to comment on the opinion to the arbitrator before the hearings are closed. The cost of the opinion shall be shared by the parties as agreed by the parties [in writing]; absent [such] agreement, the arbitrator shall decide on apportionment of this cost.

Commentary

Rule 15 follows AAA R. R-30, except Rules 15(g) and 15(h), which follow AAA Separation Agreement R. 13-14, with provision for a child's separate counsel and how Rule 15(h) costs will be apportioned. *See also* AAML R. 3.d, 6.g. The NCBA Committee has recommended the underlined material in Rule 15(f). *See* 2004 FLAA Amendments, note 14, at 59-60. In this regard Rule 15(f) is consistent with Rules 26(b) and 30. Rule 15(h) agreements must be in writing.

Under these rules many agreements must be in "writing;" *see* Basic Rules 2, 5, 7, 8, 10, 11, 12, 18, 19, 22, 24, 25, 26, 27, 28, 32, 33, 34 and Optional Rule 104. Model Act 101(b)(6), analyzed in Part III.A.1, has a broad definition for "record," which might be construed to include more than "writing." Model Act § 104(a) allows modification of *id.* § 101; "writing" is therefore not inconsistent with the Act. However, Basic Rule 15(f) allows parties and the arbitrator to agree on other means of communication, *e.g.*, e-mail. The result is that documents prepared before an arbitrator is available must be in written format; afterward, other means of documentation may be used. Nearly all attorneys employ e-mail. This may not be the case with parties to an arbitration agreement who do not have counsel; their only recourse may be traditional paper documentation. Rule 15(f) allows the arbitrator to agree, with the parties, on means of communication other than postal mail and affords those parties who do not have e-mail access to be placed on a fair footing with those who do. In these cases an arbitrator might decide that communications can only be effected through first class postal mail.

16. Arbitration in the Absence of a Party or Counsel for a Party. Unless the law provides to the contrary, the arbitration may proceed in the absence of a party or counsel who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

Commentary

Rule 16 follows Model Act § 115(c); AAA R. R-29; AAA Separation Agreement R. 11.

17. Evidence and Procedure.

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce evidence that the arbitrator deems necessary to an understanding and determination of the dispute.

(b) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon a party's request or independently.

(c) The arbitrator shall be the judge of the relevance and materiality of evidence offered.

(d) The rules of evidence and civil procedure shall be general guides in conducting the

hearing. The arbitrator has discretion to waive or modify these rules to permit efficient and expeditious presentation of the case. The rules of privilege shall apply as in civil actions.

(e) Evidence shall be taken in the presence of all arbitrators and all parties, except where a party is absent in default or has waived the right to be present.

Commentary

Rule 17 follows AAA R. R-30 and R-31, AAA Separation Agreement R. 12, and P-A-C Agreement, ¶ 4; *see also* AAML R. 4.e, 4.g.

18. Evidence by Affidavits; Post-Hearing Filing of Documents or Other Evidence.

(a) The arbitrator may receive and consider evidence of witnesses by affidavit but shall give this evidence only such weight as the arbitrator deems it entitled to after considering objections made to its admission.

(b) If the parties agree [in writing] or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

Commentary

Rule 18 follows AAA R. R-32. Rule 18(b) agreements must be in writing.

19. Inspection or Investigation. An arbitrator who finds it necessary to make an inspection or investigation in connection with the arbitration shall advise the parties. The arbitrator shall set the date, time and place and shall notify the parties. Any party desiring to do so may be present at such an inspection or investigation. If one or [more] parties are not present at the inspection or investigation, the arbitrator shall make a written report, unless the parties have agreed in writing to accept an oral report, to the parties and afford them opportunity to comment.

Commentary

Rule 19 follows AAA R. R-33, except that Rule 19 requires written agreement of the parties for an oral report if one or more parties are not present at an inspection or investigation. *See also* AAML R. 7.

20. Provisional Remedies. The grant of provisional remedies shall be governed by the [Jurisdiction] Family Law Arbitration Act.

Commentary

Rule 20 does not follow AAA Separation Agreement R. 16 or AAA R. R-34 on this point; *see* Model Act § 108. Parties wishing to exclude provisional remedies must do so by a special rule or clause; *see* Forms B and E. Parties must be aware of Model Act §§ 104(b)(1) and 104(c) and their waiver limits.

21. Closing of Hearing.

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer, witnesses to be heard, or whether they wish to be heard in final argument. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If briefs are to be filed, the hearing will be declared closed as of the final date the arbitrator sets for receipt of briefs. If documents are to be filed as provided in Rule 18 and the date set for their receipt is later than that set for receipt of briefs, the later date shall be the date of closing the hearing.

(c) Unless the parties agree otherwise, the time limit within which the arbitrator must make the award shall begin to run upon the closing of the hearing.

