Arbitrating Family Law Cases by Agreement

by
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"No-fault" divorce[1] and life stresses in the last century and the first years of this century, among other factors, have led to a

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1 *See, e.g.*, N.C. Gen. Stat. § 50-6 (2003) (divorce available after husband, wife live separate and apart a year; plaintiff or defendant must reside in state six months).

rise in the number of divorces and related proceedings in the state courts. (Nearly half of recent first marriages may end in divorce.[2]) Other matters, particularly criminal cases with speedy trial requirements,[3] overwhelm state courts that also must contend with growing civil dockets.[4] Budget crunches in most jurisdictions suggest that relief for the courts, *e.g.*, more judges and other personnel or capital improvements, may be on hold for years to come.

The picture is not all gloomy. Alternative dispute resolution (ADR), including court-annexed arbitration, mediation under court auspices, private mediation and arbitration by agreement, has been a response to crowded dockets.[5] Some states provide

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2 United States Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, Number, Timing, and Duration of Marriages and Divorces: 1996, at 17 (Feb. 2002).

3 The U.S. and state constitutions command speedy trial. Klopfer v. North Carolina, 386 U.S. 213, 222-26 (1967) (Sixth Amendment speedy trial requirement applies to states through Fourteenth Amendment); *e.g.,* N.C. Gen. Stat. § 15A-954(a)(3) (2003) (charges dismissed if defendant denied speedy trial under U.S., North Carolina Constitutions); State v. McCoy, 277 S.E.2d 515, 522-24 (1981); State v. Tindall, 242 S.E.2d 806, 810-11 (N.C. 1978) (inter alia citing U.S. Const. amend. VI, N.C. Const., art. I § 18).

4 Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A.J. 24, 27 (Oct. 2002). Federal courts will abstain and not hear divorces and similar family law issues even though diversity of citizenship and jurisdictional amount under 28 U.S.C. § 1332 (2000) are present. Ankenbrandt v. Richards, 504 U.S. 689, 693-704 (1992); 13B Charles Alan Wright et al., Federal Practice & Procedure § 3609 (2d ed. 1984 & 2003 Pocket Pt.); Linda Mullenix et al., Understanding Federal Courts and Jurisdiction §§ 3.17[1]-3.17[2] (1998); Charles Alan Wright & Mary Kay Kane, Federal Courts § 25 (6th ed. 2002); Martin H. Redish, *Diversity Jurisdiction*, in 15 Moore's Federal Practice §§ 102.90-102.91 (Daniel R. Coquillette et al. eds., 3d ed. 2003). Congress may supersede this rule, as in International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-10 (2000) (hereinafter ICARA), implementing Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 51 Fed. Reg. 10,494 (Mar. 26, 1986), 1343 U.N.T.S. 89 (hereinafter Abduction Convention), as of 2003 in force for the United States and 52 other countries. Treaty Affairs Staff, Office of the Legal Adviser, United States Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003, at 406-07 (2003) (hereinafter TIF). For most family law cases state courts and state law remain the primary resources.

5 Samborn, *supra* note 4, at 26-27 (decline in number, percentage of civil cases going to trial; discussing trend's pros and cons).

for family courts to bring all issues related to matrimonial, juvenile and other family difficulties into one proceeding.[6]

In some jurisdictions disputants have tried to use general arbitration legislation, *e.g.*, the Uniform Arbitration Act,[7] to resolve marital disputes. Some courts, however, have declared that some issues, *e.g.*, child support or child custody, may not be arbitrated as matters of public policy; others have different views.[8]

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6 1998 N.C. Sess. Laws ch. 1998-202, § 25; 1999 *id.* ch. 1999-237, §§ 17.16(a)-17.16(d), 21.6(b), 30.2; Joan G. Brannon, The Judicial System in North Carolina 13 (2000) (pilot program).

7 Unif. Arbitration Act, 7(1) U.L.A. 1 (1997) (hereinafter Uniform Act, the Act, or UAA).

8 *Compare* 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 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); Kovacs v. Kovacs, 633 A.2d 425, 431-32 (Md. App. 1993) (court de novo review of child support required) *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); Dick v. Dick, 534 N.W.2d 185, 188-91 (Mich. App. 1995) (support, custody arbitrable); Bandas v. Bandas, 430 S.E.2d 706, 707-08 (Va. App. 1993) (approving arbitration for spousal 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*, *supra*); Revised Unif. Arbitration Act § 23, *Comment* to § 23, ¶ C.4 7(1) U.L.A. 37, 38 (2002 Cum. Ann. Pocket Pt.) (hereinafter Revised Uniform Act, RUAA, or the Act); 2 Thomas H. Oehmke, Commercial Arbitration § 49:04 (rev. ed. 2002); 1 Gabriel M. Wilner, Domke on Commercial Arbitration § 13:09 (rev. ed. 2002);

Arbitral awards are final under the Act and similar legislation;[9] these issues must always remain open to protect the best interests of the child,[10] according to courts refusing to allow arbitration on

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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 recent cases holding offer of judgment practice rules, *e.g.*, modeled on Fed. R. Civ. Proc. 68, inapplicable in family law litigation. *See, e.g.*, Mohr v. Mohr, 573 S.E.2d 729, 731-32 (N.C. App. 2002).

9 UAA, *supra* note 7, §§ 1, 11, 14-15, at 6, 264, 419, 425.

10 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66, 69-70 (2000) (plurality op.) (" . . . [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children[,]" citing best interests of the child legislation); *see also id.* 75, 76-77 (Souter, J. concurring); 80, 83 (Stevens, J., dissenting); 93, 98-99 (Kennedy, J., dissenting); *Crutchley*, 293 S.E.2d at 797-98. Florida reaches this result by legislation; Fla. Stat. Ann. § 44.104(14) (West 2003) forbids voluntary binding arbitration of child custody, visitation or child support disputes. Other state statutes allow it. *See infra* notes 17-18 and accompanying text. Apparently the first case to employ "best interests" language is Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.). Although the Court has recognized parents' constitutional rights to their children's care and custody, *see Troxel*, *supra*, and Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2116, codified as amended in scattered sections of 42 U.S.C. (2000), recognizes that in certain egregious situations states need not seek to reunify a family before ending rights of abusive or neglectful parents, the Court has never squarely constitutionalized the best interests of the child standard. *See also* Santosky v. Kramer, 455 U.S. 745, 752-56 (1982) (parental due process); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (balancing private interest against society's interest in protecting children's welfare); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (liberty of parents, guardians to direct upbringing, education of children under their control); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (parents' liberty interest in children's education). All states have the same basic structure of applying the best interest of the child standard, perhaps in legislation like N.C. Gen. Stat. §§ 50-13.2, 50-13.7 (2003). *See generally* Melodie Pillitire, Comment, *Granparent Visitation Rights: The Pitfalls and the Promise*, 2 Loy. J. Pub. Int. L. 177, 188-98 (2001); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 Alb. L. Rev. 345, 378-409 (1997). Nonarbitrability is not unique to family law issues. *Compare, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (international antitrust issues arbitrable) *with* American Safety Equip. Corp. v. J.P. Maguire &

child support, child custody or other related issues. Other ADR options may be limited; although court-annexed mediation[11] or collaborative law agreements[12] may be available, court-annexed arbitration may not be[13] for those situations where parties, too far apart emotionally or otherwise for successful mediation or collaboration, may yet wish to keep sensitive issues out of the courthouse. Even if divorce issues might be arbitrated, there are few arbitration rules tailored to family law issues.[14] The result is

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Co., 391 F.2d 821, 827-28 (2d Cir. 1968) (domestic antitrust issues nonarbitrable). *American Safety*'s continued viability divides the circuits. *See generally* Kotam Elec., Inc. v. JBL Consumer Prods., 93 F.3d 724 (11th Cir. 1996) (en banc, holding *Mitsubishi* overruled *American Safety*, noting circuits' division). *See also* Pacificare Health Sys., Inc. v. Book, 123 S.Ct. 1531, 1536 n.2 (2003) (question of arbitrability under Federal Arbitration Act has limited scope); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (same); 2 Ian R. Macneil et al., Federal Arbitration Law ch. 16 (1994, 1996, 1997 Supps.); 2 Oehmke, *supra* note 8, §§ 47:01-47:02; 1 Wilner, *supra* note 8, § 12:03; Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1, 2-4, 7-9, 21-33 (1996).

11 *Cf., e.g.*, N.C. Gen. Stat. §§ 7A-38.4, 7A-494 - 7A-495, 50-31 (2003). *See also* Jacqueline R. Clare, Alternative Dispute Resolution in North Carolina: A New Civil Procedure chs. 9-12, 14-15, 20, 25, 28 (2003); John G. Mebane III, Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C.L. Rev. 1857 (1993).

12 *Compare* N.C. Gen. Stat. §§ 50-70 - 50-79 (2003), enacted by 2003 N.C. Sess. Laws ch. 2003-371 *with* Tex. Fam. Code Ann. § 153.0072 (Vernon 2001); *see also* Steven Keeva, *Working It Out Amicably*, 89 A.B.A.J. 66 (2003); *Risks of Collaborative Law*, *id.* 13 (Aug. 2003).

13 *See, e.g.* N.C. Gen. Stat. § 7A-37.1 (2003); N.C. Ct.-Ord. Arb. R. 1(a)(1)(iv). North Carolina was among the first states adopting court-annexed arbitration. Clare, *supra* note 11, chs. 4, 13; George K. Walker, *Non-Binding, Court-Ordered Arbitration: Practice Pointers*, Trial Briefs 6 (Summer 1998) ; *id., Arbitration*, in Desk Book on Alternative Dispute Resolution (A. Mark Weisburd ed. 1992); *id.*, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 Wake Forest L. Rev. 901 (1986); *id.*, *Experimental Court-Annexed Arbitration Comes to North Carolina*, 33 N.C. St. B.Q. 10 (No. 4, 1986);William Kinsland Edwards, Note, *"No Frills" Justice: North Carolina Experiments with Court-Ordered Arbitration*, 66 N.C.L. Rev. 395 (1988). Rules for Court-Ordered Arbitration in North Carolina, promulgated pursuant to N.C. Gen. Stat § 7A-37.1(b) (2003), have been amended, *see* Rules for Court-Ordered Arbitration in North Carolina, 356 N.C. — (2003), since all but Clare, *supra* were published.

14 *See*, however, American Arbitration Association, Arbitration Rules for the Interpretation of Separation Agreements (Feb. 1, 1982) (hereinafter AAA Separation Agreement R.), in CCH, Doyle's Dispute Resolution Practice North

that although breakup of a husband-wife business might be subject to state arbitration legislation and the Federal Arbitration Act[15] if interstate or foreign commerce is involved, other aspects of the family breakup would not, thereby complicating financial and other aspects of dividing a marital estate fairly.[16]

One result of the nonarbitrability decisions has been that a few states provide for arbitrating family law issues by agreement by patching statutes into the Uniform Act or by special legislation.[17] North Carolina's 1999 Family Law Arbitration Act is

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America ¶ 15-100, at 23,302 (1990), no longer actively listed by the American Arbitration Association. The author has been told of cases where parties agreed to arbitrate family law issues under the AAA commercial arbitration rules. These rules, probably the most widely used in arbitrations, are good for their purpose, *i.e.*, business disputes, but they may be inappropriate for family law cases or, worse, may fail to address critical issues peculiar to a marriage breakup, *e.g.*, child custody. The North Carolina Family Law Arbitration Act, N.C. Gen. Stat. §§ 50-41 - 50-62 (2003) (hereinafter Family Law Act, FLAA, or the Act) does.

15 9 U.S.C. §§ 1-307 (2000) (hereinafter FAA).

16 *E.g.*, if arbitration might validly decide the breakup of a family business but cannot decide custody and support, the result could be two proceedings, one before an arbitrator (the business) and one in court (custody, support). If arbitrators first make a final award on dividing business assets or ownership that is reduced to judgment, that would bind courts, *cf.* N.C. Gen. Stat. §§ 1-567.12, 1-567.15 (2001), UAA, *supra* note 7, §§ 11, 14-15, at 264, 419, 425, with perhaps less than the best results for custody and support. If a court first decides on custody and support, absent a waiver (*cf., e.g.*, Servomation Corp. v. Hickory Constr. Co., 342 S.E.2d 853, 854 [N.C. 1986]), and business issues go to arbitration, the result may be less than optimal for custody and support and maybe business issues as well, *e.g.*, allocation of marital assets to cover custody and support in connection with dissolving the business.

17 Colo. Rev. Stat. § 14-10-128.5 (Lexis/Nexis 2003) (incorporates by reference UAA, *supra* note 7, but 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.) (amendment to UAA, *supra*); 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, *supra*). A New York bill would require mediation or arbitration in child custody disputes. Mark Boyko, *State Legislatures See Flood of ADR Bills in First Quarter of 2003*, 9 Disp. Res.

among these.[18] Unlike other states' enactments, some of which incorporate special provisions in other ADR legislation, the Family Law Act is a comprehensive statute,[19] following the then-current North Carolina Uniform Act and the North Carolina International Commercial Arbitration and Conciliation Act. The FLAA is published in the General Statutes, Chapter 50, one of several chapters dealing with family law issues in that jurisdiction.[20] The first reported case under the FLAA has been decided, although it did not address the key issues of modifying alimony, postseparation support, child support or child custody awards.[21]

Another factor is change in general arbitration and ADR legislation. The Uniform Act, first proposed in 1955 with 1956 amendments, was widely adopted.[22] Arbitration or litigation

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Mag. 29 (No. 3, 2003). Fla. Stat. Ann. § 44.104(1-14), *supra* note 10, bars voluntary binding arbitration of child custody, visitation or child support disputes.

18 N.C. Gen. Stat. §§ 50-41 - 50-62 (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

19 *Compare* N.C. Gen. Stat. §§ 50-41 - 50-62 (2003) *with* Colo. Rev. Stat. § 14-10-128.5; Mo. Ann. Stat. § 435.405; N.H. Rev. Stat. Ann. § 542.11; Okla. Stat. Ann. tit. 43, § 109H; S.D. Codified Laws § 21-25B-2; Tenn. Code Ann. §§ 36-6-402, 36-6-409; Tex Fam. Code §§ 6.601, 153.0071; Wash. Rev. Code §§ 7.06.020(2), 26.09.175; Wis. Stat. Ann. §§ 766.58(10), 802.12, *supra* note 17, some of which are published in family law legislation.

20 *Compare* North Carolina Uniform Arbitration Act, N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001); North Carolina International Commercial Arbitration and Conciliation Act, *id.* §§ 1-567.30 - 1-567.87 (2003) (hereinafter ICACA), as amended, 2003 N.C. Sess. Laws ch. 2003-345, § 3 as to N.C. Gen. Stat. § 1-567.64 (2003), *with id.* §§ 50-41 - 50-62 (2003). The North Carolina Revised Uniform Arbitration Act, *id.* §§ 1-569 - 1-569.31 (2003) replaced the state's Uniform Act, *id.* §§ 1-567.1 - 1-567.20 (2001), except for agreements made before Jan. 1, 2004 and as provided in *id.* § 1-569.3(b) (2003). 2003 N.C. Sess. Laws ch. 2003-345 § 4.

21 Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003) (modification, correction of award); *see also infra* notes 290-316 and accompanying text.

22 *Compare Table of Jurisdictions Wherein Act Has Been Adopted*, in *Uniform Arbitration Act*, 7(1) U.L.A. 1 (1997) *with Table of Jurisdictions Wherein Act Has Been Adopted*, in *Uniform Arbitration Act, id.* 53 (2002 Cum. Ann. Pocket Pt.) (transition from UAA, *supra* note 7, to RUAA, *supra* note 8). Thirty-five jurisdictions enacted the UAA, *supra*; 14 have similar legislation. *Prefatory Note*, in Uniform Arbitration Act (2000), 7(1) U.L.A. 2 (2003 Cum. Ann. Pocket Pt.). John M. McCabe, *Uniformity in ADR: UMA, Revised UAA Present Different Challenges*, 8 Disp. Res. Mag. 20, 21 (No. 4, 2002) counts 49 jurisdictions as enacting the UAA. The Act replaced earlier unsatisfactory uni-

practice has revealed gaps in coverage or ambiguities in the Act.[23] In response the NCCUSL[24] completed work on the Revised Uniform Arbitration Act in 2000 after a multiyear drafting process.[25] Eight states, including North Carolina, have enacted

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form legislation the National Conference of Commissioners on Uniform State Laws (hereinafter NCCUSL) proposed in 1925, which North Carolina, Act of Mar. 4, 1927, ch. 94, 1927 N.C. Sess. Laws ch. 313, but few other states enacted. *Prefatory Note*, in Uniform Arbitration Act, 7(1) U.L.A. 1, 2 (1997); McCabe, *supra* at 20; Charles F. Vance, Jr., *North Carolina's New Arbitration Act — Impact on Legal Profession*, 25 B. Notes 6 (No. 1, 1973); George K. Walker, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 Wake Forest L. Rev. 901, 906-07 (1986). The North Carolina UAA version, N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001) closely follows the UAA, *supra* note 7; *see* Vance, *supra*; Walker, *Trends, supra* at 905-14.

[23] *See Prefatory Note*, in Uniform Arbitration Act (2000), *supra* note 22, at 2 (identifying 14 problems with UAA, *supra* note 7, that adopting RUAA, *supra* note 8, may cure); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 Disp. Res. J. 28 (2001).

[24] 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 (hereinafter ABA). *See generally* Uniform Arbitration Act (2000), *supra* note 22, at 1; 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).

[25] *See generally Prefatory Note*, in Uniform Arbitration Act (2000), *supra* note 22; Heinsz, *supra* note 23, at 29, 36 (input from AAA; ABA sections, committees; CPR Institute for Dispute Resolution; Judicial Arbitration and Mediation Services, Inc. [hereinafter JAMS]; National Academy of Arbitrators; securities industry, construction industry, labor-management relations, consumer groups). Similar work is underway for court-annexed mediation. *See* Unif. Mediation Act, 7A(2) U.L.A. 80 (2003 Cum. Ann. Pocket Pt.) (hereinafter UMA), which the NCCUSL adopted in August 2001 and the ABA approved in February 2002; James J. Alfini, *Mediation's Coming of (Legal) Age*: *Foreword* to Symposium, *"Hot Topics in Dispute Resolution: What Advocates, Neutrals, and Consumers Need to Know*, 22 N. Ill. U.L. Rev. 153 (2002); Brudney, *Mediation, supra* note 24; *id., The Uniform, supra* note 24; Ellen E. Deason, *Uniform Mediation Act: Law Ensures Confidentiality, Neutrality of Process*, 8 Disp. Res. Mag 7 (No. 4, 2002); Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. Disp. Resol. 175 (2003); Symposium, *supra* (other articles on UMA, *supra)*. 2003 Laws of Illinois, Pub. Act 93-0399, codified as 710 Ill. Comp. Stat. Ann. §§ 75/1 — (West —); Neb. Rev. Stat. Ann. §§ 25-2930 - 25-2942 (2003 Supp.) are the first enactments. *See also* Boyko, *supra* note 17, at 29. The North Carolina Bar Association (hereinafter NCBA, or the Association) Dispute Resolution Section, analogous to the ABA Section on Dispute

the Revised Uniform Act; fifteen more have had the RUAA before their legislatures.[26] If experience with the Uniform Act is

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Resolution, is studying these issues. The NCBA is a private, nonprofit corporation founded in 1899; its purposes are promoting and improving administration of justice in the state; fostering and encouraging law reform when in the public interest; advancing the science of jurisprudence in all its aspects; improving the Bar's standards of service to the general public; fostering, protecting and promoting lawyers' common professional interests; and providing a means of organization through which Association members may pursue these and other objectives common to them as members of a learned profession. The North Carolina State Bar, a North Carolina state administrative agency, is charged with lawyer licensure and discipline. *Compare* Act to Incorporate the North Carolina Bar Association, 1899 N.C. Sess. Laws, Private Laws, ch. 335, since amended by North Carolina Bar Association Articles of Amendment and Restated Charter, art. 3 (June 30, 1986), *with* N.C. Gen. Stat. §§ 84-15 - 84-38 (2003).

26 Haw. Rev. Stat. Ann. §§ 658A-1 - 658A-29 (2003 Cum. Supp.); Nev. Rev. Stat. Ann. §§ 38.206-38.248 (2002 repl. vol.); 2003 Laws of New Jersey, Pub. L. No. 95, codified as N.J. Stat. Ann. §§ 2A 23B-1 — (West —); 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. §§ — (—); Utah Code Ann. §§ 78-31a-101 - 78-31a-131 (2003 Supp.). North Carolina's RUAA is effective January 1, 2004 and applies to agreements to arbitrate made on or after then. The North Carolina UAA, *supra* note 7, 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); Heinsz, *supra* note 23, at 29-30, 36. 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, *supra* note 17, 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 analysis of the Act, *see* Cole, *supra* 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, *supra* note 23. Professor Heinsz was NCCUSL's reporter for its RUAA project. *Id.* 28. For general analysis in the context of a North Carolina Bar Association proposal for enactment in North Carolina, *see* George K. Walker, Rptr., 1 & 2

precedent, other jurisdictions may enact the RUAA in the near future.[27] Even as North Carolina mediation statutes and rules suggested ideas for the FLAA, the UMA[28] and other uniform legislation may be partial guides for future arbitration legislation. Federal legislation and treaties to which the United States is party may govern family law issues in a small but increasing number of cases.[29] Dissatisfaction with arbitration as it applies to consumers and others with weaker bargaining power has led to

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).

27 Brudney, *Mediation, supra* note 24, at 813-22; *id., The Uniform, supra* note 24, at 10, sounds a more cautionary note.

28 *See supra* note 25.

29 *See generally* Convention on Recognition & Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (hereinafter U.N. or New York Convention), implemented by 9 U.S.C. §§ 201-08 (2000); Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, T.I.A.S. No. —, 1438 U.N.T.S. 211 (hereinafter Panama Convention), implemented by 9 U.S.C. §§ 301-07 (2000). As of 2003 135 countries including the United States were U.N. Convention, *supra*, parties; 17 were Panama Convention, *supra*, parties. TIF, *supra* note 4, at 334-35. Other bilateral and multilateral agreements are in force between the United States and foreign countries; the U.N. and Panama Conventions, *supra* are the best known and most widely used. *See generally* George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C.J. Int'l L. & Com. Reg. 419, 420 (1992). RUAA, *supra* note 8, does not specifically address international arbitration; "it is unlikely that state arbitration law will have major application to an international case" because of federal preemption. State and other international arbitration statutes may influence the content of general state arbitration legislation, however. *Prefatory Note*, Uniform Arbitration Act (2000), *supra* note 22, at 4-5. This was the experience in enacting the FLAA, *supra* note 14.

"due process" reform proposals for all arbitration legislation.[30] The RUAA seeks to address some of these issues.[31]

It was in this context that an NCBA Dispute Resolution Section and Family Law Section Joint Committee[32] drafted proposals for the Family Law Act and associated forms and rules,[33]

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30 *Due Process Principles*, 8 Dispute Res. Mag. 16 (Spring 2002), draws on AAA, JAMS and National Arbitration Forum standards for a composite list:

1. Fundamentally fair process;
2. Clear and adequate notice of arbitration clause and its consequences, explanation of whether arbitration is optional or mandatory, and description of the arbitration process and means for acquiring more information;
3. Independent and impartial neutral arbitrator;
4. Competent, qualified arbitrator;
5. Administration independent of parties and arbitrators;
6. Consumer participation in arbitrator selection;
7. Arbitrator disclosure of interests and relationships;
8. Retention of access to Small Claims Court;
9. Reasonable cost to customer;
10. Reasonably convenient location;
11. Reasonable time limits;
12. Right to representation by counsel or other representative;
13. Opportunity to mediate or settle;
14. Fair and efficient hearing;
15. Maintenance of confidentiality and protection of privilege;
16. Reasonable discovery;
17. Arbitral remedies same as in court;
18. Award conforming to contract and/or law;
19. Written award, with explanation of result, at least if requested by a party;
20. Mutuality of obligation to arbitrate;
21. Arbitration agreement meeting legal standards.

The Model Fair Bargain Act (Mar. 5, 2002 draft) (hereinafter Model Act), *available at* ssl.csg.org/dockets/23cycle/2003C/2003Cbills/08t23bo/model.doc, addresses some of these issues; *see also* Jackson Williams, *Revised Uniform Arbitration Act: Dangers to Consumers, Opportunities for Reform*, 25 NACCA News 2, 4 (No. 7, 2002), www.nacaanet.org/newslet.htm.

31 *See infra* note 94 and accompanying text.

32 Note * identifies Committee members; *see also infra* notes 37-53 and accompanying text.

33 *See* Lynn P. Burleson et al., The North Carolina Family Law Arbitration Act: Proposed Legislation, Forms and Rules (Jan. 25, 1999) (hereinafter Proposal; copy in author file), which differs from 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/

relying in part on the Uniform Act, the ICACA and a then-current RUAA draft.[34]

This Article analyzes the FLAA, comparing it with federal and state legislation, the UAA, the RUAA and arbitration rules, in Part I. Part I also discusses the Bar Association-drafted forms and rules suggested for FLAA-governed cases. Part II discusses situations the FLAA does not cover, possible amendments based on the RUAA, and other potential issues in FLAA-governed cases. Part III offers conclusions and projections for the future. As the foregoing suggests,[35] family law arbitration legislation like the Act may require amendment. That is one of the general purposes of this article. The other is to discuss the Family Law Act as presently enacted, to apprise other jurisdictions of this ADR option. The Arbitration Committee of American Academy of Matrimonial Lawyers is considering a draft model act, based on the North Carolina Act and the RUAA, that will be presented to the AAML during its 2004 annual meeting.[36]

I. The North Carolina Family Law Arbitration Act: Analysis

The FLAA was the product of factors mentioned above.[37] After the impact of *Crutchley*'s holding[38] had been felt in other divorce cases, the North Carolina Bar Association Family Law

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indoc.asp (hereinafter Handbook), publishing the Act, *supra* note 14, and offering suggested forms and rules based on it, with comments.