Commentary

Rule 21 follows AAA Separation Agreement R. 17 and AAA R. R-35; *see also* AAML R. 4.h. Rule 21(a) preserves the right of final argument, usually delivered by counsel. *See also* NASD R. IM-10317, which says in part:

> . . . [I]t is the practice in these proceedings to allow claimants to proceed first in closing argument, with rebuttal argument being permitted. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.

Rule 21(a) leaves the order and method of final argument to the arbitrator's discretion. If there is an issue of the order of final argument, parties could agree in writing on the order. Basic Rule 21(a) could recite the NASD formula.

22. Reopening Hearing. The hearing may be reopened on the arbitrator's initiative, or upon any party's application, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree [in writing] on an extension of time. When no specific date is fixed in the

[agreement to arbitrate or other written agreement], the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

Commentary

Rule 22 follows AAA Separation Agreement R. 18 and AAA R. R-36; *see also* AAML R. 8. Rule 22 agreements must be in writing. The phrase "agreement to arbitrate or other written agreement" has been substituted for "contract" in North Carolina Basic Rule 22.

23. Waiver of Oral Hearing. The parties may provide by written agreement for waiver of oral hearings in any case. If the parties are unable to agree on the procedure, the arbitrator shall specify a fair and equitable procedure.

Commentary

Rule 23 follows AAA R. R-30(c); *see also* AAML R. 4.i.

24. Waiver of Rules. A party who proceeds with the arbitration after knowledge that a provision or requirement of these Rules has not been complied with and who fails to object in writing shall be deemed to have waived the right to object. An objection must be timely filed with the arbitrator with a copy sent to other parties.

Commentary

Rule 24 follows AAA R. R-37, adding a requirement that the objection must be timely. The arbitrator decides whether the objection is timely. *See also* AAML R. 9; P-A-C R. 1.05.

25. Extensions of Time. The parties may modify any period of time by mutual agreement [in writing]. The arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The arbitrator shall notify parties [in writing] of any extension.

Commentary

Rule 25 follows AAA Separation Agreement R. 19 and AAA R. R-38. Rule 25 modifications or notifications must be in writing.

26. Serving Notice.

(a) Parties shall be deemed to have consented that any papers, notices or process necessary or proper for initiation or continuation of an arbitration under these Rules; for any court action in connection therewith; or for entry of judgment on any award made under these Rules may be served on a party by mail addressed to the party or the party's counsel at the last

known address or by personal service, in or outside the State where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

(b) The arbitrator and the parties may also use facsimile transmission, telex, telegram, electronic mail (e-mail), or other written forms of electronic communication to give notices permitted or required by these Rules.

Commentary

Rule 26 follows AAA R. R-39, adding in Rule 26(b) that the alternative communications may be used for communications permitted but not required by the Rules. *Commentary* to Model Act § 2, 2004 AAML Arbitration Comm. Rep., note 1, says the Act does not include provision for e-mail and similar correspondence. However, parties may agree to such unless Rule 26(b) is excluded in the arbitration agreement. The NCBA Committee has recommended the underlined material in Rule 26(b). *See* 2004 FLAA Amendments, note 14, at 60. Rule 26(b) is consistent with Rules 15(f) and 30 in this regard.

AAA R. E-3 for expedited procedures allows telephone notice; this option was not included in Rule 26, but parties may wish to add it in an agreement, or a jurisdiction's version of Rule 26 could include it in Rule 26(b). The risk of phone notice is the possibility of missed call slips or missed voice mails and the like; means listed in Rule 26(b) offer a hard copy record of the precise notice for the file.

27. Time of Award. The arbitrator shall make the award promptly and, unless otherwise agreed [in writing] by the parties or specified by law, no later than 30 days from the date of closing the hearing. If oral hearings have been waived pursuant to Rule 23, the arbitrator shall make the award no later than the day the arbitrator receives the parties' final submissions.

Commentary

Rule 27 follows AAA Separation Agreement R. 20 and AAA R. R-41. Rule 27 agreements must be in writing.

28. Form and Scope of Award.

(a) The award shall be in writing and dated and shall be signed by a majority of the arbitrators, with a statement of the place where the arbitration was conducted [and where the award was made]. It shall be executed in the manner required by law.

(b) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' agreement, including but not limited to specific performance.

(c) Unless the parties agree otherwise [in writing], the award shall state the reasons upon which it is based. *Notwithstanding the parties' agreement in writing that an award shall not be reasoned, an arbitrator may determine that a reasoned award is appropriate, in his or her discretion.*

(d) Unless the parties agree otherwise [in writing], the arbitrators may not award punitive damages but may award interest and costs as permitted by law.

Commentary

Rule 28(a) follows AAA Separation Agreement R. 21 and AAA R. R-42(a) and N.C. Gen. Stat. § 50-51(a) (2003), which specifies further details for the award, *i.e.,* date and place. The bracketed language, "and where the award was made," was inserted to conform to Model Act § 11(a), in 2004 AAML Comm. Rep., note 1 and is retained for Rule 28 in RUAA-based Model Act arbitrations. Specific statements of where the arbitration was conducted and where the award was made helps eliminate conflict of laws ambiguities. Rule 28(a) states the minimum for an award. *See also* AAML R. 10; Part III.A.19.

Rule 28(b) follows AAA R. R-43(a) and Model Act § 121(c). *See also* Part III.A.21.

Rule 28(c) declares that any award under the Rules shall be a reasoned award, the default rule of Model Act § 119(c), unless the parties agree otherwise in writing. Reasoned awards may be almost necessary in family law cases where there are child custody or child support issues. If a Rule 28(c) reasoned award is necessary, the Rule 27 30-day limit for rendering the award might be extended by written agreement of the parties. Parties should advise the arbitrators upon appointment to the case of a need for a reasoned award. If parties do not wish a reasoned award, they should exclude Rule 28(c) in the arbitration agreement. *See* Forms B.1-B.6. AAA R. R-42(b) says an arbitrator need not render a reasoned award unless parties request it in writing prior to the arbitrator's appointment or unless the arbitrator deems a reasoned award "appropriate." That language has been added as a final sentence in Rule 28(c). Parties' failure to recognize a need for a reasoned award, *e.g.,* in child support or child custody cases, could result in a court's later setting aside an award. The arbitrator might spot the problem and thereby "rescue" the case. On the other hand, the added language does give an arbitrator latitude that the parties may not want. If parties do not want this option, they may agree to delete it. *See* Forms B and E. *See also* Part III.B.19.

Rule 28(d) tracks Model Act §§ 11(c), 11(e)-11(f), 2004 AAML Comm. Rep., note 1; and N.C. Gen. Stat. §§ 50-51(c), 50-51(e) - 50-51(f) (2003). If parties want punitive damages to be part of the award, or desire that interest and/or costs not be part of the award, they should specify this in the arbitration agreement. Parties may wish to include some costs, *e.g.,* attorney fees normally awarded in divorce cases, but not others. If so, they should specify this in the arbitration agreement. *See* Forms B.1-B.6. Parties cannot opt out of costs if the law, State or federal, requires them. *See also* Rules 15, 28, 33, 34 and 102; Part III.A.11, 2004 AAML Comm.

Rep., note 1.

Model Act § 121 has a different formula for awarding punitive damages and attorney fees, *i.e.*, opt-out. *See* Part III.A.21.

29. Award upon Settlement. If parties settle their dispute during the arbitration, the arbitrator may set forth the agreed settlement terms in an award, termed a consent award. *A consent award shall allocate costs, including arbitrator fees and expenses.*

Commentary

Rule 29 follows AAA R. R-44, the 2003 revision of which suggested the second sentence. *See also* Rules 11, 15, 28, 33, 34 and 102. Proposed Act, note 3, § 20 would authorize sanctions if a party or counsel discloses to the arbitrator that settlement negotiations are going forward prior to delivery of the award.

30. Delivery of Award to Parties. Parties shall accept the placing of the award or a true copy of the award in first-class mail *or electronic mail (e-mail)* and addressed to a party or a party's counsel at the party's or counsel's last known address, personal service of the award, or filing of the award in any other manner permitted by law, as legal and timely delivery.

Commentary

Rule 30 follows AAA Separation Agreement R. 22 and AAA R. R-45; *see also* Model Act § 119(a); N.C. Gen. Stat. § 50-51(a) (2003). Unlike older AAA R. 45, the new Rule allows e-mail delivery of the award. This is consistent with revised Basic Rules 15(f) and 26(b).

31. Release of Documents for Judicial Proceedings. The arbitrator, upon a party's written request, [shall] furnish to the party at [that] party's expense certified copies of any papers in the arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

Commentary

Rule 31 follows AAA R. R-47. This relates to procedures for setting aside, confirming, etc., awards pursuant to Model Act §§ 120, 122-24A, but it might also relate to criminal proceedings (*e.g.*, perjury) arising from the arbitration. Rule 31 is not intended to bar the subpoena of material in the arbitrator's possession by prosecutors. Since modification of certain family law awards, *e.g.*, for alimony, child support or child custody, may occur years in the future and there may be judicial proceedings related to these, an arbitrator must be prepared to retain custody of papers related to these cases for many years, at least during the lifetime of a spouse entitled to alimony, unless that spouse remarries, and during the minority years of persons entitled to child support or child custody protection.

The word "shall" corrects a misprint in Handbook, note 9, at 48; "the" has been changed to "that" for clarity.

32. Applications to Court; Exclusion of Liability.

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) The arbitrator or an arbitration institution in a proceeding under these Rules are not necessary parties in judicial proceedings relating to the arbitration.

(c) Parties to proceedings conducted pursuant to these Rules shall be deemed to have consented that the judgment upon the arbitration award may be entered in any federal or State court having jurisdiction, unless the parties have agreed otherwise in writing as permitted by Model Act § 122.