34 National Conference of Commissioners on Uniform State Laws, The Revised Uniform Arbitration Act (Rev. Tent. Draft No. 2, Mar. 20, 1998), *available at* www.law.upenn.edu/bll/ulc/ulc_frame.htm (hereinafter RUAA Draft).

35 *See supra* notes 7-31 and accompanying text.

36 A North Carolina Bar Association Family Law Section committee is also studying the FLAA, *supra* note 14, for recommended revisions to parallel the RUAA, *supra* note 8, as enacted in North Carolina, N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2003), for 2005 North Carolina General Assembly consideration. The author of this article is reporter for both projects. Letter from Lynn P. Burleson, American Academy of Martimonial Lawyers Arbitration Committee Chair to the author (Feb. 26, 2004) (on file with the author).

37 *See supra* notes 7-20 and accompanying text.

38 *I.e.*, public policy required that child custody and support issues were not arbitrable because of the finality of awards under the UAA, *supra* note 7. Crutchley v. Crutchley, 293 S.E.2d at 795-98; *see also* Cyclone Roofing Co. v. David M. LaFave Co., 321 S.E.2d at 877-78 (dictum).

and Dispute Resolution Sections constituted a Joint Committee[39] to research the possibility of superseding legislation to allow arbitration by agreement of all issues in a marriage breakup except the divorce itself. Because the NCCUSL was preparing proposed legislation to supersede the Uniform Act,[40] the Committee decided to review the current NCCUSL draft,[41] other states' family law arbitration legislation,[42] other North Carolina arbitration legislation[43] and arbitration rules[44] for ideas on comprehen-

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39 The Committee chair was an experienced family law attorney who had served as a judge of the General District Court, the proper court for divorce and other family law matters. N.C. Gen. Stat. § 7A-494, 7A-495 (2003). Members included two more experienced family law attorneys, a Wake Forest University School of Law professor who had taught family law for many years and was editor of a new edition of Lee's North Carolina Family Law, and the author as reporter, who had helped draft the state's court-ordered arbitration statutes and rules and the ICACA, *supra* note 20, and who had researched in the arbitration field. *See* note * *supra*.

40 *See supra* notes 22-25 and accompanying text.

41 *See* RUAA Draft, *supra* note 34.

42 *See supra* notes 17-18 and accompanying text.

43 *E.g.*, the state version of the UAA, *supra* note 7, N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001); the ICACA, *supra* note 20, *id.* §§ 1-567.30 - 1-567.87 (2003). ICACA, which follows other states' international arbitration statutes and the United Nations Commission on International Trade Law (hereinafter UNCITRAL) Model Law, was enacted in 1991 with later amendments, including a 2003 conforming amendment to refer to the RUAA, *supra* note 8, as enacted in North Carolina. 2003 N.C. Sess. Laws ch. 2003-345, § 3, amending N.C. Gen. Stat. § 1-567.64 (2003) to refer to *id.* §§ 1-569.23, 1-569.24 (2003). *See generally* Walker, *Trends, supra* note 29, discussing the 1991 ICACA version. The Model Law was a source for other countries' modern arbitration legislation and the RUAA, *supra*, whose drafters also used the 1996 English Arbitration Act and the U.N. Convention, *supra* note 29, as sources. *Prefatory Note,* Uniform Arbitration Act (2000), *supra* note 22, at 5.

44 Drafters relied primarily on the AAA Commercial Arbitration Rules (July 1, 1996) (hereinafter AAA Com. Arb. R.), a current version of which is *available at* www.adr.org/index2.1jsp?JSPssid=15747&JSPaid=37504 (visited Sept. 11, 2003); AAA International Commercial Arbitration Rules (Apr. 1, 1997) (hereinafter AAA Int'l Com. Arb. R.) a current version of which is *available at* www.adr.org/index2.1jsp?JSPssid=15747&JSPaid=37504 (visited Sept. 11, 2003); AAA Separation Agreement R., *supra* note 14. The Committee studied these other rules in formats available in 1998: AAA Commercial Arbitration Optional Rules for Emergency Measures of Protection (hereinafter AAA Com. Arb. Optional R. for Emerg. Measures of Prot.), a current version of which is *available at* www.adr.org/index2.1jsp?JSPssid=15747&JSPaid=37504 (visited Sept. 11, 2003); National Association of Securities Dealers, Code of

sive legislation to govern arbitrating family law issues by agreement rather than proposing additions to the Uniform Act. The Committee advocated inserting the new Act in a family law chapter of the *North Carolina General Statutes*,[45] for convenience of family law counsel and to emphasize its special nature, rather than in the civil litigation chapter where general arbitration legislation was published.[46] After vetting drafts through interested Association sections (Dispute Resolution; Family Law; International Law and Practice, for thoughts on family law issues involving foreign nationals and child custody and support under this circumstance),[47] the Association leadership approved draft proposed legislation.[48] Working with the NCBA legislative liaison and North Carolina General Assembly members, the Committee proposal went to the legislature. A slightly different version emerged from legislative committees and passed in the 1999 session. It is now in force with a 2003 amendment.[49]

In the interest of "transparency," *i.e.*, to show Bar Association members, sections and leadership and General Assembly members how the new Act would operate, the Committee also prepared standard suggested forms and rules as part of the legislative proposal.[50] Like arbitration under the Uniform Act or the Federal Arbitration Act, the rules would not be mandatory[51] as

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Arbitration Procedure (Aug. 1996) (hereinafter NASD R.), a current version of which is *available at* www.nasdadr.com/arb_code/arb_code.asp (visited Sept. 11, 2003); Private Adjudication Center, Inc., Form Arbitration Agreement (1998); *id.*, Rules of Practice and Procedure (1998) (hereinafter P-A-C R.). Duke University's Private Adjudication Center (P-A-C) has shut down. July 17, 2003 letter of Thomas B. Metzloff & Cheryl J. Zielsdorf to author (copy in author file). *See also* Handbook, *supra* note 33, *Introduction* to Part II.

45 N.C. Gen. Stat. ch. 50 (2003).

46 *Id.* §§ 1-567.1 - 1-567.87 (2001, 2003).

47 Section members with family law experience, *e.g.*, an International Law and Practice Section member who represented parties in international child custody and abduction cases, under, *e.g.*, the Abduction Convention, *supra* note 4, implemented by ICARA, *supra* note 4, reviewed the draft.

48 *See* Proposal, *supra* note 32.

49 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003); *see infra* notes 249-50 and accompanying text.

50 *See* Proposal, *supra* note 33, Part II.

51 Basic R. 1, in Handbook, *supra* note 33, gives primacy to rules parties to an agreement to arbitrate governed by the Family Law Act. This can have important consequences if two agreements to arbitrate are involved, *e.g.*, where

the North Carolina court-ordered arbitration rules are;[52] parties could amend them to suit a particular case or ignore them.[53] The forms and rules could also serve as a road map, particularly for lawyers considering this ADR option for the first time.

After the Family Law Act was in force, the Committee revised its proposal publication into a handbook that publishes the Act, comments on each section and suggested forms and rules with comments.[54] The Bar Association Family Law Section is the focal point for recommended statutory, form or rule amendments.

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two people in business together as a partnership agree to arbitrate dissolving the business pursuant to, *e.g.*, the AAA Commercial Arbitration Rules, and later decide to marry, with a FLAA-based prenuptial agreement to govern marriage dissolution. If the two arbitrations are consolidated under N.C. Gen. Stat. § 50-50 (2003), Basic R. 1 would give primacy to Family Act rules to the consolidated proceedings. Basic R. 1 also carries forward rules amendments to the time a demand for arbitration is given; parties can agree to freeze the rules as of the prenuptial agreement's date, or any date. If parties wish to add special rules, Basic Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* may be used for this purpose. *See* Basic Forms B.1-B.6, *Rules for Arbitration (Six Options)*; Optional Form AA, *Rules in Force for Arbitration*, in Handbook, *supra. See also id., Comments* to Basic Forms B.1-B.6, E, Optional Form AA, Basic R. 1; AAA Com. Arb. R. 1.

52 N.C. Ct.-Ord. Arb. R. 1(a); *see supra* note 13 and accompanying text. .

53 If parties agree to arbitrate but do not agree on arbitration rules, the arbitrator can set the rules in FLAA-governed cases. N.C. Gen. Stat. § 50-45(e) (2003), which might also cover situations if parties agree on rules, but a need for a rule later arises during arbitration, *e.g.*, an interpreter is required, for which Optional R. 102, in Handbook, *supra* note 33, supplies a standard. In those cases arbitrators also may declare fair rules. Even if the Act did not so provide, arbitrators may promulgate fair rules if an agreement to arbitrate does not provide for them and parties cannot agree on them. Keebler Co. v. Truck Drivers Local 170, 247 F.3d 8, 11 (1st Cir. 2001) (if parties do not choose procedure rules, arbitrator free to set his or her own rules if they are within bounds of fundamental fairness). Arbitrator rulemaking, particularly if a gap must be filled, is consistent with civil litigation practice; a judge may regulate practice if there is no controlling law. *Cf.* Fed. R. Civ. P. 83(b); 12 Charles Alan Wright et al., Federal Practice & Procedure §§ 3152-55 (2d ed. 1997 & 2003 Pocket Pt.); Wright & Kane, *supra* note 4, §§ 62, at 434-35; 63A, at 441-42; Mary P. Squiers, *Rules by District Courts; Judge's Directives*, in 14 Moore's Federal Practice § 83.32 (Daniel R. Coquillette et al. eds., 3d ed. 2003).

54 *Compare* Proposal, *supra* note 33, *with* Handbook, *supra* note 33.

A. *Analysis of the Legislation*

The Family Law Act relies primarily on the North Carolina Uniform Arbitration Act for basic format,[55] the state's International Commercial Arbitration and Conciliation Act for provisions that are not in the Uniform Act, *e.g.*, preaward assets protection;[56] and a then-current Revised Uniform Arbitration Act draft.[57] As the RUAA emerged from the NCCUSL in 2000, it included 14 features,[58] now in force in North Carolina and other states enacting the RUAA, that are not in the Uniform Act:

(1) who decides arbitrability of a dispute and by what criteria;[59]
(2) whether a court or arbitrators may issue provisional remedies;[60]
(3) how a party can initiate an arbitration proceeding;[61]
(4) whether arbitration proceedings may be consolidated;[62]
(5) whether arbitrators must disclose facts reasonably likely to affect their impartiality;[63]
(6) to what extent arbitrators or arbitration organizations are immune from civil actions;[64]
(7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding;[65]

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55 Sometimes the North Carolina version does not include recommended UAA legislation; in other cases there are additions to or variants from the UAA. *Compare* UAA, *supra* note 7, §§ 1-25 *with* N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001). *See generally* Vance, *supra* note 22.

56 *Compare* N.C. Gen. Stat. § 50-44 (2003) *with id.* §§ 1-567.39, 1-567.47 (2003).

57 RUAA Draft, *supra* note 34.

58 *Prefatory Note*, Uniform Arbitration Act (2000), *supra* note 22, at 2; *see also* Hayford & Palmiter, *supra* note 26, at 209-10.

59 *Compare* RUAA, *supra* note 8, § 6, at 12 *with* N.C. Gen. Stat. § 1-569.6 (2003).

60 *Compare* RUAA, *supra* note 8, § 8, at 18 *with* N.C. Gen. Stat. § 1-569.8 (2003).

61 *Compare* RUAA, *supra* note 8, § 9, at 20 *with* N.C. Gen. Stat. § 1-569.9 (2003).

62 *Compare* RUAA, *supra* note 8, § 10, at 21 *with* N.C. Gen. Stat. § 1-569.20 (2003).

63 *Compare* RUAA, *supra* note 8, §§ 12, 14(c), at 25, 29 *with* N.C. Gen. Stat. §§ 1-569.12, 1-569.14(c) (2003).

64 *Compare* RUAA, *supra* note 8, §§ 14(a)-14(b), at 29 *with* N.C. Gen. Stat. §§ 1-569.14(a) - 1-569.14(b) (2003).

65 *Compare* RUAA, *supra* note 8, § 14(d), at 29 *with* N.C. Gen. Stat. § 1-569.14(d) (2003).

(8) whether arbitrators or representatives of arbitration organizations have discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold preheating conferences and otherwise manage the arbitration process;[66]

(9) when a court may enforce a preaward ruling by an arbitrator;[67]

(10) what remedies an arbitrator may award, especially in regard to attorneys' fees, punitive damages or other exemplary relief;[68]

(11) when a court can award attorneys' fees and costs to arbitrators and arbitration organizations;[69]

(12) when a court can award attorneys' fees and costs to a prevailing party in court review of an arbitral award;[70]

(13) which RUAA sections would not be waivable, to ensure fundamental fairness to parties, particularly where one party may have significantly less bargaining power;[71] and

(14) use of electronic information and other modern technology in arbitration.[72]

Many of these features had been incorporated in the FLAA. An early NCCUSL proposal to allow review of arbitrator decisions on the law, present in earlier drafts, was not included in the RUAA but is in the FLAA.[73]

The FLAA also broke new ground, *e.g.*, in providing for arbitrating alimony, postseparation support, child support and child custody with special later review of these issues.[74]

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66 *Compare* RUAA, *supra* note 8, § 17, at 33 *with* N.C. Gen. Stat. § 1-569.17 (2003).

67 *Compare* RUAA, *supra* note 8, § 18, at 37 *with* N.C. Gen. Stat. § 1-569.18 (2003).

68 *Compare* RUAA, *supra* note 8, § 21, at 40 *with* N.C. Gen. Stat. § 1-569.21 (2003).

69 *Compare* RUAA, *supra* note 8, § 14(e), at 29 *with* N.C. Gen. Stat. § 1-569.14(e) (2003).

70 *Compare* RUAA, *supra* note 8, § 25(c), at 50 *with* N.C. Gen. Stat. § 1-569.25(c) (2003).

71 *Compare* RUAA, *supra* note 8, § 4, at 10 *with* N.C. Gen. Stat. § 1-569.4 (2003); *see also* Heinsz, *supra* note 23, at 29-30.

72 *Compare* RUAA, *supra* note 8, § 30, at 53 *with* N.C. Gen. Stat. § 1-569.30 (2003).

73 *See* RUAA Draft, *supra* note 34, §§ 18(b), 25(a)(6), a feature included in N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2003). In a few instances other states' arbitration legislation or commonly-used arbitration rules influenced the drafters. *See infra* notes 267, 270, 320 and accompanying text.

74 N.C. Gen. Stat. § 50-56 (2003).

1. *Cutting the Gordian Knot of Nonarbitrability; Superseding* Crutchley[75]

Unlike the Uniform Act and comparable federal and state legislation,[76] the FLAA includes a special provision allowing a court or an arbitrator to modify an award for postseparation support, alimony, child support, or child custody under conditions similar to those allowing a court to modify a previous award in a judgment.[77]

A court may also vacate an award if an award for child support or child custody is not in the best interest of the child. If there is an otherwise valid award, the Act offers three options for modifying custody and support; grounds for modification are the same as in circumstances where modification might be sought in court:

(1) If postseparation support, alimony, child support or child custody can be modified by a court after a judgment on these issues, a court can modify an arbitral award confirmed as a judgment that involves the same issues;
(2) A claimant may move the same arbitrator for amendment; or
(3) A party may move a new arbitrator, if parties can agree on a new arbitrator, for modification.[78] (If parties agree on a new arbitrator for this purpose but cannot choose one, the FLAA, like the Uniform Act and other modern arbitration statutes, allows a court to appoint an arbitrator for this purpose.[79])

Parties also have the same other opportunities to seek modification of these awards, or other aspects of an award, as they would if there is no claim related to postseparation support, alimony, child support or child custody.[80] The provision for vacating an award is among eight bases for vacating an award, most based on

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75 Crutchley v. Crutchley, 293 S.E.2d at 795-98; *see also supra* notes 8-10 and accompanying text.

76 N.C. Gen. Stat. §§ 1-567.14, 1-567.64, 50-55 (2001, 2003) (tracking or incorporating by reference substance of UAA, *supra* note 7, § 13, at 409 for modifying, correcting awards); *see also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003).

77 N.C. Gen. Stat. §§ 50-56(a) - 50-56(e) (2003), incorporating by reference *id.* §§ 50-13.7, 50-16.2A, 50-16.3A, 50-16.4, 50-16.7, 50-16.9 (2003).

78 *See generally id.* § 50-45 (2003).

79 *Id.* § 50-45(b) (2003); *compare id.* §§ 1-567.4, 1-567.41, 1-569.11(a) (2001); UAA, *supra* note 7, § 3, at 167; RUAA, *supra* note 8, § 11(a), at 24.

80 N.C. Gen. Stat. § 50-56(f) (2003), incorporating *id.* § 50-55 (2003) by reference.

prior legislation, and two new provisions dealing with punitive damages and review of errors of law, if parties contract for the latter.[81]

2. *General Statutory Analysis*

Like its North Carolina Uniform Act and ICACA counterparts, the Family Law Act begins with a policy statement:

> . . . 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 Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes 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.[82]

The Act also provides that it must be construed consistently with these Chapters and similar statutes in the state Uniform Act and the ICACA.[83]

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81 *See generally id.* § 50-54(a) (2003).

82 N.C. Gen. Stat. § 50-41(a) (2003), citing *id.* chs. 50, 50A, 50B, 51, 52B, 52C (2003), the primary statutes governing North Carolina family law; *compare id.* §§ 1-567.1, 1-567.30 (2001, 2003). *Id.* § 50-41(b) (2003) declares the Act's title. The FAA has no comparable statute, but cases, *e.g.*, Doctor's Assocs. v. Cassarotto, 517 U.S. 681 (1996); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc, 473 U.S. 614, 625 (1985) reiterate a similar strong Congressional policy favoring arbitration. *See also* Handbook, *supra* note 33, *Comment* to § 50-41. The UAA, *supra* note 7, and the RUAA, *supra* note 8, enacted in North Carolina as N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2003), have no similar policy statements.

83 N.C. Gen. Stat.§ 50-62 (2003); *compare id.* §§ 1-567.20, 1-569.29 (2001); UAA, *supra* note 7, § 21, at 467; RUAA, *supra* note 8, § 29, at 53; *see also* Handbook, *supra* note 33, *Comment* to § 50-62. RUAA, *supra*, § 4(c), at 10 declares that parties may not waive *id.* § 29, *supra*; *see also id., Comment* to § 4, § 5.g; N.C. Gen. Stat. §§ 1-569.4(c), 1-569.29 (2003); Heinsz, *supra* note 23, at 29-30. Although the UAA, *supra*, § 22, at 467, declares a severability clause, *i.e.*, that if any of its provisions are declared unconstitutional, the rest of the Act remains in force, North Carolina did not enact it; the FLAA does not have an analogous provision either; *but see* N.C. Gen. Stat. § 1-567.33A (2003) (ICACA severability provision).

The FLAA does not cover agreements made on or before October 1, 1999 unless parties so agree.[84] For states with the RUAA and the equivalent of the FLAA, a question that might arise is which legislation should apply to a family law dispute. The sensible course is to specify family law arbitration statutes in the agreement to arbitrate. Applying the *lex specialis* rule of statutory construction, *i.e.*, the special (here the Family Law Act) governs over the general (*i.e.*, the RUAA) arbitration legislation.[85] The FLAA aids this construction by its specific reference to family law disputes.[86] However, citing appropriate legislation will cure the problem if the issue is choice of one of several statutes. Counsel must be aware of consolidation possibilities if there is another arbitrable transaction, *e.g.*, breakup of a husband-wife business partnership and a possible conflict of arbitration rules, however. Under such circumstances other arbitration legislation, *e.g.*, the RUAA or perhaps the FAA or international arbitration legislation, may govern those aspects of the proceedings, although the FLAA rules offer a primacy principle for which rules will apply.[87]

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84 N.C. Gen. Stat. § 50-61 (2003); *compare* 9 U.S.C. § 14 (2000), N.C. Gen. Stat. §§ 1-567.19, 1-567.31(g), 1-569.3 (2001, 2003) & 2003 N.C. Sess. Laws ch. 2003-345, § 4; UAA, *supra* note 7, § 20, at 465; RUAA, *supra* note 8, §§ 3, at 8; 31-32, at 53; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-61; RUAA, *supra, Comment* to § 3; *Due Process Principles, supra* note 30, ¶ 21 ("Arbitration agreement meeting legal standards"). RUAA, *supra*, § 4(c), at 10, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003), declares that parties cannot waive or vary the effect of RUAA, *supra*, §§ 3(a), 3(c), at 8, 31-32, at 53, *id*. §§ 3(a), 3(c) being enacted as N.C. Gen. Stat. §§ 1-569.3(a), 1-569.3(b) (2003); *see also* 2003 N.C. Sess. Laws ch. 2003-345, § 4. RUAA, *supra*, § 4(b), enacted as 2003 N.C. Sess. Laws ch. 2003-345, § 4, referring to N.C. Gen. Stat. § 1-569.3(b) (2003), says that although RUAA does not apply to agreements made before the RUAA effective date, this provision is waivable, *i.e.*, parties can negotiate their applicability to agreements made before RUAA's effective date, as with agreements to arbitrate family law issues made before the FLAA effective date. *See also* RUAA, *supra, Comment* to § 4, §§ 1-3, 5; Heinsz, *supra* note 23, at 29-30, 36.

85 *E.g.*, Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992); Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc. 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985), citing Seders v. Powell, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979) recite the principle for North Carolina.

86 N.C. Gen Stat. § 50-41(a) (2003).

87 *See infra* Part II.

The General Assembly restricted use of the legislation for child custody and support issues to agreements signed after marriage.[88] However, a couple may sign a prenuptial agreement providing for arbitration, marry, and later sign a new agreement, provided contractual requisites and limitations are met.[89] The FLAA does not forbid a postnuptial agreement to arbitrate all issues, except the divorce, including child custody and support.[90]

The policy statement and other FLAA provisions also make it clear that the Act applies only to arbitrations incident to dissolving a marriage or issues after divorce, *e.g.*, custody and support.[91] Thus, *e.g.*, a married couple may agree to arbitrate under the Act for custody and support of their natural and adopted children. A married couple with custody of a deceased couple's children, *e.g.*, an uncle and aunt who are married with joint custody of a deceased couple's children, might employ the Act. If the aunt and uncle are not married (*e.g.*, brother and sister of a deceased married couple) and have joint custody, the Act does not apply to them. The drafters (and the legislature) intended that the FLAA does not apply to the latter kind of situations.[92]

Beyond these limits, the Family Law Act follows patterns of modern arbitration legislation in declaring that an agreement to arbitrate "is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy[,]" thus including arbitration of future disputes within its purview.[93] The RUAA does not allow waiving its

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88 *Compare id.* § 50-42(a) (2003) *with* Proposal, *supra* note 33, § 50-42; *see also* Handbook, *supra* note 33, *Comment* to § 50-42.

89 Unif. Premarital Agreement Act § 2, 9C U.L.A. 41 (2001), (hereinafter UPAA), in force in 26 states, *id.* 35, and in North Carolina as N.C. Gen. Stat. § 52B-3 (2003), provides that a prenuptial agreement be in writing but that no consideration is required. *See also* N.C. Gen. Stat. §§ 50-41(a), 50-62 (2003); *Official Comment* to § 2, 9C U.L.A. at 41.

90 UPAA, *supra* note 89, § 10, enacted in North Carolina as N.C. Gen. Stat. § 52-10 (2003), governs postnuptial agreements.

91 *See, e.g.*, N.C. Gen. Stat. §§ 50-41(a) ("marital separation or divorce"), 50-42(a) ("marriage," "divorce," "marital relationship") (2003); *see also* Handbook, *supra* note 33, *Comments* to §§ 50-41, 50-42.

92 *See also infra* note 398 for a suggested amendment to address these relationships.

93 *Compare* N.C. Gen. Stat. 50-42(a) (2003) *with* 9 U.S.C. § 2 (2000); N.C. Gen. Stat. §§ 1-567(2)(a), 1-567.37, 1-569.6(a) (2001, 2003); UAA, *supra* note 7,

version of this provision before a controversy arises; thereafter, parties may waive its protections.[94] signing an agreement provid-

§ 1, at 6; RUAA, *supra* note 8, § 6(a), at 12; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-42; RUAA, *supra, Comment* to § 6, ¶ 1.