(d) The arbitrator and an arbitration organization shall be entitled to immunity as provided by law.

Commentary

Rule 32 follows AAA Separation Agreement R. 23 and AAA R. R-48 except for Rule 32(d), which incorporates by reference principles in Model Act § 114 relating to immunities, and other applicable law. Rule 32(a) reverses case law elsewhere that says filing suit can be deemed a waiver of arbitration. Filing pleadings does not constitute waiver under North Carolina law, but trial of a case or other litigation activity that prejudices a party desiring arbitration may. Servomation Corp. v. Hickory Constr. Co., 342 S.E.2d 853, 854 (N.C. 1986); Cyclone Roofing Co. v. David M. LaFave Co., 321 S.E.2d 872, 877-78 (N.C. 1984). Rule 32 would enhance those principles, which may be different in other jurisdictions.

The NCBA Committee recommended amending Rule 32(c) to account for the 2003 amendment to the FLAA, N.C. Gen. Stat. § 50-53 (2003). That amendment has been carried forward in Model Act § 122. *See also* Part III.A.22.

33. Expenses, Costs and Fees.

(a) Expenses of witnesses ( ) shall be paid by the party producing such witnesses. The parties shall bear equally all other expenses of the arbitration, including required travel and other expenses of the arbitrator and any witness and the cost of any proof produced at the arbitrator's direct request, unless the parties agree otherwise, or the arbitrator assesses these expenses or any part of them against a specified party or parties.

(b) To the extent provided by law, fees and expenses of counsel shall be included among

costs of the arbitration.

(c) Other expenses, fees and costs, and sanctions, shall be paid as required by the [name of jurisdiction] Family Law Arbitration Act or other law, unless otherwise agreed in writing by the parties as permitted by that Act or other law.

Commentary

Amended Basic Rule 33(b), proposed by 2004 FLAA Amendments, note 14, at 61-62, would restate a proposed amendment to the FLAA, § 50-51(f)(2)(b), carried forward into Model Act § 11(f)(2)(b), 2004 AAML Arbitration Comm. Rep., note 1, which recites North Carolina law on attorney fees. Amended Basic Rule 33(c) would do the same for other expenses, fees and costs. If parties wish to agree to different rules for, *e.g.,* attorney fees or other expenses, etc., they must draft a special rule for the agreement to arbitrate and delete reference to Basic Rule 33(b) and/or Basic Rule 33(c).

Revised Basic Rule 33 clarifies principles relating to attorney fees and expenses and declares, following the Model Act, that the Act or other law, e.g., federal law, governs for required expenses, fees, costs and sanctions, but that parties may agree on different rules for these as long as the Act or other law does not require them. If parties wish to agree on additional attorney fees and expenses, this might be added, using Form E.1:

> **Attorney fees and expenses.** Besides those attorney fees and expenses allowed by law, the arbitrators may award attorney fees and expenses for [here list items, e.g., equitable distribution].

Under current North Carolina law, courts cannot award attorney fees and expenses for equitable distribution. N.C. Gen. Stat. § 50-51(f)(2)(b) (2003) declares that arbitrators may award attorney fees and expenses to the extent provided by law, unless parties agree otherwise. Basic Rule 33(b) recites this rule. If parties wish to negotiate award of attorney fees and expenses for other issues like equitable distribution, they may do so by including a special rule, using Form E.1. Parties cannot contract out of attorney fees and expenses where the law requires imposing them, however. The revised version of Rule 33, in following North Carolina law for FLAA-based arbitrations, may be not fit principles for attorney fees elsewhere. The version of Rule 33 in other jurisdictions should reflect those differences.

Rule 33 follows AAA R. 48, with modifications; *see also* AAML R. 2.f. If incorporated in an arbitration agreement, this modifies assessment of costs for which Model Act §§ 121(a)-21(b) provide; the statute allows modification by the parties' agreement. *See also* Part III.A.21. *See also* Rules 15, 28, 34 and 102.

34. Arbitrator's Compensation. The compensation of the arbitrator shall be agreed upon [in writing] by the parties and the arbitrator when the parties select the arbitrator ( ).

Commentary

Rule 34 states the principle for a contract, *e.g.*, a premarital agreement, that includes an arbitration agreement, and the arbitrator must be chosen at some time after the contract's execution. Arbitration by submission is governed by Rule 4. Under AAA practice the AAA determines arbitrator compensation. *See* AAA R. R-51. The NCBA Committee recommended amendments to clarify Rule 34. *See* 2004 FLAA Amendments, note 14, at 62. A further amendment is that the agreement among the parties and the arbitrator must be in writing.

See also Rules 15, 28, and 33.

35. Deposits. The arbitrator may require the parties to deposit, in advance of any hearing, such sums of money as the arbitrator deems necessary to cover expenses of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the close of the case.

Commentary

Rule 35 follows AAA R. R-52, which makes the AAA the collector of deposits. Rule 35 will not normally be invoked in simple cases; however, if it is necessary for an arbitrator to arrange a neutral room and pay rent for it, *e.g.*, in a hotel, or if there are unusually high expenses anticipated, *e.g.*, air flights, Rule 35 is authority for the arbitrator to act. If parties exclude Rule 35 in the arbitration agreement, an arbitrator, before agreeing to hear the case, might inquire as to provision for these kind of expenses.

36. Interpretation and Application of Rules. The arbitrator shall interpret and apply these Rules and any Optional Rules or special rules incorporated in the arbitration agreement. If there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, and any Optional Rules or special rules incorporated in the arbitration agreement, the decision on meaning or application shall be decided by majority vote.

Commentary

Rule 36 follows AAA Separation Agreement R. 24 and AAA R. R-53; the arbitrator has authority to interpret all rules incorporated in the arbitration agreement. AAA R. R-53 refers decision on some rules to the AAA.

37. Time. Time periods prescribed under these Rules or by the arbitrator shall be computed in accordance with [jurisdiction's procedural rules or statutes].

Commentary

P-A-C R. 1.12 suggested Rule 37. *See, e.g.*, Fed. R. Civ. P. 6 for federal practice. Rule

37 puts all participants (parties, counsel, arbitrator) on the same time track they would face if the case were in litigation.

38. Judicial Review and Appeal. No judicial review of errors of law in the award [as Model Act §§ 123(a)(9) and 128(b) provide] is permitted.

Commentary

Model Act §§ 123(a)(9) and 128(b), copied from the FLAA, N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2003), allow a court to review errors of law in the award if parties agree to this. Rule 38, if incorporated in the agreement to arbitrate, denies parties this option. Traditional arbitration practice follows Rule 38; *see also* Parts III.A.23, III.A.28.

Parties wishing to allow judicial review of errors of law may insert a special rule, *e.g.*:

> **38. Judicial Review and Appeal.** The parties agree to judicial review of errors of law as [Model Act §§ 123(a)(9) and 128(b)] provide.

If parties want judicial review of some errors of law, *e.g.*, spouse support but not equitable distribution, they should so specify in the agreement to arbitrate. *See also* Form E.

For those jurisdictions that do not enact the equivalent of Model Act §§ 123(a)(9) and 128(b), Rule 38 should be eliminated. *See* Form B.

2. Optional Rules for Arbitrating Family Law Disputes

101. Nationality of Arbitrator. Where the parties are nationals or residents of different countries, any neutral arbitrator shall, upon either party's request, be chosen from among the nationals of a country other than that of any of the parties. This request must be made 30 days before the time set for appointment of the arbitrator as agreed by the parties or set by these Rules.

Commentary

AAA R. R-14 is the source for Optional Rule 101. This Optional Rule might be incorporated by reference if parties to a divorce are from different countries. If one party is a U.S. citizen or national, and the other is a foreign subject, citizen or national, the result of this rule will be that a third-country national --- *i.e.*, not from the United States or the other party's country --- must be chosen as an arbitrator. The 30-day deadline reflects North Carolina practice and is not in AAA R. R-14; a 30-day deadline forecloses a possibility that such a request could come at the last minute. Other jurisdictions with different turnaround times might insert a different deadline. AAA Rule R-14 requires a request before the time set for appointment of an arbitrator as agreed by the parties or as set by the AAA Rules.

Good practice under Rule 101 would be to request this upon notice of arbitration or in a demand for arbitration.

102. Interpreters. A party [desiring] an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the interpreter, unless the arbitration agreement specifies otherwise.

Commentary

AAA R. R-27 is the source for Optional Rule 102, except the last clause, which reflects the policy of allowing parties to modify these rules to suit a particular arbitration. *See also* AAML R. 4.a.

103. Language. The language of the arbitration shall be that of the documents containing the arbitration agreement. The arbitrator may order that any documents submitted during the arbitration that are in another language shall be accompanied by a translation into the language of the arbitration. The proponent of the document shall bear the cost of the translation, which may be assessed as a cost in the arbitration.

Commentary

Optional Rule 103 follows AAA Int. R., Art. 14 except the last sentence.

104. Experts.

(a) The arbitrator may appoint one or more independent experts to report in writing to the arbitrator on specific issues designated by the arbitrator and communicated to the parties.

(b) The parties shall provide the expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. A dispute between a party and the expert as to relevance of the requested information or goods shall be referred to the arbitrator for decision.

(c) Upon receipt of an expert's report, the arbitrator shall send a copy to all parties and shall give the parties an opportunity to express their opinion on the report in writing. A party may examine any document upon which the expert has relied in the report.

(d) At any party's request, the arbitrator shall give the parties an opportunity to question the expert at a hearing. Parties may present expert witnesses to testify on the points at issue during this hearing.