[94] N.C. Gen. Stat. § 1-569.4(b)(1) (2003); RUAA, *supra* note 8, § 4(b)(1), at 10; *see also* RUAA, *supra, Comment* to § 4, ¶¶ 1-4; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. No other legislation has an explicit provision like this. The Basic and Optional Rules do not provide for waiver of N.C. Gen. Stat. § 50-42(a) provisions, although Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra*, might be so employed. However, a court might rule that including a waiver of provisions and protections in N.C. Gen. Stat. § 50-42(a) (2003), perhaps coupled with waivers of other rights under the Act, amounts to an unconscionable contract. UPAA, *supra* note 89, § 6(a)(2), 9C U.L.A. at 48-49, in force in North Carolina as N.C. Gen. Stat. § 52B-7(a)(2) (2003), provides for invalidating prenuptial agreements on unconscionability grounds; *see also* Uniform Marriage & Divorce Act § 306, 9A(1) U.L.A. 159, 248 (1998), in force in eight states, *id.* 21 (2003 Cum. Ann. Pocket Pt.); *Comment* to UPAA, § 6, 9C U.L.A. at 49. Unconscionability can be a defense in a postnuptial agreement suit; *see, e.g.*, King v. King, 442 S.E.2d 154, 157 (N.C. App. 1994) (separation agreement; defense denied). Doctor's Assocs. v. Cassarotto, 517 U.S. 681, 686-87 (1996) repeated the Court's interpretation of 9 U.S.C. § 2 (2000), saying defenses like fraud, duress or unconscionability are matters of state law and are not covered by the FAA, *supra* note 15 (dictum). The law on unconscionability for agreements to arbitrate is developing; courts have been reluctant to find contracts unenforceable for this reason. RUAA, *supra*, *Comment* to § 6, ¶ 7, citing factors for declaring a contract unenforceable as unconscionable to include unequal bargaining power, whether a weaker party can opt out of arbitration, clarity and conspicuousness of an arbitration clause, whether unfair advantage is obtained, whether the arbitration clause is negotiable, whether the clause is boilerplate, whether the aggrieved party had a meaningful choice, or was compelled to accept arbitration, whether the agreement was within the parties' reasonable expectations, and whether a stronger party used deceptive tactics, citing, *e.g.*, Harris v. Green Tree Fin. Corp., 183 F.3d 173, 182-84 (3d Cir. 1999) (discussing unconscionability; agreement not unconscionable); We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 842-44 (7th Cir. 1999) (same); Buraczynski v. Eyring, 919 S.W.2d 314, 320-21 (Tenn. 1996) (same); Chor v. Piper, Jaffray & Hopwood, Inc, 862 P.2d 26, 28-30 (Mont. 1993) (agreement not contract of adhesion); Powers v. Dickson, Carlson & Campillo, 63 Cal. Rptr.2d 261, 265-66 (Cal. App. 1997) (no contract of adhesion); 2 Macneil et al., *supra* note 8, § 19.3 (reluctance to declare contracts unconscionable); 1 Thomas H. Oehmke, Commercial Arbitration chs. 15, 17 (rev. ed. 2002); 1 Wilner, *supra* note 8, §§ 5:09, 34:03; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 107-09 (1997) (same); Stephen J. Ware, *Arbitration and Unconscionability after* Doctor's Associates,

ing for arbitration in the state or under its laws confers jurisdiction on a "court of competent jurisdiction of this State" to enforce the agreement and to enter judgment on an award under the agreement.[95] Unlike other arbitration statutes, the FLAA

Inc. v. Cassarotto, 31 Wake Forest L. Rev. 1001, 1008-10 (1996) (same). There have been trends the other way. RUAA, *supra, Comment* to § 6, ¶ 7, citing inter alia Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-41 (4th Cir. 1999) (arbitration rules egregiously unfair); Shankle v. B-G Maint. Mgt., Inc., 163 F.3d 1230, 1233-35 (10th Cir. 1999) (arbitration agreement unenforceable); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1058-60 (11th Cir. 1998) (deficient arbitration agreement); Armendariz v. Foundation Health Psychcare Serv. Inc., 6 P.3d 669, 679-99 (Cal. 2000) (unconscionable contract; trial court could sever unenforceable parts); Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 859-62 (W. Va. 1998) (unconscionable arbitration agreement in consumer loan contract); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264-70 (3d Cir. 2003) (employment contract procedurally, substantively unenforceable under Virgin Islands law, citing Restatement [Second] of Contracts § 208 [1981]); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1169-80 (9th Cir. 2003) (same, unenforceable under California law), following Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892-96 (9th Cir. 2002) (same); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 937-41 (9th Cir. 2001) (franchise arbitration clauses void for unconscionability; Montana law); Sosa v. Paulos, 924 P.2d 357, 360-65 (Utah 1996) (contract unconscionable); Broemmer v. Abortion Serv., Ltd., 840 P.2d 1013, 1015-17 (Ariz. 1992) (unenforceable adhesion contract). Szetela v. Discover Bank, 118 Cal. Rptr.2d 862, 867-68 (Cal. App. 2002) (anti-class action provision void on unconscionability, public policy grounds). Parties determined to insert a waiver clause should consider adding a severability clause to the agreement to arbitrate. Fraud, undue influence, unconscionability or unfairness may vitiate prenuptial agreements; courts vary on whether relief on these or similar grounds, and standards of proof, are available. *See, e.g.*, DeMatteo v. DeMatteo, 762 N.E.2d 797, 805-10 (Mass. 2002) (fairness and reasonableness standard; rejecting unconscionability test; collecting cases); In re Yannalfo, 794 A.2d 795, 797-98 (N.H. 2002) (antenuptial agreement upheld against duress attack); In re Marriage of Spiegel, 553 N.W.2d 309, 317-19 (Iowa 1996) (fraud, duress, undue influence defenses rejected); Newman v. Newman, 653 P.2d 728, 730-31 (Colo. 1982) (prenuptial agreement upheld against unconscionability attack); Scherer v. Scherer, 292 S.E.2d 662, 666-67 (Ga. 1982) (defenses available but not in this case); In re Marriage of Gonzalez, 561 N.W.2d 94, 96-97 (Iowa App. 1997) (no knowing waiver; *Spiegel* distinguished); Lebeck v. Lebeck, 881 P.2d 727, 733-35 (N.M. App. 1994) (undue influence, coercion, overreaching, misrepresentation defenses to prenuptial agreement enforcement rejected); Howell v. Landry, 386 S.E.2d 610, 615-18 (N.C. App. 1989) (relief on fraud, undue influence grounds denied); In re Marriage of Norris, 624 P.2d 636, 639-40 (Ore. App. 1981) (agreement set aside on undue influence grounds).

95 N.C. Gen. Stat. § 50-59 (2003); *compare id.* §§ 1-567.17, 1-567.66 (2001, 2003); UAA, *supra* note 7, § 17, at 429; RUAA, *supra* note 8, §§ 1(3), 26(a), at

does not provide for venue; however, other legislation provides for divorce venue where plaintiff or defendant resides.[96] If parties do not specify an arbitration site, the arbitrator may establish it.[97]

The FLAA, following the UAA, does not provide for arbitrability like the ICACA.[98] The RUAA establishes a two-part analysis for arbitrability. A court must decide "substantive" arbitrability issues, *e.g.*, whether there is an agreement to arbitrate or whether a subject may be arbitrated (*i.e.*, arbitrability). The arbitrator decides "procedural" arbitrability issues, *e.g.*, time limits, notice, etc.[99] Thus under the RUAA an issue like arbitrability of

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6, 51, enacted as N.C. Gen. Stat. §§ 1-569.1(3), 1-569.26(a) (2003); *see also id.* § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-59; RUAA, *supra, Comments* to §§ 1, ¶ 3; 26, ¶¶ 1-2 ("court of competent jurisdiction" must have subject matter, personal jurisdiction; most states give authority to court of general jurisdiction); Heinsz, *supra* note 23, at 29-30, 36. In North Carolina the General District Court is the proper court for divorces; the Superior Courts in theory may hear them but would likely transfer cases to the District Courts. N.C. Gen. Stat. §§ 7A-240, 7A-249, 7A-256 - 7A-259 (2003). Before a controversy arises that is subject to an agreement to arbitrate, parties may not agree to waive or vary the effect of RUAA, *supra*, § 26, enacted as N.C. Gen. Stat. § 1-569.26 (2003). RUAA, *supra*, § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 4.d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver, provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving jurisdictional rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. *See supra* note 94.

96 N.C. Gen. Stat. § 50-3 (2003).

97 *See infra* notes 428-29 and accompanying text; RUAA, *supra* note 8, *Comment* to § 27, ¶ 1, referring to *id.* § 15, at 31, enacted as N.C. Gen. Stat. 1-569.15 (2003).

98 N.C. Gen. Stat. § 1-567.46 (2003); *see also* Walker, *Trends, supra* note 29, at 435.

99 N.C. Gen. Stat. §§ 1-569.6(b), 1-569.6(c) (2003); RUAA, *supra* note 8, §§ 6(b), 6(c) at 12; *see also* Pacificare Health Sys., Inc. v. Book, 123 S.Ct. 1531, 1535-36 (2003) (arbitrator, not court, should initially interpret agreements to determine if Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 [2000] et seq. treble damages can be awarded); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (arbitrator, not court, determines preliminary matters like arbitrability, defenses to arbitrability in FAA, *supra* note 15, governed cases); First Options, Inc. v. Kaplan, 514 U.S. 938, 942-45 (1995) (arbi-

support or custody would have been a matter for the court; in *Crutchley*, the issue arose after the award in a set-aside proceeding.[100] Today under the RUAA substantive arbitrability could be decided at the start of proceedings, thereby minimizing a problem of proceeding through an arbitration, only to discover that the procedure, or part of it, was a nullity.

a. *Matters Preliminary to an Arbitration Hearing*

Like older arbitration legislation, the Family Law Act does not establish procedures to start arbitration. The RUAA does. Parties to an agreement under the Family Law Act must incorporate rules, or include them in the agreement, for this purpose.[101] The FLAA Basic Rules follow AAA commercial arbitration practice for noticing (demanding) arbitration to begin the procedure, with nods to timing (30-day turnaround) and a required response to a counterclaim, under North Carolina civil practice.[102]

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trability an issue of state law of contracts); RUAA, *supra, Comment* to §§ 6(b), 6(c) (citing cases, noting that most jurisdictions separate substantive, procedural issues under their arbitration law); Heinsz, *supra* note 23, at 29-31 (same). Unlike RUAA § 6(a), parties may agree to waive or vary the effect of RUAA §§ 6(b), 6(c), enacted as N.C. Gen. Stat. 1-569.6(b), 1-569.6(c) (2003). RUAA, *supra*, § 4(a), at 10, enacted as N.C. Gen. Stat. § 1-569.4(a) (2003); RUAA, *supra, Comment* to § 4, ¶ 1; Heinsz, *supra* at 29-30.

100 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also supra* notes 8-10 and accompanying text.

101 If no rules govern these matters, the arbitrator or the court, perhaps requiring use of an established arbitration institution competent to administer family law arbitrations, may establish arbitration rules. N.C. Gen. Stat. §§ 50-45(d), 50-45(e) (2003); *see also supra* note 53 and accompanying text.

102 *Compare* Basic R. 3, in Handbook, *supra* note 33, *with* AAA Com. Arb. R. 6; AAA Separation Agreement R. 1; *see also* RUAA, *supra* note 8, § 9(a), at 20, enacted as N.C. Gen. Stat. § 1-569.9(a) (2003) (notice in a record required by certified or registered mail, return receipt requested, unless agreement provides otherwise; notice must include nature of controversy, remedy sought); Handbook, *supra, Comment* to Basic R. 3; RUAA, *supra, Comment* to § 9, ¶¶ 1-6 (similar notice requirements under Florida, Indiana law, arbitration institution rules like AAA's); Hayford & Palmiter, *supra* note 26, at 222-23; Heinsz, *supra* note 23, at 29-30, 32-33. RUAA, *supra*, § 9(b), at 20, enacted as N.C. Gen. Stat. § 1-569.9(b) (2003), says that unless a person objects for lack or insufficiency of notice under RUAA, *supra* § 15(c), at 28, enacted as N.C. Gen. Stat. § 1-569.15(c) (2003) (arbitrator notice of hearing), not later than the beginning of the hearing, the person's appearance waives objections to lack or insufficiency of notice; *see also* RUAA, *supra* § 1(5), at 7, enacted as N.C. Gen.

Basic Rule 37 incorporates state civil practice standards and state law for computing time for amendments and other matters.[103] Under Basic Rule 26,

> (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 [the Basic] Rules; for any court action in connection therewith; or for entry of judgment on any award made under [the Basic] 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 or other written forms of electronic communication to give notices permitted or required by [the Basic] Rules.[104]

The Rules preserve traditional arbitration practice for defaults; if a party fails to respond, the arbitrator(s) must hear the claim before making an award.[105] Parties may also start arbitration under a submission, *i.e.*, they may file a copy of the arbitration agreement or submission to arbitrate certain matters.[106] The

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Stat. § 1-569.1(5) (2003) (broadly defining "person" to include legal entities as well as individuals). Under RUAA, *supra* § 4(b)(2), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(2) (2003), parties may not agree to unreasonably restrict notice rights under RUAA, *supra*, § 9, at 20, enacted as N.C. Gen. Stat. § 1-569.9 (2003), before a controversy arises. *See also* RUAA § 4, *supra, Comment*, ¶¶ 1-4a; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions; these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving notice rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence, duress or fraud can also vitiate an agreement. *See supra* note 94. *Due Process Principles, supra*, ¶ 11, would require "[r]easonable limits."

103 *See also* Handbook, *supra* note 33, *Comment* to Basic R. 37, noting P-A-C R. 1.12, N.C.R. Civ. P. 6; N.C. Gen. Stat. § 103-4 (2003) (state public holidays).

104 *See also* Handbook, *supra* note 33, *Comment* to Basic R. 26, comparing AAA Com. Arb. R. 40.

105 Basic R. 3(c), in Handbook, *supra* note 33; *see also id.*, *Comment* to Basic R. 3.

106 *Compare* Basic R. 4, in Handbook, *supra* note 33, *with* AAA Com. Arb. R. 7; *see also* Handbook, *supra*, *Comment* to Basic R. 4. Basic R. 26, in Handbook, *supra* also applies to this option, unless parties agree otherwise.

Rules provide for amendments, again looking to state civil practice for timing.[107]

Although the FLAA does not declare notice standards like the RUAA,[108] the suggested Basic Rules mostly follow the AAA rules format, upon which RUAA drafters relied in part.[109] The difference is that while the FLAA Basic Rules may not necessarily govern a particular arbitration, being subject to parties' choice in drafting the agreement, RUAA notice provisions are mandatory to a certain extent. Parties may not "agree to unreasonably restrict the right . . . to notice of the initiation of an arbitration proceeding."[110] Although a Family Act agreement might include a clause waiving notice or unreasonably restricting the right to notice of arbitration, an award predicated on no or unreasonable notice would be subject to applications to vacate or to modify or correct the award, for which the time for application could be quite long or, in alimony, postseparation support, child support or child custody awards, unlimited as long as those issues remain open. For example, a divorce involving a couple aged 21 could involve spousal support for over a half century.[111] The same is true if very young children are involved. The practical result is that although a nonwaivable notice of arbitration provision would strengthen a policy similar to that in civil litigation[112]

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107 *Compare* Basic R. 5, in Handbook, *supra* note 33, *with* AAA Com. Arb. R. 8; AAA Separation Agreement R. 2; *see also* N.C.R. Civ. P. 15; Handbook, *supra, Comment* to Basic R. 5; Basic R. 37, in *id.*

108 RUAA, *supra* note 8, § 9, at 20, enacted as N.C. Gen. Stat. § 1-569.9 (2003).

109 *See supra* note 44 and accompanying text.

110 RUAA, *supra* note 8, § 4(b)(2), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(2) (2003); *see also* RUAA, *supra, Comment* to § 4, ¶¶ 1-3, 4a; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, clauses unduly restricting or waiving notice rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate agreements. *See supra* note 94.

111 *Cf.* N.C. Gen. Stat. §§ 50-54(a)(1), 50-54(b), 50-56 (2003).

112 *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (leading case). ADR organizations, often the same ones whose rules the FLAA drafters consulted for the Basic Rules, also advocate adequate notice. *See supra* note 110 and accompanying text.

of giving reasonable notice and opportunity to be heard under the circumstances in divorce and other family law cases, an aggrieved party would not be without recourse, particularly if the arbitration includes issues of postseparation support, alimony, child support or child custody awards. Agreement drafters considering a restrictive or no-notice clause should consider these factors and avoid provisions that do not give reasonable notice. The Basic Rules, or modern arbitration rules like them, offer guides with a higher likelihood of defense against applications to vacate, modify or correct.[113]

The Act establishes a single arbitrator as a standard unless parties agree otherwise. If an agreement to arbitrate provides for appointing arbitrators, that method must be followed.[114] Usually a single arbitrator will suffice, but in a complex divorce involving a large marital estate, or a consolidated proceeding with business law issues, three or even five arbitrators might be chosen, with a resulting tripling or quintupling of arbitrator fees and expenses that parties must pay.[115] Basic Rule 34 requires parties to agree on arbitrator compensation; the arbitrator(s) must agree to the offered compensation.[116] Arbitrators act by a majority unless the Act or the agreement to arbitrate provides otherwise.[117]

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113 *See infra* notes 255-316 and accompanying text.

114 N.C. Gen. Stat. §§ 50-45(a) - 50-45(b) (2003); *compare id.* §§ 1-567.4, 1-567.40, 1-569.11(a) (2001, 2003); UAA, *supra* note 7, § 3, at 167; RUAA, *supra* note 8, § 11(a), at 24; *see also* N.C. Gen. Stat. § 50-62 (2003); Basic R. 2, in Handbook, *supra* note 33 (one arbitrator the norm); Handbook, *supra, Comments* to § 50-45, Basic R. 2 (referring inter alia to AAA Int'l Arb. R., Art. 5); RUAA, *supra, Comment* to § 11, ¶ 1; Hayford & Palmiter, *supra* note 26, at 217.

115 Handbook, *supra* note 33, *Comment* to Basic R. 2; *see also* N.C. Gen. Stat. § 50-51(f)(2)(a) (2003); Basic R. 33-34, in Handbook, *supra*; *id.*, *Comments* to Basic R. 33-34. Multiple arbitrator cost must be balanced against a policy for a "Competent, qualified arbitrator" that *Due Process Principles, supra* note 30, ¶ 4 advocates.

116 *See also* Handbook, *Comment* to Basic R. 34; *compare* AAA Com. Arb. R. 50; *see also* N.C. Gen. Stat. §§ 50-45(f)(2)(a) (2003) (arbitrator fees, expenses), Handbook, *supra* note 33, *Comment* to Basic R. 34.

117 N.C. Gen. Stat. § 50-46 (2003); *compare id.* §§ 1-567.5, 1-569.15(c), 1-569.13 (2001); UAA, *supra* note 7, § 4, at 173; RUAA, *supra* note 8, § 13, at 28, also requiring all arbitrators to conduct the RUAA § 15(c), enacted as N.C. Gen. Stat. 1-569.15(c) (2003), hearing; *see also id.* § 50-62 (2003); Basic R. 14, in Handbook, *supra* note 33 (adding possibility that agreement may provide for only majority decisions before or when they render award or in both situations,

If the parties' method for choosing the arbitrator(s) fails or cannot be followed, an arbitrator already appointed fails or is unable to act and parties have not chosen a successor, or if the parties cannot agree on an arbitrator, a court must appoint the arbitrator(s) upon a party's application.[118] Court-appointed arbitrators have all powers of arbitrators named in the agreement to arbitrate. Perhaps unique to arbitration legislation, the Family Law Act requires an appointing court to consult with prospective arbitrators as to their availability and must refer to the following during the consultation: parties' positions and desires; issues in

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thereby allowing parties to say a single arbitrator, *e.g.*, a chair, may rule on some issues, citing AAA Com. Arb. R. 28); Basic R. 36, in Handbook, *supra* (requiring majority vote on meaning or application of rules parties incorporate in agreement, comparing AAA Com. Arb. R. 52, AAA Separation Agreement R. 24); Handbook, *supra, Comments* to § 50-46, Basic R. 14, 36; RUAA, *supra, Comment* to § 13.

118 N.C. Gen. Stat. § 50-45(b) (2003); *compare id.* §§ 1-567.4, 1-567.41(b), 1-567.41(c), 1-569.11(a) (2001, 2003); UAA, *supra* note 7, § 3, at 167; RUAA, *supra* note 8, § 11(a), at 24; *see also* Handbook, *supra* note 33, *Comment* to § 50-45; RUAA, *supra, Comment* to § 11, ¶ 1. Unless the FLAA specially provides, applications to a court must be by motion, heard in manner and upon notice provided by law or rule of court for motions in civil actions, usually governed by the North Carolina Rules of Civil Procedure, modeled on the Federal Rules. Service of an initial application for an order must be served in accordance with civil summons procedure, *i.e.*, N.C.R. Civ. P. 4, unless the parties agree otherwise. N.C. Gen. Stat. § 50-58 (2003), tracking *id.* § 1-567.16 (2001); *compare* 9 U.S.C. §§ 6, 12, 208, 307 (2000); N.C. Gen. Stat. § 1-569.5(a) (2003); UAA, *supra*, § 16, at 426; RUAA, *supra*, § 5(a), at 12; *see also* N.C. Gen. Stat. § 50-62 (2003); Basic R. 26(a), in Handbook, *supra*; *id., Comments* to § 50-58, Basic R. 26 (comparing AAA Com. Arb. R. 40); RUAA, *supra, Comment* to § 5; Heinsz, *supra* note 23, at 29-31. N.C. Gen. Stat. § 50-59 (2003) defines "court" as any court of the state of competent jurisdiction. Before a controversy arises that is subject to an agreement to arbitrate, parties may not agree to waive or vary the effect of RUAA, *supra*, § 5(a), enacted as N.C. Gen. Stat. § 1-569.5(a) (2003), providing for applications or motions to a court. RUAA, *supra*, § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 4.d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, clauses unduly restricting or waiving motion rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate agreements. *See supra* note 94.

dispute; prospective arbitrators' skill, substantive training and experience in those issues, including their skill, substantive training and experience in family law issues; and prospective arbitrators' availability.[119]

The Act allows parties to employ an established arbitration institution to conduct the arbitration. If an agreement to arbitrate does not have a method for appointing arbitrators and parties cannot agree on an arbitrator, the court has another option, appointing an established arbitration institution the court considers qualified in family law arbitration to conduct proceedings.[120] Presumably, although the Act does not require it, a court would consult with parties on institution choice.[121]

Arbitrators and established arbitration institutions, whether chosen by the parties or designated by a court, have the same immunity as judges from civil liability for their conduct in the arbitration. The RUAA adds that parties cannot agree to waive or vary its immunity provisions' effect.[122] The Family Law Act, following the Uniform Act, does not have a comparable non-

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119 N.C. Gen. Stat. § 50-45(c) (2003); *compare id.* §§ 1-567.4, 1-567.41(d), 1-567.41(e), 1-569.11(a), § 1-567.41(e) (2001, 2003), the latter providing appointments are final and not subject to appeal; UAA, *supra* note 7, § 3, at 167; RUAA, *supra* note 8, § 11(a), at 24; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-45; RUAA, *supra, Comment* to § 11, ¶ 1; *Due Process Principles, supra* note 30, ¶ 4 ("Competent, qualified arbitrator").

120 N.C. Gen. Stat. § 50-45(d) (2003); *compare id.* §§ 1-567.41(e) (2003). *Id.* § 50-45(g) (2003) defines "arbitration institution;" *compare id.* §§ 1-567.41(g) (2003) (court appointment of arbitration institution, not defined); *id.* § 1.569.1(1) (2003) (defining "arbitration organization"); RUAA, *supra* note 8, § 1(1), at 6. The RUAA does not offer an option of a court's appointing an arbitration institution for an arbitration. Section 1(1), enacted as N.C. Gen. Stat. § 1.569.1(1) (2003), is used in RUAA, *supra*, §§ 12, 14, at 25, 29, enacted as N.C. Gen. Stat. § 1.569.12, 1.569.14 (2003). *See also id.* § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-45; RUAA, *supra, Comment* to § 1, ¶ 1; *Due Process Principles, supra* note 30, ¶ 5 ("Administration independent of parties and arbitrators").

121 *Cf.* N.C. Gen. Stat. § 50-45(c) (2003).

122 *Id.* § 50-45(f) (2003); *compare id.* §§ 1-567.87 (2003) (ICACA conciliator immunity); 1.569.4(c), 1.569.14(a), 1.569.14(b) (nonwaivable arbitrator immunity); 7A-37.1(e) (2003) (court-ordered arbitration arbitrator immunity); N.C. Ct.-Ord. Arb. R. 5(f) (same); RUAA, *supra* note 8, §§ 4(c), 14(a), 14(b), at 10, 29; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-45; RUAA, *supra, Comments* to § 4, ¶ 5.b, § 14; *Due Process Prin-*

waiver provision. However, an arbitrator or an arbitration institution otherwise eligible to serve, could refuse appointment under an agreement to arbitrate waiving their immunity. Courts might construe the immunity legislation[123] as nonwaivable or susceptible to an unconscionability claim.[124]

A court may impose costs in appropriate situations where parties fail to comply with an agreement to choose arbitrators.[125]

The Family Law Act does not declare arbitrator disclosure standards as the RUAA and ICACA do.[126] Suggested forms im-

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ciples, supra note 30, ¶ 21; Hayford & Palmiter, *supra* note 26, at 221-22; Heinsz, *supra* note 23, at 29-30, 33-34.

123 N.C. Gen. Stat. § 50-45(f) (2003).

124 *See supra* note 94.

125 N.C. Gen. Stat. § 50-45(h) (2003), referring to *id.* 50-51(f) (2003), an incentive for parties to do what is agreed. *See also* Handbook, *supra* note 33, *Comment* to § 50-45.