Commentary

Optional Rule 104 follows AAA Int. R., Art. 22. Optional Rule 104 introduces a form of conciliation report, a procedure favored in some Asian countries. If parties agree on this procedure, perhaps after arbitration has begun, they might settle on the basis of the report. Unless the Rule is revised to require acceptance of the report, the parties are free to disregard some or all of the report. Although Optional Rule 104 would seem to have slight relevance in family law, it might be useful in a premarital agreement on an international business that includes an arbitration agreement, and divorce is sought. Rule 15(h), permitting parties to allow an arbitrator to seek an outside opinion in determining what is in the best interests of a child, does not mean that the outside opinion must be an "expert" opinion within the meaning of Rule 104. Proposed Act, note 3, § 18 would bar arbitrators from mediation, conciliation or similar techniques during any phase of the arbitration proceedings. *Id.* § 17 would bar arbitrators from appointing a guardian ad litem, custody evaluator, accountant or other expert, unless such expert(s) would serve without cost to the parties.

105. Law Applied. Subject to any choice of law clause or clauses in an applicable contract or other agreement and any law governing choice of law, the arbitrator shall apply the substantive law of [jurisdiction whose Model Act is invoked] exclusive of [jurisdiction whose Model Act is invoked] conflict of laws principles.

Commentary

P-A-C R. 1.04 suggested Optional Rule 105, which presumes that arbitration pursuant to the Act will occur in the "jurisdiction whose Model Act is invoked," a substitute for "North Carolina." *See* Handbook, note 9, at 51-52. *see also* Restatement (Second) of Conflict of Laws § 187 (1988 rev.). If parties choose an arbitration site outside the jurisdiction, in a contract or a submission to arbitration, they should be mindful of legislation that may affect choice of law or arbitration situs clauses, *e.g.,* N.C. Gen. Stat. § 22B-3 (2003). If such law is chosen, consideration should be given to including a severability clause. In most cases involving a divorce, the substantive law of the jurisdiction will govern as to property, etc., in that jurisdiction. However, if a premarital agreement involving business transactions, etc., between the marriage partners is involved, or if there are property, etc. interests outside the jurisdiction, parties and counsel should consider carefully the advisability of a blanket rule that the jurisdiction's substantive law governs all aspects of the marriage breakup. In those cases a choice of law clause must be drafted carefully, in all cases excluding conflict of laws rules to avoid renvoi problems, to take into account the several jurisdictions' substantive law. The phrase "applicable contract or other agreement" means that the procedural rules chosen by the parties, *e.g.,* the Basic and Optional Rules, will apply. Since the Model Act is procedural in nature, Optional Rule 105 does not apply to it. To the extent that it might be considered substantive in nature, *i.e.,* the offer and acceptance of the agreement to arbitrate, Optional Rule 105 is congruent with the Act.

106. Class Actions. Arbitrations under this agreement shall not be subject to consolidation with any class action subject to arbitration.

Commentary

Optional Rule 106 is new; the NCBA Committee has recommended it for a future Handbook revision. Green Tree Finan. Corp. v. Bazzle, 539 U.S. 444, 447-55 (2003) (Breyer, J., plurality op.; Stevens, J., concurring) held that whether a claim in an agreement to arbitrate can be treated as a class action treatment by arbitrators is subject to State law and terms in the agreement in a case otherwise governed by the FAA. Livingston v. Associates Finan., Inc., 339 F.3d 553, 558-59 (7th Cir. 2003) enforced an arbitration agreement clause precluding class actions. Although class actions will be rare in family law arbitrations where all at stake is a marriage breakup, if such an arbitration is consolidated with a business arbitration under Model Act § 110, the likelihood of a class action issue increases. If parties wish to consolidate with an arbitrated class action, this could be substituted:

> **Class Actions.** Arbitrations under this agreement shall be subject to consolidation with any class action subject to arbitration.

Optional Form CC suggests a form for not allowing consolidation of arbitrations, which might be used; its *Commentary* suggests alternatives if consolidation is thought desirable. These alternative might be used if consolidation with a particular class action is desirable. *See also* Part III.A.10.

Forms and Rules: Summary

The Model Act, like arbitration practice generally, offers parties many options on how the arbitration will be conducted. In the first place, a decision to arbitrate is completely voluntary; parties should inform themselves of options under the Act before they sign an agreement to arbitrate. The Act, like other arbitration legislation, presupposes that many procedural rules will be covered by clauses in the agreement to arbitrate; some clauses may change the rules in the Act if the Act or other law, *e.g.*, rights for emergency support, do not forbid it.[38]

Many agreements to arbitrate have a clause incorporating by reference a standard set of rules, to shorten the length of the agreement to arbitrate. (There is nothing wrong with writing the rules into the agreement to arbitrate, but this may create an unnecessarily long document in most cases.) The forms for clauses frequently have options, depending on the nature of the dispute, and parties must choose among these clauses to provide for the basic rules for the proceeding, *e.g.*, for the site of the arbitration. Similarly, the rules often have options, and it is the parties' option to include a rule, delete it, modify it, or draft a special rule not in standard rules, to suit their desires for arbitration, subject to limitations within the Act or other law such as rights for emergency support.[39]

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[38] *See, e.g.*, Model Act § 104 and Part III.A.4.