126 N.C. Gen. Stat. § 1-567.42 (2003); *id.* §§ 1-569.11(b) (neutral arbitrator), 1-569.12 (disclosure rules) (2003); RUAA, *supra* note 8, §§ 11(b) (neutral arbitrator), 12, at 24-25 (disclosure rules); *see also* RUAA, *supra, Comments* to §§ 11, ¶ 2, 12 (neutral arbitrator failure to disclose certain relationships subject to presumption of vacatur); *Due Process Principles, supra* note 30, ¶ 7 ("Arbitrator disclosure of interests and relationships"); 1 Oehmke, *supra* note 94, ch. 36; Hayford & Palmiter, *supra* note 26, at 220-21; Heinsz, *supra* note 23, at 29-30, 33. Under RUAA, *supra*, § 4(b)(3), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(3) (2003), parties may not agree to unreasonably restrict rights under RUAA, *supra* § 12, at 24, enacted as N.C. Gen. Stat. § 1-569.12 (2003), to neutral arbitrator disclosure of any facts before a controversy arises. *See also* RUAA, *supra*, § 4, *Comment*, ¶¶ 1-4; Heinsz, *supra* at 29-30. RUAA, *supra*, §§ 11(b), 12(e), at 24-25, enacted as N.C. Gen. Stat. §§ 1-569.11(b), 1-569.12(e) (2003), set standards for "neutral" arbitrators. Not all arbitrators are "neutral." *E.g.*, parties may appoint persons interested in a case as arbitrator-representatives on a three-arbitrator panel, with a third arbitrator chosen by the non-neutrals. Non-neutral arbitrators would not be bound by RUAA §§ 11(b), 12(e) but would be bound by the rest of § 12; *compare* N.C. Gen. Stat. §§ 1-569.11(b), 1-569.12(e) (2003). Under the FLAA, *supra* note 12, and UAA, *supra* note 2, which do not have disclosure rules, parties should agree on them. Special ethics rules may apply to non-neutral arbitrators. *See, e.g.*, American Bar Association & American Arbitration Association, *2004 Revised Code of Ethics for Arbitrators in Commercial Disputes*, Canons I, IX-X, *available at* http://www.adr.org/index2.1.jsp?JSPssid=15722&JSPsrc=upload\LIVESITE\Featured%20Area\. .\Rules_Procedures\Ethics_Standards\codeofethics2004.htm, on the American Arbitration Association website; *id.*, *Code of Ethics for Arbitrators in Commercial Disputes* (1977), Canon VII, 33 Bus. Law. 311, 318-20 (1977) (hereinafter 1977 ABA-AAA Code); North Carolina Canons of Ethics for Arbitrators, Oct. 1, 1999, Canon VII, 350 N.C. 877, 887 (1999) (hereinafter N.C.

pose the North Carolina Canons of Ethics for Arbitrators on FLAA arbitrators.[127] These standards, unless incorporated in award vacatur grounds[128] in other rules governing an arbitrations under the Act,[129] are not per se mandatory. Whether courts will accept incorporated arbitrator ethics standards as another vacatur ground remains doubtful. Like contracting for review of issues of law, which continues to divide courts except those governed by the FLAA and similar legislation, the issue is

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Canons); John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, in Symposium, *Ethics in a World of Mandatory Arbitration*, 18 Ga. St. L. Rev. 907, 919-24 (2002) (Canon VII working draft); Bruce Meyerson & John M. Townsend, *Revised Code of Ethics for Commercial Arbitrators Explained: Both the AAA and the ABA House of Delegates Have Approved the Revised Code*, Disp. Res. J. 10, 11-16 (Feb./Apr. 2004) (presumption of neutrality in 2004 Code but retention of party-appointed arbitrator option). The FLAA, *supra* does not bar non-neutral arbitrators; this may be rare in practice.

127 Basic Form C, *Ethical Standards for Arbitrators*, in Handbook, *supra* note 33, incorporating N.C. Canons, *supra* note 125. The Canons and the Comments following each Canon as part of the Order are binding for court-ordered arbitrations under N.C. Gen. Stat. § 7A-37.1 (2003). Other North Carolina government agencies may declare them to be binding in cases, *e.g.*, court-ordered arbitrations in cases before an agency. The Canons may be incorporated by reference in any arbitration agreement. They are not binding in arbitrations under the Act unless parties agree that they are binding. Subject to other provisions of law, *e.g.*, FLAA child abuse reporting requirements in *id.* § 50-44(h) (2003), parties adopting the Canons for arbitration under the Act may modify them for a particular arbitration. Legislation establishing disclosure standards trumps the Canons where they conflict. *See* Canon VIII, 350 N.C. at 889. The Canons are modeled on the 1977 ABA-AAA Code, *supra* note 125 and other standards. The ABA-AAA Code is designed for commercial arbitration and not necessarily for family law arbitrations. *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 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, VIII, 350 N.C. 877-880, 889. Another chapter in Arbitration Now, *supra* analyzes the 1977 ABA-AAA Code, *supra*. *See also* Handbook, *supra* note 33, *Comment* to Form C; 1 Oehmke, *supra* note 94, ch. 45.

128 *See* N.C. Gen. Stat. §§ 50-54(a)(2) (2003). RUAA, *supra* note 8, § 12, at 25, enacted as N.C. Gen. Stat. § 1-569.12 (2003), elevates these into a statute.

129 *Cf.* Basic Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33.

whether parties can vary terms of a statutory vacatur standard.[130] Until a state's highest court rules on the ethics issue for legislation like the FLAA, or there is an authoritative decision for FAA-governed cases, incorporating ethics standards as a vacatur ground might be useful, if for no other reason than to encourage proper behavior.[131]

Parties may agree on rules for the arbitration. If parties agree to arbitrate a matter and do not recite rules, perhaps by reference, the arbitrator may select rules of procedure under which proceedings will operate, subject always to binding law and with "particular reference to model rules developed by arbitration institutions or similar sources."[132] Thus recalcitrant parties may end up with the same rules upon which they could not agree, perhaps the rules the Bar Association formulated for FLAA arbitrations. If the arbitrator(s) cannot agree on rules, a party may apply to a court; the court may order use of rules, again with particular reference to model rules developed by arbitration institutions or similar sources,[133] *e.g.*, the Bar Association rules for FLAA arbitrations.[134]

The Act does not provide for selecting a site to arbitrate; its UAA counterpart, also recited in the RUAA, has been construed

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130 *See, e.g.*, Delta Mine Holding Co. v. AFC Coal Prop., Inc., 280 F.3d 815, 820 (8th Cir. 2001) (arbitrator ethics code not part of parties' contract, not 9 U.S.C. § 10 [2000] vacatur ground); ANR Coal Co. v. Cogentrix, Inc., 173 F.3d 493, 495-500 (4th Cir. 1999) (breach of arbitration rules, arbitrator ethics rules is not 9 U.S.C. § 10 vacatur ground); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679-82 (7th Cir. 1983) (arbitration rules, code do not have force of law, not as stringent as 28 U.S.C. § 455 [2000] standards for federal judges); Feerick, *supra* note 125, at 909-10 (ethics code not vacatur ground but ethics important factor in assessing a particular arbitration's result); Lee Korland, Comment, *Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 Case W.L. Rev. 815, 832-34 (2003) (arbitration rules, arbitrator ethics rules, guidelines not mandatory).

131 Mariner Finan. Group, Inc. v. Bossley, 79 S.W.2d 30, 44-46 (Tex. 2002) (Owen, J.; Phillips, C.J.; Hecht, J.; Jefferson, J., concurring) noted the federal circuits' division but did not decide that ethics rules incorporated into an arbitration agreement might be a vacatur ground, citing inter alia cases where parties incorporated courts' authority to consider arbitrator rulings on law as appeal grounds. *See also infra* notes 264-71, 319-22 and accompanying text.

132 N.C. Gen. Stat. § 50-45(e) (2003).

133 *Id.* § 50-45(e) (2003).

134 For analysis of forms and rules for practice under the Act, *see supra* notes 101-107, *infra* Part I.B.

to allow party autonomy in choosing an arbitration site.[135] The arbitration site is important. Unless parties agree on choice of law,[136] arbitration must proceed pursuant to conflict of laws principles chosen by the arbitrators, usually those of the jurisdiction where arbitration is held.[137]

The Act contemplates that a divorce, and arbitration incident to it, will occur within North Carolina, and that North Carolina family law and the FLAA will apply, subject to federal law.[138] To do otherwise might involve other states' courts in a

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135 *Compare* N.C. Gen. Stat. § 50-59 (2003) *with id.* §§ 1-567.17, 1-567.50, 1-569.26(b) (2001, 2003); UAA, *supra* note 7, § 17, at 429; RUAA, *supra* note 8, § 26(b), at 51; Handbook, *supra* note 33, *Comment* to § 50-59; RUAA, *supra*, *Comment* to § 26, ¶ 3, inter alia citing Kearsarge Metallurg. Corp. v. Peerless Ins. Co., 418 N.E.2d 580, 583-84 (Mass. 1981) (parties' agreeing to AAA-administered arbitration allowed AAA to administer arbitration from its Boston office although transaction New Hampshire-oriented); Tru Green Corp. v. Sampson, 802 S.W.2d 951, 953 (Ky. App. 1991) (agreement must provide for arbitration in state whose courts are sought for relief; court cannot enforce arbitral awards rendered outside that state); State ex rel. Tri-County Constr. Co. v. Marsh, 668 S.W.2d 148, 152 (Mo. App. 1984) (only courts of state where arbitration held can confirm award); Stephanie's v. Ultracashmere Hse., Ltd., 424 N.E.2d 979, 980 (Ill. App.1981) (same); *id., Comment* to § 27, ¶ 2; *see also* Chicago S. & S.B. R.R., 703 N.E.2d 7, 9-11 (Ill. 1998) (same). Before a controversy subject to an agreement to arbitrate arises, parties may not agree to waive or vary the effect of RUAA, *supra*, § 26, enacted as N.C. Gen. Stat. § 1-569.26 (2003). RUAA, *supra*, § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 4.d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions; these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving jurisdictional rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate agreements. *See supra* note 94.

136 Optional R. 105 offers a choice of law clause; *see also* Handbook, *supra* note 33, *Comment* to Optional R. 105.

137 1 Oehmke, *supra* note 94, § 3A:17; *see also* Earl McLaren, *Effective Use of International Commercial Arbitration: A Primer for In-house Counsel*, 19 J. Int'l Arb. 473, 484 (No. 5, 2002). N.C. Gen. Stat. § 1-567.58 (2003) codifies the rule.

138 U.S. Const. art. VI, § 1, cl. 2; *see also* Abduction Convention, *supra* note 4, implemented by ICARA, *supra* note 4; N.C. Gen. Stat. § 50-44(g) (2003) (supremacy of federal law, treaties to which United States is party, for interim relief, interim measures); *id.* §§ 1-567.39, 1-567.47 (2003) (similar ICACA, *supra* note 20, provisions).

proceeding. For example, if parties choose to arbitrate in neighboring Virginia, that state's arbitration provisions, *e.g.*, Virginia's version of the Uniform Act,[139] might apply if court orders are necessary to, *e.g.*, appoint an arbitrator.[140] To so arbitrate in Virginia, perhaps for convenience of a divorcing couple, one of whom may have moved to Virginia, invites difficulty in applying substantive law applicable to the divorce. It may result in nonapplication of parts of the FLAA, *e.g.*, its arbitrator appointment provisions[141] unless the arbitration rules also provide for such,[142] and those state courts can enforce it.[143] There might also be a

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139 Va. Code Ann. §§ 8.01-581.01 - 8.01-581.016 (Michie 2000); *see also id.* §§ 8.01-577 - 8.01-581 (Michie 2000).

140 *Id.* § 8.01-581.03 (Michie 2000). Depending on the arbitration's scope, *e.g.*, dissolving a husband-wife family business in interstate or foreign commerce incident to a divorce, the FAA, 9 U.S.C. §§ 1-307 (2000), as well as the FLAA, *supra* note 14, or other state law like the UAA, *supra* note 7, might be implicated.

141 N.C. Gen. Stat. § 50-45 (2003).

142 *Cf.* Basic R. 20, in Handbook, *supra* note 33, incorporating the FLAA, *supra* note 14 by reference. N.C. Gen. Stat. § 50-59 (2003), defining "court" as a court of competent jurisdiction of "this State," following the UAA, *supra* note 7 format, illustrates possible confusion that may result in a FLAA arbitration outside North Carolina. Would a Virginia court rule it had jurisdiction to appoint an arbitrator under *id.* § 50-45 (2003), Basic R. 20 or its version of the Act, Va. Code Ann. § 8.01-581.014 (Michie 2000)? There are no reported decisions under *id.*, copied from the UAA, but its language ("The term '*court*' means a court of this Commonwealth [*i.e.*, Virginia] having jurisdiction over the subject matter of the controversy.") strongly points toward applying Virginia statutes and decisions; *see supra* note 8, *infra* note 143.

143 N.C. Gen. Stat. § 50-44 (2003) allows enforcement within North Carolina; *see also id.* §§ 1-567.39, 1.567.47 (North Carolina international arbitrations), 1-569.8 (North Carolina RUAA-based arbitrations) (2003); RUAA, *supra* note 8, § 8, at 18. Although its General Assembly has had a RUAA bill before it, *supra* note 26, the Commonwealth has not yet enacted the RUAA, *supra*; what law there is (*cf.* Bandas v. Bandas, 430 S.E.2d 706, 707-08 [Va. App. 1993] [approving arbitration for spousal support], *but see* Patin v. Patin, 45 Va. Cir. 519, 1993 WL 972221 [Va. Cir. 1998] [*Bandas* distinguished; cannot contract away child's best interests]; *supra* note 8) suggests Virginia courts might not construe the UAA in Virginia, Va. Code Ann. §§ 8.01-581.01 - 8.01-581.016 (Michie 2000) as available to give child support protection in a family law case with North Carolina arbitration roots. Baker v. General Motors Corp., 522 U.S. 222, 231-36 (1998) suggests that Virginia courts, under comity principles, might or might not grant provisional remedies in a North Carolina-based arbitration case.

different flavor of interpreting North Carolina law by a judge not familiar with nuances of North Carolina jurisprudence. Although the FLAA Optional Rules include a provision for choice of law,[144] wise counsel should avoid this imbroglio by naming an in-state situs for family law arbitration, so that the applicable law forms concentric circles of North Carolina family law, the FLAA and clauses and rules subject to the FLAA and federal law, which would apply wherever the arbitration is conducted in the United States.[145] The same principles apply to UAA or RUAA-based arbitrations, and for jurisdictions enacting family law arbitration legislation. State legislation voiding arbitration situs clauses may also apply if parties wish to arbitrate at a site different from the place where divorce or other family law proceedings will be or are filed.[146]

The Basic Rules provide that if parties agree on an arbitration site, it must be honored. If they do not, and a party requests that arbitration be held in a specific place and there is no objection within 30 days after notice of the request has been sent to the arbitrator, that selection governs. If a party objects to the nomination, the arbitrator must make a final, binding determination. If parties agree on a site, and a party later asks that proceedings be held at another site "because of serious inconvenience of a party . . . or a witness such that justice in the arbitration cannot be had," the arbitrator may decide on the other place requested after receiving the request and the other party's response, to be filed within 30 days after the request. The arbitrator may choose the other place or a neutral site or sites.[147]

The Act tracks the Uniform Act to provide for compelling or staying arbitration; it also provides for partial stays and other

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144 Optional R. 105; *see also* Handbook, *supra* note 33, *Comment* to Optional R. 105.

145 For federal law analysis and issues, *see* Part II.B *infra*.

146 *E.g.*, N.C. Gen. Stat. § 22B-3 (2003). The force of statutes like this in a FAA-governed case is not clear. *Due Process Principles, supra* note 30, ¶ 10, would require a "[r]easonably convenient location."

147 Basic R. 7, in Handbook, *supra* note 33; *see also* N.C. Gen. Stat. § 1-567.50 (2003); AAA Com. Arb. R. 3, 5, 11; AAA Separation Agreement R. 4; Handbook, *supra, Comment* to Basic R. 7; Basic R. 37, in Handbook, *supra.* Rule 7 is consistent with civil case venue transfer standards. *See generally, e.g.*, 28 U.S.C. § 1404 (2000); N.C. Gen. Stat. §§ 1-83 - 1-87 (2003).

relief.[148] Court orders denying an application to compel arbitration or granting an application to stay arbitration are appealable orders.[149]

The FLAA also follows other arbitration legislation in declaring that parties have a right to be represented by counsel at any proceeding or hearing. Waivers of counsel representation before a proceeding or hearing are ineffective.[150]

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148 N.C. Gen. Stat. § 50-43 (2003); *compare* 9 U.S.C. §§ 3-4, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.3, 1-567.38, 1-569.7 (2001, 2003); UAA, *supra* note 7, § 2, at 109; RUAA, *supra* note 8, § 7, at 17; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-43; RUAA, *supra, Comment* to § 7. Parties cannot waive or vary the effect of RUAA § 7. *Id.* § 4(c), at 10, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 5.a; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* A clause unduly restricting or waiving statutory rights to compel or stay arbitration may be subject to an unconscionability claim, particularly if an agreement includes other similar clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

149 N.C. Gen. Stat. §§ 50-60(a)(1), 50-60(a)(2) (2003).

150 The Act provides for representation by "counsel," not "an attorney," the phrase in analogous statutes, thereby making it clear that parties may have more than one lawyer, which is the sense of but not other legislation's explicit language. *Compare* N.C. Gen. Stat. § 50-48 (2003) *with id.* §§ 1-567.7, 1-567.48(b), 1-567.79, 1-569.4(b)(4), 1-569.16 (2001, 2003); UAA, *supra* note 7, § 6, at 198; RUAA, *supra* note 8, §§ 4(b)(4), 16, at 10, 33 (before controversy subject to agreement to arbitrate arises, parties to an agreement may not waive counsel; labor organization, employee can waive right to lawyer representation in labor arbitration at any time); Basic R. 9, in Handbook, *supra* note 33 (also providing that parties must notify other parties, arbitrators of counsel's name, address, telephone and facsimile numbers at least seven days before date set for hearing when counsel will first appear, and that when counsel initiates arbitration or responds for a party, notice is deemed given); *see also* AAA Com. Arb. R. 22 (shorter notice time); AAA Separation Agreement R. 7 (same); N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra, Comment* to Basic R. 9; RUAA, *supra, Comments* to §§ 4, ¶¶ 1-3, 4.c; 16 (nonlawyer not prohibited from representing party in arbitration where law does not bar it); *Due Process Principles, supra* note 30, ¶ 12 ("Right to representation by counsel or other representative"); *id.*, ¶ 21; Hayford & Palmiter, *supra* note 26, at 225-26; Heinsz, *supra* note 23, at 29-30, 34. Although Basic R. 9 does not so provide, counsel might add e-mail addresses. *Cf.* Handbook, *supra*, *Comment* to Basic R. 6, 26. Because the FAA, *supra* note 15, does not provide for legal representation, almost all arbitration rules set standards. The FLAA has no nonwaiver provision. The

The FLAA, like most modern legislation, provides for interim relief and interim measures, *e.g.*, to protect assets before the arbitrator renders an award. (Interim relief is a term of art describing those actions a court may take to preserve the status quo; interim measures refer to actions arbitrators may take in similar circumstances.) Cases divide[151] on availability of preaward relief unless a statute[152] or a rule governing the arbitra-

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FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* A clause unduly restricting or waiving rights to counsel may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate agreements. *See supra* note 94. RUAA, *supra*, § 30, at 53 declares that RUAA provisions governing legal effect, validity and enforceability of electronic records or signatures, and of contracts performed by using such records or signatures conform to the Electronic Signatures in Global and National Commerce Act, § 102, 15 U.S.C. § 7002 (2000); the North Carolina version, N.C. Gen. Stat. § 1-569.30 (2003) adds coverage for other similar federal or state legislation like the Uniform Electronic Transactions Act; *compare id.*, 7A(1) U.L.A. 211 (2002) & *id.* 15 (2003 Cum. Ann. Pocket Pt.), enacted as N.C. Gen. Stat. §§ 66-311 - 66-330 (2003). Parties cannot agree to waive or vary RUAA § 30's effect. *Id.* § 4(c), at 9, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003). *See also* RUAA, *supra, Comments* to §§ 4, ¶¶ 1-3, 5.g; 30; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver or variance provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly varying or waiving rights under federal law may be subject to preemption. *See also* Part II.B *infra*. Collaborative law legislation provides that attorneys serving pursuant to a collaborative law agreement may serve in other forms of ADR, including binding arbitration. They may also serve in an ADR proceeding that is part of a collaborative law agreement. N.C. Gen. Stat. § 50-78 (2003), enacted pursuant to 2003 N.C. Sess. Laws ch. 2003-371 § 1. *See also supra* note 12 and accompanying text.

151 *See* RUAA, *supra* note 8, *Comment* to § 8, ¶¶ 2-4.

152 N.Y.C.P.L.R. 7502(c) (McKinney 2002 Cum. Pocket Pt.); N.C. Gen. Stat. §§ 1-567.39, 1-567.47 (2003) are antecedent examples; *see also id.* § 50-62 (2003). 9 U.S.C. § 8 (2000) provides for preaward relief, but only in admiralty cases. Unless a federal statute provides otherwise, Fed. R. Civ. P. 4(n), 64 incorporate state prejudgment procedures for cases in the U.S. District Courts for the state in which they sit. The result is that for New York, North Carolina and other states with analogous legislation, a federal court must also grant prejudgment relief if its state counterparts can, although Fed. R. Civ. P. 4(n) limits jurisdiction to situations where personal jurisdiction cannot be achieved. 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1119-21 (3d ed. 2002, 2003 Pocket Pt.); 11A Charles Alan Wright et al., Fed-

tion[153] allows it. The FLAA, following the ICACA, allows interim relief and includes special provisions to parallel state and federal law governing child custody and support.

If arbitrators have not been appointed, or if arbitrators are not available, *e.g.*, on vacation when a need arises, a party may seek interim relief directly from a court, including an order of attachment or garnishment; a temporary restraining order or preliminary injunction; an order for claim and delivery; appointment of a receiver; delivery of money or other property into court; notice of lis pendens; any temporary relief permitted by North Carolina family law legislation; any relief permitted by federal law or treaties to which the United States is a party; or any other order necessary to ensure preservation or availability of assets or documents, destruction or absence of which would likely prejudice the arbitration's conduct or effectiveness.[154] In considering an interim relief request, a court must accept arbitrator findings of

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eral Practice and Procedure §§ 2931-32 (2d ed. 1995, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, § 65; Martin H. Redish, *Seizure of Person or Property*, in 13 Moore's Federal Practice §§ 64.10-64.14 (Daniel R. Coquillette et al. eds., 3d ed. 2003); Mary P. Squiers, *Summons*, in 1 *id.* § 4.120; Walker, *Trends*, *supra* note 29, at 432-34. Unless federal law intervenes, however, federal courts generally do not hear family law cases; this would include interim relief actions in those kinds of arbitrations. *See supra* note 4.

153 *See, e.g.*, AAA Com. Arb. R. 36; AAA Com. Arb. Optional R. for Emerg. Measures of Prot. 1-8; AAA Int'l Arb. R., Art. 21.

154 N.C. Gen. Stat. §§ 50-44(a), 50-44(c) (2003), the latter in *id.* § 50-44(c)(7) specifically incorporating relief federal law like the Abduction Convention, *supra* note 4, implemented by ICARA, *supra* note 4, might give; N.C. Gen. Stat. §§ 7B-502, 7B-1902, 50-13.5(d), 50-16.2A, 50-20(h), 50-20(i), or 50-20(i1) (2003); or *id.* chs. 50A, 50B, or 52C (2003) require or allow; *compare id.* §§ 1-567.39(a), 1-567.39(c), 1-569.8(a) (2003); RUAA, *supra* note 8, § 8(a), at 18. *See also, e.g.,* N.C. Gen. Stat. §§ 1-116 - 1-120.2 (notice of lis pendens), 1- 440.1 - 1-440.46 (attachment, garnishment), 1-472 - 1-484.1 (claim and delivery), 1-501 - 1-507.11 (receiver appointment, etc.), 1-508 - 1-510 (delivery of money, property into court), 1-567.47, 50-62 (2003); N.C.R. Civ. P. 65 (temporary restraining order, preliminary injunction); Handbook, *supra* note 33, *Comment* to § 50-44; RUAA, *supra, Comment* to § 8, ¶¶ 1-5; Hayford & Palmiter, *supra* note 26, at 217-18. N.C. Gen. Stat. § 50-44(a)'s nonappointment provision includes situations where parties have not appointed arbitrators or cannot agree on an arbitrator, with the result that a court upon application under *id.* § 50-45 (2003) must do so. A court might get simultaneous § 50-44 and § 50-45 applications, with a possibility of costs under *id.* § 50-45(h) and an interim relief award against a party.

fact, including probable validity of a claim that is the subject of interim relief sought or granted. However, a court may review findings of fact or modify interim measures governing child support or custody.[155]

In other situations, *e.g.*, if arbitrators have been appointed and are available to grant interim measures, the arbitrators must award them. A party to an arbitration may request that the court enforce an arbitrator order granting interim measures and may review or modify any interim measures governing child support or custody.[156] Arbitrators, upon a party's request, may order a party to take interim measures as the arbitrators consider necessary, including interim measures the same as the interim relief a court may grant, and may require security of parties.[157] In con-

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155 N.C. Gen. Stat. § 50-44(e) (2003); *compare id.* §§ 1-567.39(d), 1-569.8(b)(2) (2003), RUAA, *supra* note 8, § 8(b)(2), at 18; *see also* N.C. Gen. Stat. §§ 50-54(a)(6), 50-56 (2003), RUAA, *supra*, § 18, at 37, enacted as N.C. Gen. Stat. § 1-569.18 (2003); Handbook, *supra* note 33, *Comment* to § 50-44; RUAA, *supra, Comments* to § 8, ¶ 6; 18. Parties may not waive or vary the effect of RUAA § 18, enacted as N.C. Gen. Stat. § 1-569.18 (2003). RUAA, *supra*, § 4(c), at 10, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003); *see also id., Comment* to § 4, ¶¶ 1-3, 5.c; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving preaward rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94. Considerations of arbitrator findings may come into play if an arbitrator makes a finding, and later becomes unavailable due to, *e.g.*, illness, and a court receives an enforcement application.

156 N.C. Gen. Stat. § 50-44(b) (2003); *see also id.* §§ 1-567.39(b), 1-569.8(b)(1), 50-56, 50-62 (2003); RUAA, *supra* note 8, § 8(b)(1), at 18; Handbook, *supra* note 33, *Comment* to § 50-44; RUAA, *supra, Comment* to § 8, ¶ 6.

157 N.C. Gen. Stat. § 50-44(d) (2003), incorporating by reference *id.* §§ 50-44(c), 50-51 (2003); *see also id.* §§ 1-567.47, 1-569.8(b)(1), 50-60 (2003); RUAA, *supra* note 8, § 8(b)(1), at 18; Handbook, *supra* note 33, *Comment* to § 50-44; RUAA, *supra, Comment* to § 8, ¶ 6. Before a controversy subject to an agreement to arbitrate arises, parties may not agree to waive or vary the effect of RUAA, *supra*, § 8, enacted as N.C. Gen. Stat. § 1-569.8 (2003). *Id.* § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-4; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver, provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in

sidering a request for interim measures enforcement, a court must accept arbitrator findings of fact, including probable validity of any claim that is the subject of interim relief sought or granted. However, a court may review findings of fact or modify interim measures governing child support or custody.[158]

If arbitrators have not ruled on an objection to their jurisdiction, *e.g.*, on the arbitration's scope, arbitrator findings of fact do not bind a court until it has independently found as to the arbitrators' jurisdiction. If the court rules that the arbitrators did not have jurisdiction, an application for interim relief must be denied.[159] Although the RUAA does not have a comparable provision,[160] if arbitrator action amounts to an interim award, under the UAA and the RUAA parties may apply for change of the award by the arbitrator or a court, or vacatur from a court.[161]

Although parties may limit interim relief or interim measures by prior written agreement, *e.g.*, in an agreement to arbitrate, they may not limit relief designed to award immediate, emergency relief or protection for children or a spouse under federal or state law.[162] Otherwise, parties seeking interim mea-

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Handbook, *supra.* However, a clause unduly restricting or waiving protections for interim measures or interim relief may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate an agreement. Insofar as rights protected under federal law, there will be preemption issues. *See supra* note 94; *infra* Part II.B.

158 N.C. Gen. Stat. § 50-44(e) (2003); *see also id.* §§ 50-56, 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-44. There is no comparable RUAA provision.

159 N.C. Gen. Stat. § 50-44(f) (2003); *see also id.* §§ 1-567.39(e), 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-44.

160 *But see* RUAA, *supra* note 8, § 18, at 37, enacted as N.C. Gen. Stat. § 1-569.18 (2003); RUAA, *supra*, *Comment* to § 18.

161 *See generally* UAA, *supra* note 7, §§ 9, 12, at 244, 280, enacted as N.C. Gen. Stat. §§ 1-567.9, 1-567.12 (2001, 2003); RUAA, *supra* note 8, §§ 20, 23, at 39, 43, enacted as N.C. Gen. Stat. §§ 1-569.20, 1-569.23 (2003).

162 N.C. Gen. Stat. § 50-44(g) (2003), incorporating by reference *id.* §§ 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50A-25, 50B-3, 50B-5 (2003); *id*. ch. 52C (2003); "federal law; or treaties to which the United States is party," *e.g.*, Abduction Convention, *supra* note 4, implemented by ICARA, *supra* note 4; *see also* Basic R. 20, in Handbook, *supra* note 33, requiring parties to opt out of interim relief, except that which § 50-44(g) excludes from opt-out; AAA Com. Arb. R. 34; AAA Separation Agreement R. 16; Handbook, *supra, Comment* to § 50-44. RUAA, *supra* note 8, §§ 4, 8, at 10, 18, enacted as N.C. Gen. Stat. §§ 1-

sures, or in other proceedings before the arbitrators, parties must proceed in accordance with the agreement to arbitrate. If the agreement does not provide for interim measures, or for other proceedings before the arbitrators, a party must request interim measures or a hearing by notifying the arbitrators and other parties.[163] Basic Rule 35 says arbitrators may require parties, including interim relief applicants, to deposit money as the arbitrators deem necessary to cover arbitration expenses, including arbitrator fees, for a hearing. Arbitrators must render an accounting to parties and return unexpended balances at the end of the case.[164] They cannot assess these expenses as costs,[165] to the extent there has been Rule 35 compensation, except to note them as credits.

Following other North Carolina law, the FLAA requires that an arbitrator who has cause to suspect that a child is abused or neglected must report the case to the director of the department of social services of the county where the child resides. If the child resides out of state, the arbitrator must report to the director of the department of social services of the county where the arbitration is held.[166]

Like all hearings, the FLAA rules provide standards for the date, time and place of interim measures hearings upon 20 days' notice. Attending waives notice of the hearing.[167]

569.4, 1-569.8 (2003), preserve party autonomy in choosing to be bound by or opt out of some or all interim relief measures; *see* RUAA, *supra, Comment* to § 4, ¶ 1; Heinsz, *supra* note 23, at 29-30.

163 N.C. Gen. Stat. § 50-44(i) (2003); *see also id.* §§ 1-567.47, 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-44.

164 *See also* Handbook, *supra* note 33, *Comment* to Basic R. 35.

165 *Cf.* N.C. Gen. Stat. § 50-51(f)(2) (2003).

166 *Id.* § 50-44(h) (2003); *see also id.* §§ 7B-301 - 7B-310 (2003); Handbook, *supra* note 33, *Comment* to § 50-44.

167 Basic R. 8, in Handbook, *supra* note 33; *compare* RUAA, *supra* note 8, §§ 4(b)(2), 9, at 10, 20, enacted as N.C. Gen. Stat. § 1-569.4(b)(2), 1-569.9 (2003); *see also* Handbook, *supra*, *Comment* to Basic R. 8 (comparing AAA Com. Arb. R. 21, AAA Separation Agreement R. 9, NASD R. 10315); Heinsz, *supra* note 23, at 29-30. Parties concerned with a possibility of need for interim measures might consider amending the 20-day notice rule for these proceedings. The 20-day rule would not bind a court petitioned for interim relief.

The RUAA provides that seeking interim relief does not waive a party's right to arbitration; Basic Rule 32(a) covers the point for Family Law Act arbitrations.[168]

b. *Hearing Procedure; Award and Judgment on the Award*

Once an arbitral tribunal has been constituted, a case may go to hearings, perhaps only a final hearing to determine an award. There may be others in contentious or complex cases.[169]

The Act does not specifically provide for an early hearing or hearings in the nature of a pretrial conference on matters related to the arbitration. The RUAA does.[170] The FLAA does say, however, that arbitrators, after calling a hearing, "may adjourn the hearing . . . as necessary and, on request of a party and for good cause shown, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date." This provision follows the Uniform Act.[171] Even under the UAA, "arbitrators probably have the inherent authority to [hold prehearing conferences or to rule on preliminary matters]."[172]

Moreover, the FLAA interim relief and interim measures provisions suggest the near certainty of a hearing separate from hearings on substantive issues. If a party tries to abscond with assets, or a spouse or children need interim protection, arbitrator interim measures followed by relief from a court would necessitate separate hearing(s) before a final award.[173]

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168 *Compare* RUAA, *supra* note 8, § 8(c), at 18, enacted as N.C. Gen. Stat. § 1-569.8(c) (2003), *with* Basic R. 32(a), in Handbook, *supra* note 33; *see also* AAA Com. Arb. R. 47, AAA Separation Agreement R. 23; Handbook, *supra*, *Comment* to Basic R. 32; RUAA, *supra, Comment* to § 8, ¶ 7.

169 *Due Process Principles, supra* note 30, ¶ 14 requires a "[f]air and efficient hearing."

170 N.C. Gen. Stat. § 1-569.15(a) (2003); RUAA, *supra* note 8, § 15(a), at 31; *see also id., Comment* to § 15, ¶¶ 1-2; Heinsz, *supra* note 23, at 29-30, 34.

171 *Compare* N.C. Gen. Stat. § 50-47(a) (2003) *with id.* §§ 1-567.6, 1-567.54, 1-569.15(a) (2001, 2003); RUAA, *supra* note 8, § 15(a), at 31; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-47. No FAA provision provides for hearings; statutes imply as much. *See* 9 U.S.C. §§ 3, 4, 7, 9, 208, 307 (2002) ("arbitrate," "arbitration").

172 RUAA, *supra* note 8, *Comment* to § 15, ¶ 2.

173 *See* N.C. Gen. Stat. § 50-44 (2003).

The FLAA Basic Rules, paralleling the RUAA, provide for the equivalent of a civil pretrial conference in their standards for administrative conferences. A party may request, or an arbitrator may decide to hold, the equivalent of an initial pretrial conference. The rule also suggests a possible final pretrial conference equivalent, and that these may be held by telephone or other efficient means, *e.g.*, facsimile or e-mail.[174] Taking a leaf from the AAA Separation Agreement Rules, Basic Rule 6(d) also provides that

> . . . [i]f 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.[175]

The Rule also provides that if parties agree, the arbitrator may arrange a mediation conference, which may result in resolving some or all issues without arbitration. The mediation consent must provide for rules to be followed and mediator compensation. The mediator must be someone other than the arbitrator

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174 *Compare* Basic R. 6(a), 6(b), in Handbook, *supra* note 33, *with, e.g.*, N.C. Gen. Stat. § 1-569.15(a) (2003); RUAA, *supra* note 8, § 15(a), at 31; *see also* Fed. R. Civ. P. 16(b), 16(d), 26(f); N.C.R. Civ. P. 16; N.C. Prac. R. 7; AAA Com. Arb. R. 10; AAA Separation Agreement R. 3; *see also* Handbook, *supra, Comment* to Basic R. 6; RUAA, *supra, Comment* to § 15, ¶ 1. Arbitrators may require parties to deposit funds for hearing expenses. Basic R. 35, in Handbook, *supra*.

175 *Compare* Basic R. 6(d), in Handbook, *supra* note 33, adding provisions for arbitrator approval of waiver of updates as an option for vacating an award, and for sanctions, *with* AAA Separation Agreement R. 8; *see also* Handbook, *supra, Comment* to Basic R. 6. A continuing disclosure rule is consistent with civil discovery practice. *Cf.* Fed. R. Civ. P. 26(e); N.C.R. Civ. P. 26(e); 8 Charles Alan Wright et al., Federal Practice & Procedure §§ 2048-50 (2d ed. 1994, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, § 86 at 630; Patrick E. Higginbotham, *General Provisions Governing Discovery; Duty of Disclosure*, in 6 Moore's Federal Practice §§ 26.130-26.132 (Daniel R. Coquillette et al. eds., 3d ed. 2003).

appointed for the case.[176] North Carolina civil case mediation is mandatory, although courts may allow parties to opt out;[177] mediation under the Rule is opt-in.[178] Depending on the parties' agreement and an arbitrator's decision, the final result might be incorporating a mediated settlement into an award that may be converted to a judgment.[179] On the other hand, mediation might result in resolving some issues with the rest left to arbitrator decision and award, the latter also perhaps converted to a judgment for enforcement or other purposes. If parties approve, Basic

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176 *Compare* Basic R. 6(e), in Handbook, *supra* note 33, *with* AAA Com. Arb. R. 9-10, L-4; P-A-C R. 4.02-4.03, 7.01; *see also* Handbook, *supra, Comment* to Basic R. 6(e); *Due Process Principles, supra* note 30, ¶ 13 ("Opportunity to mediate/settle").

177 Aside from small claims, mostly in the state District Courts, mediation is the primary ADR process in the North Carolina courts. Federal courts in North Carolina have procedures similar to state mediation practice, including court-approved opt-out. ADR decisions usually come before or with a initial pretrial conference in civil litigation; this is likely for arbitration, too. *See* N.C. Gen. Stat. §§ 7A-38.1 - 7A-38.4A, 50-13.1 (2003); N.C.R. Implem. Statewide Mediated Settlement Confs. in Super. Ct. Civ. Actions, R. 1-12; R. of N.C. Sup. Ct. Implem. Prelitig. Farm Nuisance Mediation Prog., R. 1-10; Fed. R. Civ. P. 16(b)-16(c), 26(f); E.D.N.C.R. 30-32.11 (also providing for nonjury summary trials); M.D.N.C.R. LR16.4; W.D.N.C.R. LR16.2-LR16.3 (noting possibility of other ADR techniques). Appeals from U.S. District Courts in North Carolina are subject to mediation conferences. 4th Cir. R. 33. Worker compensation claims must be mediated. *See* North Carolina Industrial Commission, R. for Mediated Settlement & Neutral Eval. Confs., R. 1-12. *See also* UMA, *supra* note 25, § 3, at 90; Clare, *supra* note 11, chs. 9-12, 14-16, 19-20, 23-28; 6A Charles Alan Wright et al., Federal Practice & Procedure §§ 1525-26 (2d ed. 1995, 2003 Pocket Pt.); 8 *id., supra* note 175, §§ 2051-51.1; Wright & Kane, *supra* note 4, §§ 81, at 583-84; 91; 1 Oehmke, *supra* note 94, chs. 1-2 (ADR methods discussion); Wayne D. Brazil, *Pretrial Conferences; Scheduling; Management*, in 3 Moore's Federal Practice §§ 16.30, 16.50-16.56 (Daniel R. Coquillette et al. eds., 3d ed. 2003) (same).

178 Sometimes divorce parties agree to mediation before arbitration (med-arb). There is nothing in the FLAA prohibiting this. If parties want med-arb, the agreement should recite this procedure. Since parties' counsel remain in the same adversarial roles they would have if the case were arbitrated or litigated, there is no need for withdrawal. In collaborative law, counsel must agree to withdraw if the procedure does not result in settling the dispute. If parties agree on FLAA arbitration or other ADR procedures, however, counsel may serve in those proceedings. N.C. Gen. Stat. §§ 50-73, 50-78 (2003), enacted by 2003 N.C. Sess. Laws ch. 2003-371 § 1.

179 N.C. Gen. Stat. §§ 50-53, 50-57 (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

Rule 15(h) allows an arbitrator to get a nonbinding professional opinion relevant to the best interests of a child, a form of conciliation.[180] Optional Rule 104 also offers a form of conciliation report in providing for an arbitrator-appointed expert.[181] Although the Act and Rules do not otherwise provide for conciliation, parties can consider this as an ADR option.[182]

There is therefore nothing in the Act to prohibit the equivalent of civil case pretrial conferences in FLAA-governed cases.[183] There is nothing in the Act to prohibit the equivalent of summary judgment as in civil litigation,[184] although no statute or

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180 Basic R. 15(h), in Handbook, *supra* note 33, following AAA Separation Agreement R. 14, also providing for separate counsel and cost allocations; *see also* Handbook, *supra, Comment* to Basic R. 15.

181 Optional R. 104, in Handbook, *supra* note 33; *see also id.*, *Comment* to Optional R. 104 (comparing AAA Int'l Arb. R., Art. 22).

182 Conciliation, an ADR method with roots in international arbitrations, is a procedure by which parties agree that independent experts may prepare and deliver a nonbinding opinion that they may accept or reject for resolving a dispute. Parties in East Asian countries like China tend to favor this option, although it has been employed elsewhere. *See generally* Sekolec & Getty, *supra* note 25, at 179. The ICACA now provides for conciliation; its terms might be considered for conciliation rules in FLAA cases as special rules for an arbitration. *See* N.C. Gen. Stat. §§ 1-567.78 - 1.567.87, 50-62 (2003). If other states have or adopt an equivalent to the Act, those states' conciliation statutes might be consulted. There are also rules for conciliating disputes. *See, e.g.*, Sekolec & Getty, *supra*, at 183-93 (discussing UNCITRAL Model Law on International Commercial Conciliation, U.N. Doc. A/35/17 [2002], Annex 1, UNCITRAL Conciliation Rules, *available at* www.uncitral.org/english/texts/arbitration/concrules.htm, that can be consulted for conciliation procedures); International Chamber of Commerce, ADR Dispute Resolution Services (Mar. 24, 2003), *available at* http://www.iccwbo.org/index_adr.asp (ICC options, rules); Society of Maritime Arbitrators, About the SMA (Mar. 24, 2003), *available at* http://www.smany.org/smany.html (SMA conciliation).

183 Handbook, *supra* note 33, *Comment* to § 50-47. RUAA, *supra* note 8, § 15(a), at 31, enacted as N.C. Gen. Stat. § 1-569.15(a) (2003), elevates the procedure to statutory status.

184 *See* N.C.R. Civ. P. 56, similar to former Fed. R. Civ. P. 56; 10A Charles Alan Wright et al., Federal Practice & Procedure §§ 2711-29.1 (1998, 2003 Pocket Pt.); 10B *id.* §§ 2730-42 (1998, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, § 99; Jeffrey Stempel, *Summary Judgment*, in 11 Moore's Federal Practice ch. 56 (Daniel R. Coquillette et al. eds., 3d ed. 2003).

standard rule specifically authorizes it;[185] here again the RUAA elevates this option into a statute.[186]

Discovery procedure can be a prehearing conference subject.[187] Discovery has been a problem in arbitration; older legislation reflects a policy of minimizing this potentially major cost.[188] However, these statutes may not account for parties that would use this policy to thwart full development of a case's facts before arbitrators. The result has been strengthening discovery procedures through arbitration rules.[189] The RUAA reflects this trend while attempting to further the discovery cost minimization goal. Anticipating the RUAA, the FLAA also reflects this trend.

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185 *Cf.* Basic R. 6(b), in Handbook, *supra* note 33 (authorizing, in large or complex case, preliminary hearing to specify issues to be resolved, stipulation on uncontested facts, other matters to expedite proceedings). Parties may agree by special rule for summary treatment, *cf.* Basic Form E, in *id.* The rules of civil procedure, *e.g.*, N.C.R. Civ. P. 56 (summary judgment), can be guides in conducting a hearing; arbitrators have discretion to waive or modify the Basic Rules to permit efficient presentations. Basic R. 17(d), in Handbook, *supra*.

186 N.C. Gen. Stat. § 1-569.15(b) (2003); RUAA, *supra* note 8, § 15(b), at 31; *see also id., Comment* to § 15, ¶ 3, noting "cautious," "hesitan[t]" opinions supporting summary disposition, citing Pegasus Constr. Corp. v. Turner Constr. Co., 929 P.2d 1200, 1203 (Wash. App. 1997) (civil litigation summary judgment procedure distinguished, approving arbitrator disposition); Schlessinger v. Rosenfeld, Meyer & Sussman, 47 Cal. Rptr.2d 650, 653-59 (Cal. App. 1995) (same; approving arbitrator's deciding case without taking oral testimony; cautionary note on summary adjudication); Stifler v. Seymour Weiner, M.D., P.A., 488 A.2d 192, 194 (Md. App. 1985) (under Maryland law, entire arbitrator panel should have considered summary judgment, not just the chair; nevertheless, award upheld); Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411, 1417-18 (N.D. Okla. 1996) (claimant not given fair hearing); In re InterCarbon Bermuda, Ltd. - Caltex Trad. & Transp. Corp. Arb., 146 F.R.D. 64, 72-74 (S.D.N.Y. 1993) (summary disposition approved as fair; no need for oral hearings). *See also* Sheldon v. Vermonty, 269 F.3d 1202, 1206-07 (10th Cir. 2001) (summary disposition appropriate so long as arbitration a fundamentally fair proceeding); Hayford & Palmiter, *supra* note 26, at 224; Heinsz, *supra* note 23, at 29-30, 34.

187 General hearing notice and expense provisions govern. Basic R. 6(b), 6(c), 8, 35, in Handbook, *supra* note 33; *Due Process Principles, supra* note 30, ¶ 16 would require "[r]easonable discovery."

188 *See generally* 9 U.S.C. §§ 7, 208, 307 (2002); N.C. Gen. Stat. § 1-567.8(a) - 1-567.8(c) (2001), tracking UAA, *supra* note 7, § 7, at 199; *see also* N.C. Gen. Stat. § 50-62 (2003); 3 Ian R. Macneil et al., Federal Arbitration Law § 34.1 (1995); 2 Oehmke, *supra* note 8, §§ 90:01-90:03; 1 Wilner, *supra* note 8, § 27:01.

189 *See, e.g.*, AAA Com. Arb. R. 23, E-6, E-7.

The Act follows the UAA and anticipated the RUAA in providing for arbitrator subpoena of witnesses, production of evidence and arbitrator permission before depositions are taken.[190] However, following the ICACA and the RUAA, the FLAA also allows arbitrators, or a party with arbitrator approval, to request court assistance with discovery and taking evidence if, *e.g.*, it is necessary because of problems in obtaining discovery through usual methods. Besides incorporating the state Rules of Civil Procedure governing discovery and sanctions, the FLAA also refers to state family law legislation.[191] The result can be a mailed fist inside a velvet glove; if parties cooperate in discovery under the usual arbitration methods, there will be no need for court intervention. If there are problems, a specter of full discovery under the civil rules, including sanctions pursuant to court supervision, is there. Like certain weapons in warfare, the hope is that this option will never be employed. The possibility of use should encourage compliance for those few who would try to defeat discovery through standard arbitration practice.

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190 *Compare* N.C. Gen. Stat. §§ 50-49(a) - 50-49(c) (2003) *with id.* §§ 1-567.8(a) - 1-567.8(c), 1-569.17(a) - 1-569.17(f) (2001, 2003); UAA, *supra* note 7, § 7, at 199; RUAA, *supra* note 8, §§ 17(a)-17(f), at 33-34 (also providing for protective orders; *see also* RUAA, *supra, Comment* to § 17, ¶¶ 1-8; N.C. Gen. Stat. § 50-62 (2003). Before a controversy arises that is subject to an agreement to arbitrate, parties may not agree to waive or vary the effect of RUAA, *supra*, §§ 17(a)-17(b), at 33-34, enacted as N.C. Gen. Stat. §§ 1-569.17(a) - 1-569.17(b) (2003), they may modify other § 17 provisions in the agreement. *Id.* § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(1) (2003); *see also* RUAA, *supra, Comment* to § 4, ¶¶ 1-4; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving hearing rights may be subject to an unconscionability claim, particularly if an agreement includes other similar waiver clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

191 *Compare* N.C. Gen. Stat. §§ 50-49(d) - 50-49(e) (2003) (incorporating by reference N.C. Gen. Stat. chs. 50, 50A, 52B, 52C [2003], North Carolina Rules of Civil Procedure), *with id.* §§ 1-567.57(a) (incorporating by reference North Carolina Rules of Civil Procedure), 1-569.17(g) (2003); RUAA, *supra* note 8, § 17(g), at 34; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-49; RUAA, *supra, Comment* to § 17, ¶ 9; Hayford & Palmiter, *supra* note 26, at 225-26; Heinsz, s*upra* note 23, at 29-30, 34.

Another weakness of older arbitration legislation like the UAA is failure to provide for consolidating arbitrations where, *e*.g., common issues of fact arise in separate cases as it can be accomplished in civil litigation.[192] Today modern arbitration legislation like the RUAA provides for consolidation.[193] The FLAA also elevates consolidation to statutory status.[194] Consolidation could be an early administrative conference issue.[195]

The FLAA tracks the ICACA to allow parties to consolidate arbitrations if they agree to this or by a court upon a party's application if parties have agreed to consolidate. This differs from the RUAA, which allows a court to consolidate cases upon a party's application without other parties' agreement if there are common fact issues.[196] FLAA-governed consolidations should

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192 *Cf.* Fed. R. Civ. P. 42(a); N.C.R. Civ. P. 42(a); *see also* 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 2381-86 (2d ed. 1995, 2003 Pocket Pt.); Stephan Landsman, *Consolidation; Separate Trials*, in 8 Moore's Federal Practice §§ 42.10-42.15 (Daniel R. Coquillette et al. eds., 3d ed. 2003).

193 N.C. Gen. Stat. § 1-569.10 (2003); RUAA, *supra* note 8, § 10, at 21. The AAA rules do not provide for this; other rules may.

194 Enactment will end divisions among courts, some of which reject parties' attempts to consolidate absent parties' agreement. Others order consolidation when parties have not provided for it in their agreements, *e.g.*, Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771, 774-76 (7th Cir. 2000) (ambiguous contract construed to allow consolidation). A few state statutes already allow it. RUAA, *supra* note 8, *Comment* to § 10; *see also* 3 Macneil et al., *supra* note 188, ch. 33; 1 Oehmke, *supra* note 94, ch. 29; 1 Wilner, *supra* note 8, § 27:02; Heinsz, *supra* note 23, at 29-30, 33; Landsman, *supra* note 192, § 42.15 (Fed. R. Civ. P. 42[a] no authority to order consolidation, joint hearings if agreement to arbitrate does not provide for such, citing cases).

195 *See generally* Basic R. 6(a), 6(b), in Handbook, *supra* note 33.