[39] *See id.* and Forms B, E.

Parties considering arbitration as a family law dispute resolution alternative must therefore consider the forms for basic clauses, and rules for the arbitration, besides statutes, State and federal, and case law governing arbitration by agreement. No litigant in any jurisdiction's courts stops with the civil practice rules or statutes and Constitutional provisions. Examination of local practice rules, if any, and case law is also necessary. The same kind of layered analysis is necessary in considering whether to arbitrate. The major difference is that parties have a much greater opportunity to draft the procedural regime under which they will operate in arbitrations by agreement than in traditional civil litigation.

IV. CONCLUSIONS

The Model Family Law Arbitration Act makes the ADR option of arbitration by agreement available for resolution of all issues related to a marriage breakup except the divorce itself. The agreement can be part of a premarital agreement,[40] an agreement to arbitrate during the marriage, an agreement after separation and before divorce proceedings are filed, or after entry of an absolute divorce judgment. This procedure can only be invoked if the parties want it and sign an agreement to that effect.[41] The scope of the arbitration is also determined by the parties' agreement. For example, a couple in business together can agree on arbitration of business issues but not family issues if they choose, and vice versa, or both sets of issues, *i.e.*, family business and marriage dissolution. The Act also provides for consolidating arbitrations if two or more agreements to arbitrate are at issue.[42]

As citations to Part III.C indicate, the AAML Committee initially drafted two Model Act versions, one based on the North Carolina Family Law Arbitration Act, which had been based on North Carolina's version of the UAA, with provisions added from a draft of the RUAA, and a second based on the RUAA.[43] The AAML Executive Committee has decided to go forward with a RUAA-based Model Act.[44] Jurisdictions that do not wish to enact an entire Model Act may use them as checklists to engraft special family law arbitration provisions on a jurisdiction's version of the UAA, RUAA or other arbitration legislation. The Committee recommends separate legislation,[45] perhaps inserted in a jurisdiction's family law statutes, for convenience of parties and counsel, however. Moreover, policies different from those in other arbitrations, e.g., those for commercial disputes, are at stake in family law arbitrations.

For example, alimony, child support and child custody issues may be arbitrated, but these issues may be subject to court action after an award has been rendered, or in the future when

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[40] Model Act § 106(a) forbids including the divorce, child support and child custody in a premarital agreement to arbitrate. Subject to limitations and procedures recited in the Act, child support and child custody may be the subject of a postmarital agreement to arbitrate. *See also* Part III.A.6; Part III.A.2, 2004 AAML Comm. Rep., note 1. The § 106(a) limits are based on the North Carolina FLAA. Other jurisdictions may allow a premarital agreement on child support and child custody. *See* Part III.A.6's *Commentary*.

[41] Model Act § 106; *see also* Part III.A.6.

[42] Model Act § 110; *see also* Part III.A.10.

[43] *See* Part III.A and 2004 AAML Comm. Rep., note 1, Part III.A, for analysis of each.

[44] *See* Part I, Introduction, note 1 and accompanying text.

[45] This echoes McGuane, note 3, at 400-01's recommendation.

there have been changes of circumstances entitling a spouse or child to court action and change of an award. Parties can agree to have these issues initially decided by an arbitrator.[46]

A major departure from traditional U.S. arbitration in all but uncomplicated consent divorce cases where there is no postseparation support, alimony, child support or child custody at issue is the need for the arbitrator to issue a reasoned award[47] so that the court can examine an award to determine if awards for postseparation support, alimony, child support or child custody are appropriate under substantive family law.

Parts III.B and III.C publish standard suggested Forms and Rules for family law arbitration. Some Forms, *e.g.*, an agreement to arbitrate, are mandatory if parties wish to arbitrate a dispute.[48] Parties have freedom of contract to choose among the suggested Forms and Rules to determine, *e.g.*, how many arbitrators will be used (the default rule is a single arbitrator),[49] and how arbitration will be conducted, subject to limitations.[50] Even here, the interests of spouses for alimony, and children for support and custody, must be protected. *Drafters must consider the facts and circumstances of the client and the particular case and must determine that suggested standard form(s) or rule(s) fit(s) the needs of clients and the case.*

Neither the Model Act, nor suggested Forms and Rules, are designed to change substantive law.[51]

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[46] *See generally* Model Act §§ 120, 122-24A; *see also* Parts III.A.20, 22-24A.

[47] Model Act § 119(c); *see also* Part III.A.19; Basic Rule 28 and its *Commentary* in Part III.C.

[48] *See* Model Act §§ 103-04; Form A and *Commentary*, Part III.B.1; *see also* Parts III.A.3-III.A.4.

[49] *Compare* Model Act § 5(a) (single arbitrator the norm), in 2004 AAML Comm. Rep., note 1 *with* Model Act § 111 (no similar provision, Part III.A.11's *Commentary* suggests statutory language to match Model Act § 5[a]). Forms A, BB in Part III.B and Basic Rule 2, in Part III.C provide for a single arbitrator, with an optional contract provision for more than one. *See also* Part III.A.5, 2004 AAML Comm. Rep., note 1.

[50] *E.g.*, limits on premarital agreements and on waivers. *See* Parts III.A.1 and III.A.4.

[51] There would seem to be exceptions to this statement: standards for modifying awards for alimony, postseparation support, child custody or child support; rules for punitive damages; rules for attorney fees. The language of these provisions, in Model Act §§ 121 and 124A, follows a particular state's law; *see* Parts III.A.21 and III.A.24A. The Model Act drafters did not intend to supplant these or other aspects of family law in any jurisdiction; however, the wording of the Model Act and suggested forms or rules may have that unintended effect in a particular

Like any kind of dispute resolution, including litigation, family law arbitration by agreement of the parties has advantages and disadvantages.

One major advantage of arbitration is privacy; the Model Act and its rules provide explicitly for this, not only in the process but also if an award must be confirmed by a court for enforcement proceedings, if the parties agree to this.[52] For the minority of states that allow jury trial in family law cases, jury trial is not an option with arbitration. If parties arbitrate and fulfil an award's requirements, there is no court record at all except a record of the divorce.

Some say arbitration is more expensive than litigation, citing "runaway" arbitrator fees. However, parties can negotiate with an arbitrator over the fee and may negotiate other costs, except those the law mandates.[53] Others say arbitration is less expensive, particularly if transactional costs (*e.g.*, appearances in court that must be continued or delayed until later in the day because of a court's being required to take up other matters, *e.g.*, new criminal cases requiring priority attention because of speedy trial requirements; time during the work week [and perhaps more expensive weekday baby sitter expenses] taken to appear in court; and the like) are considered. If an arbitrator and the parties agree, time limits can be set for arbitration, thereby reducing fees; hearings and other proceedings can be held at mutual convenience, perhaps on weekends or in the evening, so that time on the job, and therefore income, is not lost.

Although there are many family court judges, or generalist judges with considerable family law experience, there is a risk of a complex case's being given to a newcomer to the bench with a risk of a less than fair result for all. Parties may choose their arbitrator,[54] perhaps an experienced family law specialist or a well-respected member of the bar, or a retired judge with family law experience.

The Model Act does not require arbitration, unlike court-annexed arbitration or mediation, where parties must arbitrate or mediate, subject to a court's exempting a case. However, there is no "re-trial" if a party is dissatisfied with the result after an arbitration by agreement, as there is in court-annexed arbitration; awards are final, subject to correction, modification or vacatur under the Act. If a jurisdiction elects review and appeal of errors of law by arbitrators, those issues, along with traditional reasons for appeal from judgments on awards,

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jurisdiction. Drafters of legislation and forms or rules should be alert to this possibility and tailor statutes, forms or rules accordingly.

[52] *See* Model Act § 122 and Basic Rule 11; *see also* Parts III.A.22 and III.C, Rule 11 *Commentary*.

[53] *See* Parts III.A.4, III.A.8, III.A.21.

[54] Under the Model Act arbitrators must disclose interests, relationships with parties, etc. *See* Parts III.A.4, III.A.11, III.A.12.

can be litigated.[55]

The Model Act offers a complete ADR option. Parties can choose it in place of negotiated settlement, mediation, the collaborative law process, court-annexed ADR, or litigation. Parties can mediate before arbitration and then contract for arbitration; they can agree to mediate during the arbitration process.

As is the case with most uniform or model acts, all of the provisions of this Model Act will not be appropriate in every jurisdiction. A jurisdiction considering adoption of such an Act should critically examine each provision and determine whether that provision is appropriate for that jurisdiction. The same is true for the suggested forms and rules; some may not be appropriate for a particular jurisdiction. Other suggested forms or rules may be appropriate but must be modified to fit the law and practice needs of a particular jurisdiction.

Arbitration by agreement, like its sisters, court-annexed arbitration or mediated settlement conferences, is not a panacea. It will not cure warts, nor does it guarantee better results in every case. It may promote a better, cheaper, and more efficient result in many situations, particularly where courts are extraordinarily busy with higher-priority cases (*e.g.,* criminal litigation), and where parties choose an able, experienced arbitrator by proper use of the Model Act and incorporate appropriate form clauses and rules in an agreement to arbitrate.

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[55] *See* Parts III.A.4, III.A.6, III.A.19-24A, III.A.28.