196 Under the RUAA parties may also agree to consolidate; if they agree and a party later reneges, a court may intervene if there are common issues suitable for consolidated cases. *Compare* N.C. Gen. Stat. § 1-569.10 (2003); RUAA, *supra* note 8, § 10, at 21 *with* N.C. Gen. Stat. §§ 1-567.57(b), 50-50 (2003); *see also id.* § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-50; RUAA, *supra, Comment* to § 10; Hayford & Palmiter, *supra* note 26, at 223. Shaw's Supermarkets, Inc v. United Food & Comm. Workers, 321 F.3d 251, 252-55 (1st Cir. 2003) held a disagreement between parties over consolidation was an issue for the arbitrator and not an arbitrability question. *Shaw's* does not recite the precise rules governing the arbitrations; apparently there were no specific consolidation provisions. 2 Oehmke, *supra* note 8, § 61.13 (2003 Supp.). Although *Shaw's* involved labor arbitrations, the scope of the agreements to arbitrate and parties' expectations relative to matters under arbitra-

be rare, but the statute covers situations, *e.g.*, where two people, in business together, sign an agreement to arbitrate upon dissolution of the business. They later decide to marry and include an arbitration clause in a prenuptial or postnuptial agreement. A business partner then files for divorce and wishes to dissolve the business. In this circumstance both arbitration clauses would be invoked; consolidation would become an issue.[197] Basic Rule 1 gives priority to arbitration rules parties choose for a FLAA-based arbitration over rules otherwise in force for another arbitration that is consolidated with the Family Law Act arbitration.[198] Consolidated arbitrations could proceed with separate rules for each, perhaps with an agreement for primacy of certain rules, *e.g.*, a provision that three arbitrators must hear the case as a clause in the business agreement, rather than the standard single arbitrator provision the FLAA and its rules contemplate.[199] Failure to include a primacy rule invites an imbroglio that the arbitrator(s) might resolve by a special rule.[200]

Hearing procedures on a dispute's merits follow traditional law. As in discovery,[201]

> (a) The arbitrators have the power to administer oaths and may issue subpoenas for attendance of witnesses and for production of books, records, documents and other evidence. Subpoenas issued by the arbitrators shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for service and enforcement of subpoenas in a civil action.

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tion, the case may have implications beyond the labor law field where there are multiple arbitrations, no consolidation provisions but similar issues. The preferred approach is to include a rule provision approving or rejecting consolidation.

197 Handbook, *supra* note 33, *Comment* to § 50-50. The FAA may govern the business dissolution agreement, at least in part, if interstate, maritime or international transactions are involved. Even if no transaction covered by a separate agreement to arbitrate involves these, a state's UAA or RUAA, *supra* notes 7, 8, may be invoked with a different provision for that agreement.

198 *See supra* note 51 and accompanying text.

199 *Cf.* N.C. Gen. Stat. § 50-45(a) (2003); Basic R. 2, in Handbook, *supra* note 33.

200 N.C. Gen. Stat. § 50-45(e) (2003); *see also supra* note 53 and accompanying text.

201 *See supra* note 191 and accompanying text.

(b) On the application of a party and for use as evidence, the arbitrators may permit depositions to be taken, in the manner and upon the terms the arbitrators designate.
(c) All provisions of law compelling a person under subpoena to testify apply.[202]

The UAA and the RUAA also cover some hearing procedures and requirements, which may be modified by an agreement to arbitrate.[203] Thus the rules the parties choose are often the primary sources for hearing governance.

The FLAA Basic Rules provide for:

> Setting a hearing date, time and place, including notice times for the hearing and a statement that attending a hearing waives notice requirements for the hearing;
> Recording the hearing;
> Who may attend hearings, and an injunction of privacy for hearings;
> Hearing postponement standards; arbitrator and witness oath procedures;
> Majority decision-making by arbitrators unless otherwise agreed;
> Order of proceedings and standards for communicating with arbitrators;
> Special rules for child custody cases, including arbitrator's rights to interview a child privately to ascertain the child's needs in the presence of counsel for the child if the child has separate counsel and if parties approve, an arbitrator's obtaining a nonbinding professional opinion relevant to the best interests of the child;

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202 N.C. Gen. Stat. §§ 50-49(a) - 50-49(c) (2003); *compare* 9 U.S.C. §§ 7, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.8(a) - 1-567.8(c), 1-569.17(a) - 1-569.17(f) (2001, 2003); UAA, *supra* note 7, §§ 7(a)-7(c), at 199; RUAA, *supra* note 8, §§ 17(a)-17(f), at 33-34; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-49.

203 *Compare* N.C. Gen. Stat. §§ 1-567.6, 50-47 (2001, 2003) *with* UAA, *supra* note 7, § 5, at 173 (arbitrators appoint time, place for hearing; notice to be given personally or by registered mail not less than five days before hearing; appearance at hearing waives notice; arbitrators' right to adjourn hearing or postpone hearing to date not later than date agreement fixes for award; hearing to proceed even if duly notified party does not appear; court may direct arbitrators to proceed promptly with hearing; parties may be heard and may present evidence, cross-examine witnesses); N.C. Gen. Stat. §§ 1-569.4(a), 1-569.15(c) - 1-569.15(d) (2003); RUAA, *supra* note 8, §§ 4(a), 15(c)-15(d), at 10, 31-32 (same; notice method omitted, *but see id.* § 2, at 7; court authority to direct arbitrators omitted); *see also* Handbook, *supra* note 33, *Comment* to § 50-47; RUAA, *supra, Comments* to § 4, ¶¶ 2-3; § 15, ¶¶ 3-4; Hayford & Palmiter, *supra* note 26, at 23-25; Heinsz, *supra* note 23, at 29-30. N.C. Gen. Stat. § 1-567.54 (2003) has a different format for international arbitrations.

> Arbitrating in the absence of a party or counsel, unless the law provides otherwise, including the standard rule for arbitrations that even in default cases, arbitrators must consider evidence non-defaulting parties submit;
>
> The hearing's procedural and evidence principles, including the rule that civil procedure and evidence rules, except for privilege rules, serve as guides (a standard for arbitrations), and that the arbitrator is the judge of relevancy and materiality of evidence, and that evidence must be taken in the presence of all arbitrators and parties except parties in default, with authority for arbitrators or parties to subpoena witnesses;
>
> Arbitrator authority to make independent inspections or investigations;
>
> Closing a hearing, including rules for final argument, posthearing briefs, and timing for an award after a hearing's closing;
>
> Reopened hearings, and a 30-day deadline for arbitrators' submitting an award after a reopened hearing;
>
> Waiver of oral hearing by parties' agreement;
>
> Witness expenses to be borne by the party producing them, and expense of proof produced at the arbitrator's direct request and other expenses like arbitrator travel and expenses to be shared equally unless otherwise agreed or the arbitrator assesses part or all of them against a party or parties; and
>
> Arbitrator discretion to require parties' deposits to cover hearing expenses.[204]

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204 Basic R. 8, 10-19, 21-23, 33, 35-36, in Handbook, *supra* note 33; *see also id., Comment* to Basic R. 8 (noting differences in AAA Com. Arb. R. 21, AAA Separation Agreement R. 9; NASD R. 10315's contribution), *Comment* to Basic R. 10 (noting differences in AAA Com. Arb. R. 23), *Comment* to Basic R. 11 (comparing AAA Com. Arb. R. 25, AAA Separation Agreement R. 10, P-A-C R. 1.06), *Comment* to Basic R. 12 (comparing AAA Com. Arb. R. 26, AAA Separation Agreement R. 15), *Comment* to Basic R. 13 (noting congruence with AAA Com. Arb. R. 27, relationship with N.C. Gen. Stat. § 50-45 [2003] governing court-appointed arbitrators); *Comment* to Basic R. 14 (following N.C. Gen. Stat. § 50-46 [2003], AAA Com. Arb. R. 28, noting multimember arbitral panel possibility, a Basic R. 2 option), *Comment* to Basic R. 15 (comparing AAA Com. Arb. R. 29, AAA Separation Agreement R. 13-14), *Comment* to Basic R. 16 (comparing N.C. Gen. Stat. § 50-47[a] [2003]; N.C. Ct.-Ord. Arb. R. 3[j], since amended; AAA Com. Arb. R. 30; AAA Separation Agreement R. 11), *Comment* to Basic R. 17 (noting similarities of N.C. Ct.-Ord. Arb. R. 3[h], 3[p], since amended; AAA Com. Arb. R. 31; AAA Separation Agreement R. 12; P-A-C Agreement ¶ 4), *Comment* to Basic R. 19 (comparing AAA Com. Arb. R. 33), *Comment* to Basic R. 21 (comparing N.C. Ct.-Ord. Arb. R. 3[o], since amended; AAA Com. Arb. R. 35; AAA Separation Agreement R. 17), *Comment* to Basic R. 22 (comparing AAA Com. Arb. R. 36, AAA Separation Agreement R. 18); *Comment* to Basic R. 23 (comparing AAA Com. Arb. R.

Although interim measures issues may arise earlier than the hearing, arbitrators may grant them as a hearing progresses.[205] The Optional Rules add other provisions related to hearings:

> Interpreter standards;
> Language for conducting an arbitration, which must follow that of the arbitration agreement, including rules for translations; and
> Arbitrator appointment of experts.[206]

Except where the law requires otherwise, the parties may modify these rules.[207] If a party proceeds with arbitration without timely objecting to rules noncompliance, that party is deemed to have waived objections.[208] As noted earlier, arbitrators or perhaps a court may provide for fair rules if the parties do not.[209]

Award procedure is a mix of statutory requirements and those that rules may (or must) supply.

An award must be in writing, dated and signed by arbitrators who join the award, with a statement of the place where it was made. If there is more than one arbitrator, signatures of a majority of the arbitrators suffice, but the reason for an omitted signature, *e.g.* an arbitrator's death, must be stated. Arbitrators must deliver a copy of the award to parties personally, or as the agreement to arbitrate provides. The date of personal delivery or mailing constitutes time of delivery.[210] Requiring a statement

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37); *Comment* to Basic R. 33 (comparing AAA Com. Arb. R. 48, noting this amends N.C. Gen. Stat. § 50-51(f) [2003] costs assessment rules, which the Act allows); *Comment* to Basic R. 35; *Comment* to Basic R. 36 (comparing AAA Com. Arb. R. 52, AAA Separation Agreement R. 24); N.C. Gen. Stat. §§ 50-49(a), 50-49(e) (2003); *Due Process Principles, supra* note 30, ¶¶ 14-15 ("Fair and efficient hearing;" "Maintenance of confidentiality and protection of privilege").

205 N.C. Gen. Stat. § 50-44 (2003), Basic R. 20, in Handbook, *supra* note 33.

206 Optional R. 102-04, in Handbook, *supra* note 33; *see also id.*, *Comment* to Optional R. 102 (comparing AAA Com. Arb. R. 24), *Comment* to Optional R. 103 (comparing AAA Int'l Arb. R., Art. 14); *Comment* to Optional R. 104 (comparing AAA Int'l Arb. R., Art. 22).

207 *See supra* note 203 and accompanying text.

208 Basic R. 24, in Handbook, *supra* note 33; *see also id., Comment* to Basic R. 24 (comparing AAA Com. Arb. R. 38, adding timeliness requirement for objections; P-A-C R. 1.05).

209 *See supra* note 53 and accompanying text.

210 N.C. Gen. Stat. § 50-51(a) (2003); *compare id.* §§ 1-567.61 (2003) (primary source), 9 U.S.C. §§ 9, 208, 307 (2000), N.C. Gen. Stat. §§ 1-567.9, 1-

of where arbitrators make an award helps resolve conflict of laws issues where an agreement does not so provide.[211] In a departure from standard U.S. arbitration practice where there is no controlling statute or agreement for it[212] and like international arbitrations, a FLAA award must be "reasoned," *i.e.*, it must state findings of fact and conclusions of law similar to judge-tried cases in federal rules-governed jurisdictions, unless parties agree otherwise.[213] "A reasoned award is almost necessary in child support

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567.11, 1-569.19(a) (2001, 2003), UAA, *supra* note 7, § 8(a), at 202; RUAA, *supra* note 8, § 19(a), at 38; *see also* N.C. Gen. Stat. § 50-62 (2003); Basic R. 28(a), in Handbook, *supra* note 33; AAA Com. Arb. R. 42; AAA Separation Agreement R. 21; Handbook, *supra, Comment* to § 50-51; RUAA, *supra, Comment* to § 19; Basic R. 30, in Handbook, *supra* allows first class mail to parties or parties' counsel at their or counsel's last known address as legal, timely delivery. *See also id.*, *Comment* to Basic R. 30; AAA Com. Arb. R. 45; AAA Separation Agreement R. 22. Section 50-51(a) allows this cost-saving option ("or as provided in the agreement"). Where law or an agreement does not so provide, a prudent arbitrator should consider getting a signed, dated receipt if there is a possibility of a nondelivery claim. For first class mail, this might mean sending a receipt for signature with mailing date noted on the receipt. Similar procedures should apply for awards sent by e-mail, which can be used if the agreement to arbitrate so provides.

211 *See supra* notes 145-46 and accompanying law.

212 *E.g.*, Howell v. Wilson, 526 S.E.2d 194, 196 (N.C. App. 2000), inter alia citing Bryson v. Higdon, 21 S.E.2d 836, 837 (N.C. 1942); Patton v. Baird, 42 N.C. 255, 256 (N.C. 1851) (per curiam) (arbitrators need not state reasons for award; like jury verdict); *see also* Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 244 n.4 (1962); 3 Macneil et al., *supra* note 188, § 37.4.2; 3 Thomas H. Oehmke, Commercial Arbitration § 115:04 (rev. ed. 2002); 1 Wilner, *supra* note 8, § 29:06; R.D. Hursh, Annot., *Necessity that Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969, (1962) (principle established "beyond peradventure," absent statute or stipulation in arbitration agreement). In labor cases arbitrators routinely issue reasoned awards. Major arbitration institution rules have begun to encourage reasoned awards. The general U.S. practice is contrary to arbitration practice, sometimes required by law, in other industrialized nations. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 444-47, 501-07 (1998), advocating reasoned awards in commercial cases.

213 *Compare* N.C. Gen. Stat. § 50-51(b) (2003) *with id.* § 1-567.57(b) (2003) (international arbitrations; reasoned award not required); 9 U.S.C. §§ 9, 208, 307 (2000) (legislation silent on the point); N.C. Gen. Stat. §§ 1-567.9, 1-567.11, 1-569.19(a) (2001, 2003) (same, but parties may agree otherwise, *e.g.*, for reasoned award); UAA, *supra* note 7, § 8, at 202 (same); RUAA, *supra* note 8,

and child custody cases, to show how the arbitrator arrived at the award. On the other hand, a low-assets divorce might be resolved by a simple [statement of] property division."[214] The reasoned award default rule lays a predicate for modifying or correcting awards involving alimony, postseparation support, child support or child custody based on substantial change of circumstances.[215] It can be useful in other situations involving changing, vacating, modifying or correcting awards.[216] The award may decree specific performance but may not award punitive damages unless parties agree to the latter. A punitive damages award must be stated in a record, whether the award is reasoned or not, and must specify facts justifying the award and the part of the award attributable to punitive damages.[217] Spe-

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§ 19(a), at 38 (same); Basic R. 28(c), in Handbook, *supra* note 22 (award must be reasoned unless parties agree otherwise); AAA Int'l Arb. R., Art. 27.1 (same); Fed. R. Civ. P. 52; N.C.R. Civ. P. 52; *see also* N.C. Gen. Stat. § 50-62 (2003); 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 2571-91 (2d ed. 1994, 2003 Pocket Pt.); Handbook, *supra, Comment* to § 50-51; Wright & Kane, *supra* note 4, § 96; Charles L. Brieant, *Findings by the Court: Judgment on Partial Findings*, in 9 Moore's Federal Practice ch. 52 (Daniel R. Coquillette et al. eds., 3d ed. 2003); *Due Process Principles, supra* note 30, ¶ 19 ("Written award, with explanation of result, at least if requested by a party").

214 Handbook, *supra* note 33, *Comment* to § 50-51.

215 N.C. Gen. Stat. §§ 50-41(a), 50-56 (2003).

216 *Id.* §§ 50-52, 50-54, 50-55 (2003); *see also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003).

217 N.C. Gen. Stat. §§ 50-51(d), 50-51(e) (2003). In this regard North Carolina's RUAA follows the FLAA formula. *Id.* § 1-569.21(a), 1-569.21(c), 1-569.21(e) (2003); *compare* RUAA, *supra* note 8, §§ 21(a), 21(c), 21(e), at 40 (allowing punitive damages unless parties agree otherwise, same result in N.C. Gen. Stat. § 50-51[e]'s opt-in requirement; arbitrator may order such remedies as the arbitrator considers just, appropriate under circumstances of the arbitration); Basic R. 28(b), 28(d), in Handbook, *supra* note 33 (following N.C. Gen. Stat. § 50-51[d], 50-51[e]); AAA Com. Arb. R. 43; *see also* Handbook, *supra, Comment* to § 50-51; RUAA, *supra, Comment* to § 21, ¶¶ 1, at 3, 5, inter alia citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54-64 (1995)'s holding that parties' choice of New York law, which allowed punitive damages, applied in an FAA-governed arbitration, following Volt Inform. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 469 (1989); Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726, 731-34 (N.C. App. 1985) (tortious conduct, unfair and deceptive trade practices arbitrable; punitive damages, when available under North Carolina law, can be awarded unless parties exclude them by contract); Heinsz, *supra* note 23, at 29-32. *See also* Aguilera v. Palm Harbor

cial rules for punitive damages should facilitate resolving issues arising in proceedings to change, vacate, modify or correct awards.[218] If a FLAA award is converted to a judgment,[219] a judgment reflecting separate punitive damages may be partly enforceable if taken for recognition and enforcement to a jurisdiction abroad that has public policy objections to incoming judgments for punitive damages.[220] Within the United States, absent other considerations, sister states cannot refuse to enforce a judgment for punitive damages on public policy grounds, although full faith and credit does not require that state to enforce a sister state injunction.[221] (The injunction might be enforced on comity principles,[222] the same rule that may obtain in foreign country recognition and enforcement proceedings.[223]) Abduction Convention judgments must be given full faith and credit.[224]

There are no provisions for punitive damages in North Carolina family law legislation; this is reflective of other states' jurisprudence. However, given a possibility that a prenuptial or postnuptial agreement may include business matters that are susceptible to punitive damages awards, or the possibility of consolidated arbitrations, the Act provides for them. The FLAA does

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Homes, Inc., 34 P.3d 617, 619-24 (N.M. App. 2001), *aff'd*, 54 P.3d 993, 994-96 (N.M. 2002) (surveying cases, allowing punitive damages in arbitration; New Mexico law would permit them in litigation); Mitchell J. Benowitz, Rodgers Builders, Inc. v. McQueen*: Arbitration and Punitive Damages*, 64 N.C.L. Rev. 1145 (1986); Hayford & Palmiter, *supra* note 26, at 214.

218 N.C. Gen. Stat. §§ 50-53 - 50-55 (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003). *See also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003) (modification, correction of award issues under N.C. Gen. Stat. § 50-55 [2003]; no grounds for modification, correction found).

219 N.C. Gen. Stat. §§ 50-53, 50-57 (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

220 *Cf.* Restatement (Third), Foreign Relations Law of the United States § 483, cmt. b, r.n. 4 (1987) (hereinafter Restatement [Third]); *see also generally* Hayford, *A New, supra* note 212, advocating reasoned awards in place of statutory and nonstatutory vacatur grounds.

221 U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (2000); Baker v. General Motors Corp., 522 U.S. 222, 231-36 (1998).

222 *Baker*, 522 U.S. at 235-41.

223 *Cf.* Restatement (Third), *supra* note 220, § 481, r.n.6.

224 42 U.S.C. § 11603(g) (2000); *see also* Holder v. Holder, 305 F.3d 854, 864-66 (9th Cir. 2002).

not change the risk of punitive damages for family law issues unless parties specifically agree to include them.

Like the RUAA, the FLAA provides that arbitrators must render awards within the time the agreement recites; if it does not state a time, they must render awards as a court orders after a party applies to the court for a deadline. Parties may extend time for rendering an award before or after the recited time expires. A party waives objection to a late award unless that party notifies the arbitrator of objection to a late award before the arbitrator delivers the award to that party.[225] Basic Rule 29 allows agreed settlement terms to be recited in a consent award.[226] Parties should always consider requesting terms in consent awards; if settlement goes awry and enforcement through judgment is necessary, the award terms are available for confirmation.[227] Basic Rule 27 requires prompt rendering of an award, no later than 30 days after the last hearing closes. If parties waive oral hearings, the Rule says the award must be made no later than the day the arbitrator receives parties' final submissions.[228] Basic Rule 22 provides that if an arbitrator reopens a hearing, time for rendering the award is extended by 30 days.[229] If a party requests it, an arbitrator may furnish to that party, at that party's expense, certi-

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225 *Compare* N.C. Gen. Stat. § 50-51(g) (2003) *with id.* § 1-569.19(b) (2003); RUAA, *supra* note 8, § 19(b), at 38; *see also* 9 U.S.C. §§ 9, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.9, 1-567.11, 1-567.61, 50-62 (2001, 2003); UAA, *supra* note 7, § 8(b), at 202; RUAA, *supra, Comment* to § 19; *Due Process Principles, supra* note 30, ¶ 11; Hayford & Palmiter, *supra* note 26, at 225.

226 Basic R. 29, in Handbook, *supra* note 33; *compare* AAA Com. Arb. R. 44; *see also* Handbook, *supra*, *Comment* to Basic R. 29; *Due Process Principles, supra* note 30, ¶ 13 ("Opportunity to mediate/settle").

227 N.C. Gen. Stat. §§ 50-53, 50-57 (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

228 Basic R. 27, in Handbook, *supra* note 33; *compare* AAA Com. Arb. R. 41, AAA Separation Agreement R. 20. This is consistent with N.C. Gen. Stat. § 50-51(g) (2003), allowing parties to set a date for an award; *see also* N.C. Gen. Stat. § 1-569.19(b) (2003); RUAA, *supra* note 8, § 19(b), at 38; Handbook, *supra*, *Comment* to Basic R. 27; Basic R. 37, in *id.*

229 This is also consistent with N.C. Gen. Stat. § 50-51(g) (2003), allowing parties to set a date for an award; *see also id.* § 1-569.19(b) (2003); RUAA, *supra* note 8, § 19(b), at 38; *see also* AAA Com. Arb. R. 36; AAA Separation Agreement R. 18; Handbook, *supra* note 33, *Comment* to Basic R. 22; Basic R. 37, in *id.*

fied copies of papers in the arbitrator's possession that may be required in judicial proceedings related to the arbitration.[230]

The Act also provides for arbitrators' awarding interest and costs, which can be modified by the parties' agreement.[231] Costs can include arbitrator fees and expenses, expert witnesses and translators; attorney fees and expenses, and fees and expenses of an institution supervising an arbitration; other expenses incurred in connection with the arbitration; sanctions arbitrators or a court awards, including those provided by pleading or discovery rules in civil litigation; and other costs state law allows.[232] In al-

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230 Basic R. 31, in Handbook, *supra* note 33; *see also id.*, *Comment* to Basic R. 31 (comparing AAA Com. Arb. R. 46, noting Rule 31 applicability to N.C. Gen. Stat. §§ 50-52 - 50-56 [2003] procedures but perhaps also criminal proceedings, *e.g.*, perjury arising from arbitration). *See also id.* § 50-45(f) (2003); Basic R. 32(d), in Handbook, *supra*; (arbitrator, arbitration institution immunity); Basic R. 17(d), in *id.* (privilege rules apply in civil actions).

231 N.C. Gen. Stat. §§ 50-51(b), 50-51(f)(1) (2003); *compare id.* § 1-567.61 (2003), the model for the Act; 9 U.S.C. §§ 9, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.9, 1-567.11, 1-569.21(d) (2001, 2003); UAA, *supra* note 7, §§ 8, 10, at 202, 250; RUAA, *supra* note 8, § 21(d), at 40; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-51; RUAA, *supra, Comment* to § 21, ¶ 4. For a rule allowing different expense allocation, *see, e.g.*, Basic R. 33, in Handbook, *supra* (parties pay their witnesses' expenses, expense of proof produced at arbitrator's direct request, share arbitrator expenses unless arbitrator assesses these expenses against a party or parties).

232 N.C. Gen. Stat. § 50-51(f)(2) (2003), incorporating by reference N.C.R. Civ. P. 11, 37; N.C. Gen. Stat., chs. 6, 7A (2003). North Carolina's RUAA version, *id.* 1-569.21(b) (2003), follows prior attorney fees law. There is no entitlement to them unless parties contract for them or they would be allowed by law. They can be awarded pursuant to statute for postseparation support, alimony, child support and child custody. N.C. Gen. Stat. §§ 50-13.6, 50-16.3A, 50-16.4 (2003). Although there is no general right to attorney fees in equitable distribution cases, they can be awarded in property possession situations under *id.* § 50-20(i) (2003) and for contempt of court. *See also* Taylor v. Taylor, 468 S.E.2d 33, 34-38 (N.C. 1996) (child support case pursuant to N.C. Gen. Stat. § 50-13.6 [2003]); Clark v. Clark, 271 S.E.2d 58, 63-68 (N.C. 1980) (alimony pursuant to N.C. Gen. Stat. § 50-16.3[a] [2003]); Burr v. Burr, 570 S.E.2d 222, 224 (N.C. App. 2002) (applying N.C. Gen. Stat. § 50-13.6 [2003] in child support case; fees denied for parental rights termination); McKissick v. McKissick, 497 S.E.2d 711, 712-23 (N.C. App. 1998) (N.C. Gen. Stat. § 50-20[i] [2003] fees, others denied); Hartsell v. Hartsell, 393 S.E.2d 570, 576-77 (N.C. App. 1990) (fees award for contempt); In re Cooper, 344 S.E.2d 27 33-36 (N.C. App. 1986) (contingency fee contract for equitable distribution approved). When N.C. Gen. Stat. § 50-51(f) (2003) is read with *id.* §§ 50-41(a) and 50-62 (2003), it is clear that the Legislature meant to give arbitrators no more authority to award attorney fees

locating costs, an arbitrator must specify the party entitled to costs; the party who must pay costs; amount of costs or method of determining them; and the manner in which costs must be paid.[233] The standard FLAA costs allocation formula differs from traditional attorney fee allocation principles, *i.e.*, the "American rule" of each party's paying for his or her lawyer.[234] Unless parties agree otherwise, under the FLAA the arbitrator has discretionary authority to award attorney fees.[235] In divorce cases a successful complaining spouse may be awarded attorney's fees as part of a judgment, an exception to the American rule, for some issues.[236] Although FLAA arbitrators might usually follow this exception, there is nothing in the Act to require them to do so; parties should agree on attorney fees as part of an agreement to arbitrate.[237]

Because of a possibility of abusive practice in arbitration-related litigation, the Act includes costs provisions elsewhere.[238] There is nothing in the Act to stop courts from awarding costs in

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than a judge would have in the same case. For fee calculation factors, *see* United Labs., Inc. v. Kuykendall, 437 S.E.2d 374, 381-82 (N.C. 1993); Owensby v. Owensby, 322 S.E.2d 772, 773-75 (N.C. 1984). *Compare* N.C. Gen. Stat. § 1-567.61 (2003), the model for the FLAA; 9 U.S.C. §§ 9, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.9, 1-567.11 (2001), construed to allow attorney fees if parties contract for them, Nucor Corp. v. General Bearing Corp., 423 S.E.2d 747, 749-51 (N.C. 1993); UAA, *supra* note 7, §§ 8, 10, at 202, 250; RUAA, *supra* note 8, § 21(b), at 40; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-51; RUAA, *supra*, *Comment* to § 21, ¶¶ 2, 4; Heinsz, *supra* note 23, 29-32; Hayford & Palmiter, *supra* note 26, at 215.

233 N.C. Gen. Stat. § 50-51(f)(3) (2003); *compare id.* §§ 1-567.61 (model for the Act), 1-569.21 (2003); *compare* 9 U.S.C. §§ 9, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.9, 1-567.11 (2001); UAA, *supra* note 7, §§ 8, 10, at 202, 250; RUAA, *supra* note 8, § 21, at 40; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-51; RUAA, *supra, Comment* to § 21.

234 *See supra* note 232 and accompanying text.

235 N.C. Gen. Stat. §§ 50-51(f)(1), 50-51(f)(2)(b) (2003).

236 *See supra* note 232 and accompanying text.

237 N.C. Gen. Stat. § 50-51(f)(1) (2003) allows them to do so.

238 N.C. Gen. Stat. §§ 50-45(h) (costs in connection with arbitrator appointment), 50-53 (confirmation of award), 50-54(d) (confirmation of award after unsuccessful application to vacate), 50-55(d) (award modification, correction proceedings), 50-56(f) (modification of alimony, postseparation support, child support, child custody), 50-57 (judgment on award) (2003). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

other situations, *e.g.*, if a party starts litigation in the face of a valid clause in a contract agreeing to arbitrate.[239]

c. *Converting Arbitral Awards to Judgments*

Because arbitration by agreement is a private means of dispute resolution with court intervention only if parties do not comply with contractual obligations,[240] performance of arbitral awards pursuant to the agreement can remain outside the courts if parties comply with their obligations. However, as with noncompliance before and during arbitration, an aggrieved party may seek court[241] intervention if a party does not comply with an award. If a party does not perform obligations in an award, a party may encourage performance through warning of award confirmation, with a possibility of sanctions from the court,[242] as a judgment and enforcement of that judgment like any other.[243] In some instances this may suffice to obtain compliance.

If a party does not comply with an award's terms, which can include specific performance, court confirmation of the award may be sought. Confirming an award can involve proceedings to change, vacate, modify or correct an award by a court, however. Upon a party's application,[244] a court must confirm an award unless a party has applied for vacatur, modification or correction of

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239 *See* N.C. Gen. Stat. § 50-43 (2003); Basic R. 32, in Handbook, *supra* note 33.

240 FLAA provisions for interim measures an arbitrator may give and interim relief a court may give before a final award illustrate the primacy of private ordering for dispute resolution through arbitration by agreement. Although a court may order interim relief before appointment of arbitrators or if arbitrators are not available, "[i]n all other cases a party shall seek interim measures . . . from the arbitrators. A party has no right to seek interim relief from a court, except that a party . . . may request from the court enforcement of the arbitrators' order granting interim measures and review or modification of any interim measures governing child support." With these exceptions, parties must seek relief from arbitrators first and approach a court only if a party does not comply with an arbitrator order, with possible sanctions from arbitrators or a court for noncompliance. N.C. Gen. Stat. § 50-44 (2003).

241 *Id.* § 50-59 (2003) defines "court."

242 *Id*. § 50-53 (2003), amended by 2003 N.C. Sess. Laws ch. 2003-61.

243 N.C. Gen. Stat. § 50-57 (2003).

244 Except as otherwise provided, applications to a court must be by motion, to be heard in the manner and upon notice provided by law or court rule for making and hearing motions in civil actions. *Id.* § 50-58 (2003).

an award within 90 days of delivery[245] of the award.[246] Applications to modify alimony, postseparation support, child support or child custody awards, have no time limit. If these applications are before a court, it proceeds in accordance with the Act to resolve issues. Costs may be imposed in appropriate cases.[247] A party may also seek arbitrators' change of an award through court order if the award is before the court for ruling on applica-

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245 Arbitrators accomplish delivery by personally giving a party a copy, or by sending it to a party by registered or certified mail, return receipt requested, unless the agreement provides otherwise. *Id.* § 50-51(a) (2003). Basic R. 30, in Handbook, *supra* note 33, allows first-class mail service on parties or counsel.

246 Computing the 90 days follows but does not implement state law, *see, e.g.*, N.C.R. Civ. P. 6, N.C. Gen. Stat. § 103-4 (2003). Basic R. 37's time standard is the same but may be modified by parties' agreement. The legislature fixed the statutory 90 days.

247 N.C. Gen. Stat. § 50-53 (2003), referring to *id.* §§ 50-51(f) (2003) (costs), 50-54(b) (2003) (90 days begins after award delivered, unless application based on corruption, fraud or other undue means, in which case the clock begins to run 90 days after these grounds are known or should have been known), 50-55(a) (2003) (90 days begins to run after delivery), 50-56 (2003) (no time limits). Amended in 2003 by 2003 N.C. Sess. Laws ch. 2003-61, § 50-53 otherwise tracks *id.* § 1-567.12 (2001); *compare id.* 1-567.65 (2003), from which *id.* § 50-53's costs provision was taken; 9 U.S.C. §§ 9 (year time limit to confirm award), 207 (three years to confirm U.N. Convention, *supra* note 30, award), 208, 307 (2000); UAA, *supra* note 7, § 11, at 264; RUAA, s*upra* note 8, § 22, at 42, enacted as N.C. Gen. Stat. § 1-569.22 (2003); *see also id.* § 50-62 (2003); Photopaint Tech., LLC v. Smartlens Corp., 335 F.3d 152, 155-57 (2d Cir. 2003) (circuits' division on whether one-year rule mandatory); Handbook, *supra* note 33, *Comment* to § 50-53; RUAA, *supra, Comment* to § 22 (rejecting 9 U.S.C. § 9 year limit to confirm award). The FLAA Basic and Optional Rules are otherwise silent on this aspect of arbitration, necessarily so, since the matter has moved to the courts; and statutes and rules for confirming awards and enforcing judgments on awards. RUAA, *supra*, § 4(c), at 10, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003), declares that parties cannot agree to waive or vary the effect of the RUAA equivalent of *id.* § 50-53 (2003) for confirming awards, RUAA § 22, enacted as N.C. Gen. Stat. § 1-569.22 (2003). *See also* RUAA, *supra, Comment* to § 4, ¶ 5.e; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no provisions for waiving or varying the statutory standard, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause varying or waiving statutory rights to confirm an award may be subject to an unconscionability claim, particularly if an agreement includes other similar clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

tions to vacate, modify or correct the award. An application must be filed within 20 days of delivery of the award is filed.[248]

A 2003 statute amends the FLAA confirmation provision to allow a separate contract for issues in the arbitration.[249] The amendment allows parties to contract, *e.g.*, for a nonmodifiable property settlement or nonmodifiable alimony, that would not be subject to confirmation. A contract, as distinguished from a judgment, can be confidential.[250] The separate contract would remove these issues from a confirmed award. Although child support or child custody might be a subject of a contract at this stage of the litigation, it usually is not; these components of a divorce settlement would be subject to reopening in any event. Upon a court's granting an order partially vacating, confirming, modifying or correcting an award, perhaps also after arbitrator changes, an order or judgment must be entered and docketed. If there is noncompliance with a judgment on an award, enforcement can begin like other judgments, including imposing costs.[251] At this stage, however, if parties are satisfied with an award, per-

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248 N.C. Gen. Stat. § 50-53 (2003), amended by 2003 N.C. Sess. Laws ch. 2003-61.

249 2003 N.C. Sess. Laws ch. 2003-61, amending N.C. Gen. Stat. § 50-53 (2003).

250 Lynn P. Burleson e-mail to the author, July 28, 2003 (copy in author file).

251 N.C. Gen. Stat. § 50-57 (2003), referring to *id.* § 50-51(f) (2003); *compare* 9 U.S.C. §§ 9, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.15, 1-567.65, 1-569.25(a) (2001, 2003); UAA, *supra* note 7, § 14, at 419; RUAA, *supra* note 8, § 25(a), at 50; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-57; RUAA, *supra, Comment* to § 25 (inter alia noting costs provision waivable under RUAA, *supra*, § 4(a), at 10, enacted as N.C. Gen. Stat. § 1-569.4(a) [2003]). However, parties cannot agree to waive or vary the effect of RUAA, *supra*, §§ 25(a)-25(b), at 50, enacted as N.C. Gen. Stat. § 1-569.25(a) - 1-569.25(b) (2003). They can agree to waive the provision of RUAA, *supra*, § 25(c), at 50, enacted as N.C. Gen. Stat. § 1-569.25(c) (2003), for attorney fees. RUAA, *supra*, § 4(c), at 10, enacted as N.C. Gen. Stat. § 1-569.4(c) (2003); *see also id., Comment* to § 4, ¶¶ 1-3, 5.f; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30; Hayford & Palmiter, *supra* note 26, at 218. There is no comparable FLAA provision. The FLAA Basic and Optional Rules do not provide for variance or waiving statutory standards like those in N.C. Gen. Stat. 50-57 (2003), but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause varying or waiving statutory rights to entry of judgment may be subject to an unconscionability claim, particularly if an agreement includes

haps as vacated in part, modified, corrected or changed, and there is compliance, there may be no need to begin judgment enforcement.[252]

Besides challenging judgment enforcement, a party resisting enforcement may appeal that judgment, albeit on limited grounds.[253]

d. *Grounds for Changing, Vacating, Modifying, or Correcting Awards*

Like other legislation governing arbitrations by agreement, the Family Law Act provides for four ways to amend, or terminate the effect of, an award: (1) change of an award by arbitrators who rendered it, or a court's (2) vacating, (3) modifying or (4) correcting an award. The Act provides specially for vacating child support or custody awards and for modifying or correcting awards involving alimony, postseparation support, child support or child custody on the same basis that a North Carolina court can do so, *i.e.*, substantial change of circumstances.[254] There are different grounds and time limits for each procedure.[255] Applicants may employ any or all procedures.[256]

(1) *Change of Award by Arbitrators*.

Arbitrators may change an award if a party applies for a change within 20 days of delivery of the award. Grounds for change include "evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award[;]" an award "imperfect in form, not affecting the merits of the controversy," or clarifying the award. Parties opposing the change must serve objections to the application within 10 days from notice of the application for change. If an application to vacate, modify or correct an award is before a court when

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other similar waiver clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

252 The FLAA Basic and Optional Rules, in Handbook, *supra* note 33, are otherwise silent on this aspect of arbitration; the matter has moved to the courts; statutes and rules to confirm awards and enforce judgments on awards apply.

253 N.C. Gen. Stat. § 50-60 (2003).

254 *Id.* § 50-41(a) (2003).

255 *See generally id.* §§ 50-52 - 50-56 (2003).

256 *Cf. id.* § 50-55(c) (2003).

a party files a change application, the applicant must file with the court, which may submit the change application to the arbitrator for correction or modification under the same grounds (evident miscalculation, evident mistake, clarification) that the arbitrator could have considered if there were no court proceeding.[257] The RUAA declares that equivalents to the last sentence of the FLAA change statute ("An award . . . ") are nonwaivable, and parties cannot vary their effect, by agreement.[258] Parties may waive moving arbitrators for changes, however.[259] The FLAA Basic and Optional Rules are silent on change proceedings; insofar as an award is before a court, parties should not be able to waive the statutory right. An agreement waiving or varying the effect of resort to the courts for change of an award may be vulnerable to an unconscionability claim. The law on this issue is developing; some courts have been reluctant to find contracts unenforceable for unconscionability. There have been recent trends the other way.[260] Institutions with interests in arbitration (*e.g.*, AAA, ABA), have developed due process protocols to assure fairness.[261] However, as under the RUAA, parties by their

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257 *Id.* § 50-52 (2003), incorporating *id.* §§ 50-55(a)(1), 50-55(a)(3) (2003) specifically, and *id.* §§ 50-53 - 50-56 (2003); *compare id.* § 1-567.10, 1-567.63, 1-569.20 (2001, 2003); UAA, *supra* note 7, § 9, at 244; RUAA, *supra* note 8, § 20, at 39. *See also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003) (no grounds for modification, correction); N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-52, RUAA, *supra, Comment* to § 20; Hayford & Palmiter, *supra* note 26, at 225; Heinsz, *supra* note 23, at 29-30, 35. 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003).

258 RUAA, *supra* note 8, § 4(c), at 10, referring to *id*. §§ 20(d)-20(e), at 39; *compare* N.C. Gen. Stat. §§ 1-569.4(c), 1-569.20(d) - 1-569.20(e) (2003). *See also* RUAA, *supra, Comment* to § 4, ¶¶ 1-3, 5.d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30.

259 N.C. Gen. Stat. §§ 1-569.4(a), 1-569.20(a) - 1-569.20(b) (2003); RUAA, *supra* note 8, §§ 4(a), 20(a)-20(c), at 10, 39; *see also id., Comment* to § 4, ¶¶ 1-3, 5.d; Heinsz, *supra* note 23, at 29-30.

260 *See supra* note 94 and accompanying text.

261 RUAA, *supra* note 8, *Comment* to § 6, ¶ 7, citing Commission on Health Care Dispute Resolution, Due Process Protocol for Mediation and Arbitration of Health Care Disputes (1998) (Commission formed under AAA, ABA, American Medical Association auspices); National Consumer Disputes Advisory Committee, Due Process Protocol for Mediation and Arbitration of Consumer Disputes (1998) (Committee formed under AAA auspices); National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems (May 21, 1997); Due Process Protocol for Me-

agreement should be able to deny arbitrators an opportunity to change an award. Counsel negotiating a FLAA-based agreement to arbitrate should be alert to proposals to waive resort to the courts for change of an award; under the standard Basic and Optional Rules, there is no provision waiving or varying the effect of this statutory right.[262] Counsel considering waiver clauses should be aware of possible trouble in the courts and insert a severability clause to minimize adverse effect on an agreement to arbitrate. The best course is to avoid entirely clauses waiving court change of an award.[263]

(2) *Vacating Awards.*

The FLAA statute governing vacating an award follows prior legislation, with new provisions for awards involving child custody, child support, punitive damages, or judicial review of errors of law in the award if parties agree on judicial review. Upon a party's application, a court may vacate an award on these grounds:

> (1) The award was procured by corruption, fraud or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to the Act;

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diation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (1995). These kinds of terms are affecting court decisions. *See, e.g.*, Cole v. Burns Int'l Secur. Serv., 105 F.3d 1465, 1483-99 (D.C. Cir. 1997) (upholding arbitration, imposing per se rule refusing to require claimant to pay some, all of arbitrator fees in Title VII "public law" case); *see also* Green Tree Finan. Corp. v. Randolph, 531 U.S. 79, 91-92 (2000) (case by case standard for fees; no showing of hardship in record); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 660-65 (6th Cir. 2003), (courts' post *Green Tree* analyses for determining fees).

262 Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33, would allow inserting such clauses. In general, FLAA agreements should be considered freely negotiated; counsel should examine a proffered document carefully for Form E or its equivalent among its terms.

263 Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

(5) There was no arbitration agreement, the issue was not adversely determined in proceedings to compel or stay arbitration, and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief awarded either could not or would not be granted by a court is not ground for vacating or refusing to confirm the award;

(6) 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 is on a party seeking to vacate the arbitrator's award;

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

(8) If parties contracted for judicial review of errors of law in the award, a court must vacate an award if the arbitrators committed an error of law prejudicing a party's rights.[264]

If a party perceives several grounds for an application to vacate, all may be submitted.

FLAA grounds (1)-(5) follow the Uniform Act and should be subject to prior construction of these provisions.[265] Ground (6), to vacate an award for child support or custody that is not in the best interest of the child, with burden of proof on a party applying for vacatur,[266] follows North Carolina family law and a Texas statute on burden of proof for vacatur.[267] For North Carolina practice, the only difference is that a court must consider an application to vacate an award rather than modifying a prior judgment awarding child custody or child support. In this regard the vacatur statute supersedes the *Crutchley* case.[268] Ground (7), for awards involving punitive damages and allowing vacatur if an award of them is clearly erroneous, is congruent with the Act's allowing punitive damages, but only if parties contract for

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264 N.C. Gen. Stat. § 50-54(a) (2003).

265 *Compare id.* §§ 50-54(a)(1) - 50-54(a)(5) (2003), referring to *id.* §§ 50-43, 50-47 (2003) *with* 9 U.S.C. §§ 10, 207, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.13(a), 1-567.64, 1-569.23(a)(1) - 1-569.23(a)(5), 1-569.29 (2001, 2003), UAA, *supra* note 7, § 12(a), at 280; RUAA, *supra* note 8, § 23(a)(1)-23(a)(5), 29, at 43, 53; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-54; RUAA, *supra, Comment* to § 23, ¶¶ A.1-A.3; Hayford & Palmiter, *supra* note 26, at 218-19.

266 N.C. Gen. Stat. § 50-54(a)(6) (2003).

267 *Id.* §§ 50-13.2, 50-13.7 (2003); Tex. Family Code § 153.0071 (2002); *see also* Handbook, *supra* note 33, *Comment* to § 50-54.

268 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also supra* notes 8-10 and accompanying text.

them.[269] Ground (8) follows an early RUAA draft in providing for trial court review of errors of law if parties contract for it; the final RUAA version dropped this option.[270] Basic Rule 38 pre-

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269 N.C. Gen. Stat. §§ 50-51(e), 50-54(a)(7) (2003); *see also* Basic R. 28(d), in Handbook, *supra* note 33; *id., Comments* to § 50-51, 50-54.

270 *Compare* N.C. Gen. Stat. § 50-54(a)(8) (2003) *and* RUAA Draft, *supra* note 7, § 18(b) *with* N.C. Gen. Stat. § 1-569.23 (2003); RUAA, *supra* note 8, § 23, at 43; *see also* Handbook, *supra* note 33, *Comment* to § 50-54; RUAA, *supra, Comment* to § 23, ¶ B.6, inter alia noting that some arbitration organizations already have an internal review system within the organization, and that omitting judicial review would avoid a second level to the contractual arbitration procedure and thereby maintain overall goals for arbitration; speed, lower cost and greater efficiency; Stephen L. Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 Ohio St. J. Disp. Res. 405-06 (1995); Hayford & Palmiter, *supra* note 26, at 219-20; Heinsz, *supra* note 23, at 29-30, 36; Stephen J. Ware, *"Opt-In" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act*, 8 Am. Rev. Int'l Arb. 263 (1999) (advocating adopting then-current RUAA, *supra* § 19(b) review rule). On the other hand, given the North Carolina General Assembly decision to change public policy with respect to child custody and support by allowing arbitration of these issues under the Family Law Act with possible review of awards for these in a trial court through vacatur, modification or correction of awards, N.C. Gen. Stat. §§ 50-54(a)(6), 50-56 (2003), counsel concerned about the overall effect of a revised decision on these important aspects of marriage dissolution or post-divorce proceedings could agree on court review of errors of law as well as other vacatur grounds. Under RUAA, *supra*, parties contracting for court review are left to the developing and badly divided case law on whether parties may contract for review where there is no legislation providing for it. *Id., Comment* to § 23, ¶¶ 1-5, inter alia *comparing* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887-91 (9th Cir. 1997) (Fernandez, J.; Kozinski, J., concurring) (parties may contract for court review, overruled en banc after the *Comment* was published, Kyocera Corp. v. Prudential-Bache Trade Serv., Inc., 341 F.3d 987, 997-1000 [9th Cir. 2003], *cert. dismissed*, 104 S.Ct. 980 (2004); Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995) (same); NAB Constr. Corp. v. Metropolitan Transp. Auth., 579 N.Y.S.2d 375 (App. Div. 1992) (same) *with* UHC Mgt. Co. v. Computer Sci. Corp. 148 F.3d 992, 997 (8th Cir. 1998) (question reserved; no provision in contract); Chicago Typograph. Union v. Chicago Sun-Times, 935 F.2d 1501, 1506 (7th Cir. 1991) (no statutory provision for court review, parties cannot contract for it); Chicago, S. & S.B. R.R. v. Northern Ind. Commuter Transp. Dist., 682 N.E.2d 156, 159 (Ill. App. 1997), *rev'd on other grounds*, 703 N.E.2d 7 (Ill. 1998) (same); Dick v. Dick, 534 N.W.2d 185, 191 (Mich. App. 1994) (same; divorce arbitration). *See also* and *compare, e.g.*, Kyocera Corp. v. Prudential Bache Trade Serv., Inc., 941 F.3d at 997-1000 (parties cannot contract for appellate review); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933-37 (10th Cir. 2001) (same); John T. Jones Constr. Co. v. City of Grand Forks, 665 N.W.2d

serves the traditional principle of prior arbitration law, *i.e.*, no judicial review of errors of law in an award, but offers an alternative if parties wish to agree on review.[271] Parties must contract for errors of law review as a necessary predicate for vacatur on ground (8); a vacatur decision on this basis is a necessary appellate review predicate.[272] Meritless vacatur applications may result in sanctions.[273]

A party must apply for vacatur within 90 days after an award's delivery to the applicant, unless a ground is corruption, fraud or other undue means; in this case an application must be made within 90 days after these grounds are known or should have become known. The 90-day deadlines include applications to vacate awards for postseparation support, alimony and child custody and support.[274] Time expiry for vacatur applications for these four grounds does not end opportunities to seek this relief,

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698, 701-04 (N.D. 2003) (same, noting RUAA, *supra* drafters' excluding appellate review statute); Crowell v. Downey Community Hosp. Found., 115 Cal. Rptr. 810, 816-17 (Cal. App. 2002) (same) *with* Dow Corning Corp. v. Safety Nat'l Cas. Corp., 335 F.3d 742, 747-48 (8th Cir. 2003) (seemingly leaning toward holding parties may agree on court review); Roadway Pkg. Sys., Inc. v. Kayser, 257 F.3d 287, 292-94 (3d Cir. 2001) (parties may agree on court review but no clear intent in contract); Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997), (unpub. op.) (same); Bradford Dyeing Ass'n v. J. Stog Tech GmbH, 765 A.2d 1226, 1232-33 (R.I. 2001) (same, dictum); Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 250-52 (Tex. Civ. App. 2003) (FAA, *supra* note 15, review standard because of no explicit agreement on appellate review, citing Fifth Circuit holdings); Julie D. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 Colum. Bus. L. Rev. 1, 30 (predicting Supreme Court will agree with *Bowen* and bar agreements expanding review); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 Ga. L. Rev. 123, 202-04 (2002) (same conclusion); *but see* Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Arbitrate*, 18 Ohio St. J. Disp. Res. 151, 194-95 (2002) (advocating allowing parties to contract for review of errors of law); Alan S. Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 245-46 (1997) (same).

271 *See* Handbook, *supra* note 33, *Comment* to Basic R. 38.

272 A party must preserve the issue for appeal. N.C. Gen. Stat. § 50-54(b) (2003); *see also id.* § 50-60(b) (2003).

273 N.C. Gen. Stat. § 50-54(d) (2003), incorporating by reference *id.* § 50-51(f) (2003); *compare id.* § 1-567.65 (2003); *see also id.* § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-54.

274 N.C. Gen. Stat. §§ 50-54(a)(1), 50-54(a)(6), 50-54(b) (2003); *compare* 9 U.S.C. §§ 10, 207, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.13(b), 1-567.64, 1-

however. Postseparation support, alimony and child custody and support may also be subjects of an application to modify an award; there is no time limit for them.[275] The result is that there are two provisions for amending postseparation support, alimony and child custody and child support aspects of an award. A court may vacate, or partially vacate, an award and must direct arbitrator rehearing[276] if there is a successful, timely vacatur application. A modification or correction application involving a child support and child custody award, or an award for postseparation support or alimony, may be filed at any time and, as will be seen, a court may direct rehearing before the same or another arbitrator the parties choose. If it believes relief is appropriate, the court itself may enter a child support, child custody, alimony or postseparation support order without remitting these matters for arbitrator consideration.[277] If a court rules in favor of vacatur on any ground, it must enter a vacatur order and may direct rehearing before the arbitrator, except a claim under ground (5), *i.e.*, there was no agreement to arbitrate. A court may also direct that all but ground (5) issues be arbitrated before a new arbitrator chosen as provided in the agreement to arbitrate. After vacating an award for postseparation support, alimony or child support and custody, the court may decide to hear and determine these issues. The time the agreement to arbitrate sets for an award applies to a rehearing and begins from the order date.[278] If a court denies vacatur, it must confirm the award unless a motion to correct or modify the award is pending, with a possibility

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569.23(b) (2001, 2003); RUAA, *supra* note 8, § 23(b), at 43; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-54.

275 *Compare* N.C. Gen. Stat. § 50-56 (2003) (no time limit for applications to vacate awards for postseparation support, alimony, child support, child custody) *with id.* § 50-55 (2003) (90-day time limit); *see also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003).

276 Failure to order rehearing after vacatur is an appeal ground. N.C. Gen. Stat. § 50-60(a)(5) (2003).

277 *See generally* N.C. Gen. Stat. 50-56 (2003). The legislature added N.C. Gen. Stat. § 50-54(a)(6) (2003). Handbook, *supra* note 33, *Comment* to § 50-54.

278 N.C. Gen. Stat. § 50-54(c) (2003); *compare* 9 U.S.C. §§ 9-10, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.13(c), 1-567.64, 1-569.23(c) (2001, 2003); UAA, *supra* note 7, § 12(c), at 281; RUAA, *supra* note 8, § 23(c), at 43; Handbook, *supra* note 33, *Comment* to § 50-54.

of sanctions.[279] Vacatur orders refusing rehearing before arbitrators are subject to appeal.[280] The RUAA has no special vacatur provisions for the equivalent of grounds (6)-(8) in the FLAA, *i.e.*, awards involving postseparation support, alimony or child support or custody, punitive damages, or errors of law. The RUAA allows vacatur if an arbitration is conducted "without proper notice of the initiation of an arbitration as required in . . . [the Act] so as to prejudice substantially the rights of a party to the arbitration proceeding."[281] RUAA provisions for noticing arbitration are subject to "reasonable variation by the parties' agreement."[282] This and other vacatur provisions are not subject to variance in an agreement to arbitrate.[283] The FLAA has no nonwaivability provisions related to vacatur proceedings. The Basic and Optional Rules do not address the issue; the result for family law arbitrations is that the statutes govern unless parties agree on special nonwaivability rules.[284] However, a rule waiving or varying the effect of statutory provision for vacatur of child support or custody awards resurrects *Crutchley*, which held that the finality of arbitral awards under the North Carolina UAA violated the policy that judgments for support or custody are always open for modification.[285] Such a rule would undo the FLAA's primary purpose, to provide ultimate court review of these awards under similar conditions where a court's judgment

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279 N.C. Gen. Stat. § 50-54(d) (2003); *compare* 9 U.S.C. §§ 9-10, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.13(d), 1-567.64, 1-569.23(d) (2001, 2003); UAA, *supra* note 7, § 12(d), at 281; RUAA, *supra* note 8, § 23(d), at 43; Handbook, *supra* note 33, *Comment* to § 50-54.

280 N.C. Gen. Stat. § 50-60(a)(5) (2003).

281 RUAA, *supra* note 8, § 23(a)(6), at 43, enacted as N.C. Gen. Stat. § 1-569.23(a)(6) (2003), referring to RUAA § 9, at 20, enacted as N.C. Gen. Stat. § 1-569.9 (2003); *see also* RUAA, *supra*, *Comment* to § 23, ¶ 3.

282 RUAA, *supra* note 8, *Comment* to § 23, ¶ 3, citing *id.* § 4(b)(2), at 10, enacted as N.C. Gen. Stat. § 1-569.4(b)(2) (2003); *see also* Heinsz, *supra* note 23, at 29-30.

283 N.C. Gen. Stat. § 1-569.4(c) (2003); RUAA, *supra* note 8, § 4(c), at 10; *see also id., Comment* to § 4, ¶ 5.e; Heinsz, *supra* note 23, at 29-30.

284 *Cf.* Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33, would allow inserting such clauses. In general, FLAA agreements should be considered freely negotiated; counsel should examine a proffered document carefully for Form E or its equivalent among its terms.

285 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also supra* notes 8-10 and accompanying text.

after litigation or judicial settlement could be reopened. Waiver or varying the effect of these provisions in a FLAA-based case might be subject to attack on unconscionability grounds[286] or for manifest disregard of the law, "the seminal nonstatutory ground for vacatur of commercial arbitration awards," *i.e.*, whether the result in the arbitration is clearly consistent or inconsistent with controlling law, and whether an arbitrator, knowing the correct law, consciously decided to ignore it in fashioning an award.[287]

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286 *See supra* note 92.

287 RUAA, *supra* note 8, *Comment* to § 23, ¶ C.2, citing M & C Corp. v. Erwin Behr Gmbh & Co., 87 F.3d 844, 850 (6th Cir. 1996) (affirming denial of relief on this ground); Carte Blanche (Singapore) Pte, Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265-68 (2d Cir. 1989) (same); O.R. Sec., Inc. v. Professional Planning Assocs., 857 F.2d 742, 746-47 (11th Cir. 1988) (same); Stephen L. Hayford, *Reining in the Manifest Disregard of the Law Standard: The Key to Stabilizing the Law of Commercial Arbitration*, 1998 J. Disp. Resol. 117. Although these cases concerned commercial arbitration, the same principles could arise in a family law case; they could apply in a family law case involving commercial transactions, *e.g.*, a family business breakup incident to dissolving a marriage. While it might be argued that N.C. Gen. Stat. § 50-54(a)(8) (2003)'s opportunity to agree on review of issues of law is a legislative policy statement restricting the common-law manifest disregard of law vacatur ground, such is not the case. Manifest disregard presupposes not only (1) that an award is inconsistent with the law, but also (2) that an arbitrator, knowing the law, made a conscious decision to ignore it. Review of errors of law does not require establishing step (2). A NCCUSL Committee of the Whole meeting decided not to include manifest disregard as a vacatur ground before approving the RUAA. RUAA, *supra*, § 23, *Comment* to § 23, ¶ C.5. The FAA manifest disregard rule emerged in Wilko v. Swan, 346 U.S. 427, 436 (1953), since overruled on other grounds by Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989). First Options, Inc. v. Kaplan, 514 U.S. 938, 942 (1995), however, said the defense in a domestic FAA, *supra* note 15, case is alive and well; *see also, e.g.,* Williams v. Cigna Finan. Adv. Inc., 197 F.3d 752, 759-60 (5th Cir. 1999) (collecting authorities); Progressive Data Sys., Inc. v. Jefferson Randolph Corp., 568 S.E.2d 474-75 (Ga. 2002) (rejecting manifest disregard in UAA, *supra* note 7, case); Tretina Printing, Inc. v. Fitzpatrick & Assocs., 640 A.2d 788, 790-96 (N.J. 1994) (approving narrow "mistake of law," public policy principles; approving Faherty v. Faherty, 477 A.2d 1257 [N.J. 1984], *supra* note 8); Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, 105 S.W.3d 244, 253-54 (Tex. App. 2003) (state court FAA-based case, citing other "implied" FAA vacatur grounds, *i.e.*, public policy, arbitrary or capricious award); Belleville Hist. Devel., L.L.C. v. GCI Constr. Inc., 807 So.2d 335, 338 (La. App. 2002) (manifest disregard doctrine in state law). Implied vacatur grounds, *e.g.*, manifest disregard, do not apply in U.N. Convention, *supra* note 30, and maybe other international arbitration cases. China Minmetals Mat'ls Imp. & Exp. Co. v. Chi Mei Corp., 334

There are, of course, other nonstatutory bases for vacating awards, *e.g.*, public policy. Although North Carolina courts have been reluctant to order arbitral awards vacated, *Crutchley* is an example of citing public policy to set aside an award.[288] Counsel considering waiver or variance clauses should be aware of possible trouble in the courts and insert a severability clause to minimize adverse effect on an agreement to arbitrate. The best course is to avoid vacatur waiver or variance clauses entirely.[289]

(3) *Modifying or Correcting Awards.*

The Act's general provision for applications to modify or correct an award follows the Uniform Act. Within 90 days[290] after delivery[291] of an award to party, that party may apply[292] to a court to modify or correct the award. The court must correct or modify the award, if:

(1) There is evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to in the award;

F.3d 274, 283-90 (3d Cir. 2003) (dictum); Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1444-47 (11th Cir. 1998); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997); *but see* Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 385-393 (2d Cir. 2003) (recognizing doctrine, refusing to apply it; London arbitral award confirmation case).

288 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also* North Carolina Farm Bureau Mut. Ins. Co. v. Harrell, 557 S.E.2d 580, 582-83 (N.C. App. 2001) (mistake of fact or law, unless accompanied by fraud, misrepresentation or duress no ground for setting aside award); Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 255 S.E.2d 414, 420 (N.C. App. 1979), citing T.W. Powe & Sons, Inc. v. University of North Carolina, 104 S.E.2d 189, 195 (N.C. 1958) (same); *but see* Pinnacle Group, Inc. v. Schrader, 412 S.E.2d 117, 120 (N.C. App. 1992) (FAA-governed case; FAA-based manifest disregard standard applied).

289 Unconscionability, undue influence or fraud can also vitiate an agreement. *See supra* note 94. For general analysis of nonstatutory vacatur grounds under the FAA, *supra* note 15, *see generally* Hayford, *A New, supra* note 212, at 461-503; *id., Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 763-838 (1996).

290 *See supra* note 272 and accompanying text.

291 *See* N.C. Gen. Stat. § 50-51(a) (2003); Basic R. 30, in Handbook, *supra* note 33.

292 *See* N.C. Gen. Stat. § 50-58 (2003).

(2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

If the court decides applicant has not met the burden of establishing one or more of these grounds, the court must confirm[293] the award as a predicate for a judgment.[294] A court may award costs of the application and subsequent proceedings. Vacatur applications may be joined with applications to modify or correct an award. This statute parallels the Uniform Act; interpretations of it should parallel prior case law.[295] The RUAA declares that parties may not waive or vary the effect of its provisions for correction or modification.[296] The Basic and Optional Rules do not address the issue; the result for family law arbitrations is that the statutes govern unless parties agree on special waiver rules or rules varying the effect of the correction statute.[297] A court might be persuaded that a clause waiving or varying statutory provisions for correcting an award, perhaps coupled with clauses waiving changes in an award or vacatur, amounts to an unconscionable agreement,[298] thereby voiding the contract. Counsel considering waiver or variance clauses should be award of possible trouble in the courts and insert a severability clause to minimize adverse effect on an agreement to arbi-

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293 *See id.* § 50-53 (2003), amended by 2003 N.C. Sess. Laws ch. 2003-61.

294 N.C. Gen. Stat. § 50-57 (2003).

295 *Id.* §§ 50-55 (2003), incorporating by reference *id.* § 50-51(f) (2003); *id.* § 50-62 (2003); *compare* 9 U.S.C §§ 10-13, 207-08, 307 (2000); N.C. Gen. Stat. §§ 1-567.14, 1-567.64, 1-569.24, 1-569.29 (2001, 2003); UAA, s*upra* note 7, § 13, at 409; RUAA, *supra* note 8, §§ 24, 29 at 49, 53; *see also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003); N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-55; RUAA, *supra, Comment* to §§ 24-25, ¶¶ 1-2; Hayford & Palmiter, *supra* note 26, at 218.

296 N.C. Gen. Stat. § 1-569.4(c) (2003); RUAA, *supra* note 8, § 4(c), at 10; *see also id., Comment* to § 4, ¶ 5.e; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30.

297 *Cf.* Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33, would allow inserting such clauses. In general, FLAA agreements should be considered freely negotiated; counsel should examine a proffered document carefully for Form E or its equivalent among its terms.

298 *See supra* note 94.

trate. As in the case of vacatur, the best course is to avoid these clauses entirely.[299]

Upon a party's application, arbitrators may also change awards if there are evident miscalculations of figures, evident mistakes in describing a person, thing or property referred to in the award, or if the award is imperfect in form not affecting the merits of the controversy, unless a vacatur or modification application is before a court.[300]

(4) *Modifying Alimony, Support or Custody Awards.*

The FLAA special provision to modify an award for alimony, postseparation support, child support or child custody has no time limit for an application. It may be joined with other applications, *e.g.*, for correcting, modifying or vacating an award, subject to conditions in those statutes.[301] This statute and a vacatur statute provision[302] are designed to supersede *Crutchley*.[303] Although a court may modify postseparation support, alimony child support or child custody awards, if parties jointly move for remitting modification to an arbitrator, a court may remit the decision to the arbitrator, perhaps a different arbitrator[304] from the one who rendered the prior award.[305] Because the statute says "may,"[306] a court has discretion to deny the joint motion and decide the issue(s) for itself. Regardless of whether a court remits to the same arbitrator or a different one, parties may seek

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299 Unconscionability, undue influence or fraud can also vitiate an agreement. *See supra* note 94.

300 Parties must submit change applications to arbitrators within 20 days of an award's delivery. N.C. Gen. Stat. § 50-52 (2003), referring to *id.* § 50-55(a)(1), 50-55(a)(3) (2003).

301 *Id.* § 50-56(f) (2003), incorporating by reference *id.* § 50-55 (2003); *id.* § 50-55(c) (2003) allows joining an *id.* § 50-54 (2003) vacatur application. *See also* Handbook, *supra* note 33, *Comment* to § 50-56.

302 N.C. Gen. Stat. § 50-54(a)(6) (2003).

303 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also supra* notes 8-10 and accompanying text.

304 N.C. Gen. Stat. § 50-56(e) (2003), inter alia referring to *id.* § 50-45 (2003) (arbitrator selection procedure).

305 N.C. Gen. Stat. §§ 50-56(a), 50-56(e) (2003); *see also* Handbook, *supra* note 33, *Comment* to § 50-56.

306 N.C. Gen. Stat. § 50-56(e) (2003).

change, vacatur, modification or correction as though the new award were the first in the case.[307]

The statute incorporates by reference standards for modifying postseparation support, alimony, child support or child custody awards. Unless the parties agree that a postsepartion support or alimony award shall be nonmodifiable, such an award may be modified if a court order for postseparation support or alimony could be modified pursuant to North Carolina law.[308] Similarly, a child support or child custody award may be modified if a court order for child support or child custody could be modified pursuant to North Carolina law.[309]

Like modification applications under the standard statute, those under the special provision are subject to costs assessments for meritless applications.[310] Like its general modification counterpart, the special statute is not subject to any provision barring waiver or variance from its terms.[311] The Basic and Optional Rules do not address the issue; the result for family law arbitrations is that the statutes govern unless parties agree on special nonwaivability rules.[312] If an agreement to arbitrate family law issues includes a clause waiving or varying terms of the special statute, a resulting award might be subject to *Crutchley*, which held that the finality of arbitral awards under the North Carolina Uniform Act violated the policy that judgments for support or

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307 *Id.* §§ 50-56(d), 50-56(e) (2003), inter alia referring to *id.* § 50-52 - 50-56 (2003); *see also* Handbook, *supra* note 33, *Comment* to § 50-56.

308 N.C. Gen. Stat. §§ 50-41(a) (modification for substantial change of circumstances), 50-56(b), incorporating by reference *id.* §§ 50-16.2A, 50-16.3A, 50-16.4, 50-16.7, 50-16.9 (2003). *See also* Handbook, *supra* note 33, *Comment* to § 50-56.

309 N.C. Gen. Stat. §§ 50-41(a) (modification for substantial change of circumstances), 50-56(c) (2003), incorporating by reference *id.* § 50-13.7 (2003). *See also* Handbook, *supra* note 33, *Comment* to § 50-56.

310 N.C. Gen. Stat. § 50-56(f) (2003), incorporating by reference *id.* § 50-55(d) (2003), referring to the Act's costs provision, *id.* § 50-51(f) (2003); *see also* Handbook, *supra* note 33, *Comment* to § 50-56.

311 *See supra* notes 85-86 and accompanying text.

312 *Cf.* Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33, would allow inserting such clauses. In general, FLAA agreements should be considered freely negotiated; counsel should examine a proffered document carefully for Form E or its equivalent among its terms.

custody are always open for modification.[313] A waiver clause might undo the FLAA's purpose, to provide ultimate court review of these awards under the same conditions a judgment after litigation or a settlement may be reopened.[314]

Orders modifying or correcting any award under the standard statute or the special provision to modify awards involving postseparation support, alimony or child custody or child support,[315] are grounds for appeal.[316]

(5) *Entry of an Award As a Judgment.*

When applications for change, vacatur, modification or correction have been resolved and an award has been confirmed in all respects, it must be entered as a judgment, docketed as any other order or judgment, and enforced as any other order or judgment.[317] Orders confirming or denying confirmation of an award are subject to appeal, as are judgments entered under the Act.[318]

e. *Appeals*

Like the Uniform Act, the FLAA provides for appeal but under limited circumstances. Appeals may be taken from:

(1) An order denying an application to compel arbitration;
(2) An order granting an application 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 judgment entered pursuant to provisions of the Act.

These grounds follow the Uniform Act and the ICACA; interpretation of them should parallel prior case law.[319] If parties agree

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313 Crutchley v. Crutchley, 293 S.E.2d 793, 795-98 (N.C. 1982); *see also supra* notes 8-10 and accompanying text.

314 Unconscionability, undue influence or fraud can also vitiate an agreement. *See supra* note 94.

315 N.C. Gen. Stat. §§ 50-55, 50-56 (2003); *see also* Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003).

316 N.C. Gen. Stat. § 50-60(a)(4) (2003).

317 *Id.* § 50-57 (2003). Under *id.* § 50-53 (2003), amended by 2003 N.C. Sess. Laws ch. 2003-61, parties may contract against confirmation.

318 N.C. Gen. Stat. §§ 50-60(a)(5), 50-60(a)(6) (2003).

319 *Id.* § 50-60(a) (2003), inter alia referring to *id.* § 50-43 (2003); *compare* 9 U.S.C. §§ 16, 208, 307 (2000); N.C. Gen. Stat. §§ 1-567.1, 1-567.18, 1-567.67,

to judicial review of issues of law, if the trial court reviews issues of law, and if parties preserve these issues for appeal, parties may also assert that ground on appeal.[320] Besides complying with these provisions, appealing parties must follow the usual civil litigation practices of noting appeal, obtaining a supersedeas, etc.[321]

1.569.28(a), 1.569.29 (2001, 2003); UAA, *supra* note 7, §§ 19(a), at 437, referring to § 2, at 109; RUAA, *supra* note 8, §§ 28(a), 29 at 52, 53; *see also* N.C. Gen. Stat. § 50-62 (2003); Handbook, *supra* note 33, *Comment* to § 50-60; 4 Ian R. Macneil et al., Federal Arbitration Law ch. 43 (1995); 3 Oehmke, *supra* note 212, chs. 156-59; 15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.17 (2d ed. 1991, 2003 Cum. Ann. Pocket Pt.); 16 *id.* § 3923 (2d ed. 1996, 2003 Cum. Ann. Pocket Pt.); George C. Pratt, *Interlocutory Orders*, in 19 Moore's Federal Practice § 203.12 (Daniel R. Coquillette et al. eds., 3d ed. 2003). Before a controversy arises that is subject to an agreement to arbitrate, parties may not agree to waive or vary the effect of RUAA § 28(a), enacted as N.C. Gen. Stat. § 1.569.28(a) (2003). RUAA, *supra*, § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1.569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 4d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* A clause unduly restricting or waiving appeal rights may be subject to an unconscionability claim, particularly if an agreement includes other similar clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94.

320 N.C. Gen. Stat. § 50-60(b) (2003); *see also* Handbook, *supra* note 33, *Comment* to § 50-60. There can be no trial court review of errors of law in an award unless parties agree to it. N.C. Gen. Stat. § 50-54(a)(8) (2003); *see also* Basic R. 38, in Handbook, *supra* (same). *Id., Comment* to Basic R. 38 offers a form if parties wish to agree to review of errors of law.

321 N.C. Gen. Stat. § 50-60(c) (2003); *compare id.* §§ 1-567.18(b), 1-567.67(b), 1.569.28(b) (2001, 2003); UAA, *supra* note 7, § 19(b), at 438; RUAA, *supra* note 8, § 28(b), at 52. *See also* Handbook, *supra* note 33, *Comment* to § 50-60. Before a controversy arises that is subject to an agreement to arbitrate, parties may not agree to waive or vary the effect of RUAA, *supra*, § 28(b), at 52, enacted as N.C. Gen. Stat. § 1.569.28(b) (2003). RUAA, *supra*, § 4(b)(1), at 10, enacted as N.C. Gen. Stat. § 1.569.4(b)(1) (2003); *see also* RUAA, *supra*, *Comment* to § 4, ¶¶ 1-3, 4d; *Due Process Principles, supra* note 30, ¶ 21; Heinsz, *supra* note 23, at 29-30. There is no comparable FLAA provision. The FLAA Basic and Optional Rules have no waiver provisions, but these might be inserted through Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra.* However, a clause unduly restricting or waiving appeal rights may be subject to an unconscionability claim, particularly if the agreement includes other similar clauses. Undue influence or fraud can also vitiate an agreement. *See supra* note 94. For North Carolina appeals, *see, e.g.*, N.C.

Unless parties agree otherwise, attorney fees can be awarded as part of appeal costs under the RUAA and the FLAA.[322]

B. *Suggested FLAA Form Clauses and Rules: A Reprise*

As Part I.A's analysis suggests, forms and rules for arbitration play an integral role in regulating procedure for FLAA arbitrations. Subject to legislation, state and federal,[323] that may mandate some aspects of arbitral procedure, parties may draft their own roadmap for arbitration through proper choice of forms and rules.

1. *Form Clauses for FLAA-Based Arbitrations*

In the Bar Association *Proposal* to the legislature,[324] and in the *Handbook* for FLAA arbitrations, there are suggested Basic Forms for clauses in an agreement to arbitrate:[325] what will be arbitrated and how many arbitrators will hear a case,[326] arbitration rules to be used,[327] arbitrator ethics standards,[328] the arbitration site[329] and additional terms to be added,[330] plus two Optional Forms, to freeze the date of rules to be applied in an

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Gen. Stat. §§ 1-268 - 1-298, 7A-5 - 7A-34.1, 7A-39.1 - 7A-39.15 (2003), and the North Carolina Rules of Appellate Procedure.

322 *Compare* RUAA, *supra* note 8, §§ 4(a), 20(e), 21(a), 25(c), at 10, 39, 40, 50, enacted as N.C. Gen. Stat. §§ 1.569.4(a), 1.569.20(e), 1.569.21(a), 1.569.25(c) (2003) *with id.* §§ 50-51(f)(2)(b), 50-52, 50-53, 50-54(d), 50-55(d), 50-56(f) (2003) ("subsequent proceedings"). 2003 N.C. Sess. Laws ch. 2003-61 amended N.C. Gen. Stat. § 50-53 (2003). *See also* RUAA, *supra, Comments* to §§ 4, ¶¶ 1-3; 25, ¶¶ 3-6; Heinsz, *supra* note 23, at 29-30.

323 *See infra* Part II.B.

324 Proposal, *supra* note 33.

325 *See North Carolina Forms for Arbitrating Family Law Disputes*, in Handbook, *supra* note 33, Part II.

326 Basic Form A, *Matters To Be Arbitrated; Number of Arbitrators (Two Options)*, in *id.*, following AAA forms for future disputes or existing controversies.

327 Basic Form B, *Rules for Arbitration (Six Options)*, in *id.*, offering choices among the Basic and Optional Rules.

328 Basic Form C, *Ethical Standards for Arbitrators*, in *id.*, incorporating N.C. Canons, *supra* note 126.

329 Basic Form D, in Handbook, *supra* note 33; *see also* Basic R. 7(a), in *id.*

330 Basic Form E, *Additional Provisions or Terms (Two Options)*, in *id., supra* note 33.

arbitration[331] or for a multi-arbitrator panel.[332] There are a myriad of published form clauses;[333] as with any form, these must be used with caution. Some may not be suitable for family law arbitration; some may frustrate FLAA's purposes, most importantly the statutory policy for leaving open postseparation support, alimony and child support and custody issues,[334] or federal and state law requiring protection of spouses or children.[335] The most important clauses in any agreement to arbitrate, usually derived from a form and inserted in the agreement rather than incorporated by reference, are those describing matters to be arbitrated[336] and the site of the arbitration.[337] Although it is foolish to prepare an agreement that does not recite the number of arbitrators or does not recite or incorporate arbitration rules, these matters may be covered by legislation providing for selecting arbitrators and legislation or case law governing rules selection, perhaps with less than optimal results.[338] While it is well to have ethics standards for arbitrators, arbitrations have been conducted for centuries without them. To have a poorly drafted scope clause, or no designation of the site for arbitration, may invite disaster.[339]

2. *Rules for FLAA-Based Arbitrations*

The AAA Commercial Arbitration Rules are among the most widely used in the United States, perhaps so well known

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331 Optional Form AA, in *id., supra* note 33. Basic Form A, *supra* note 326, will carry forward the effective date of rules to be applied to the date of a demand for arbitration.

332 Optional Form BB, in Handbook, *supra* note 33. Basic Form A and Basic R. 2, in *id.*, follow the Act's default standard of a single arbitrator, N.C. Gen. Stat. § 50-45(a) (2003). If parties elect a multi-arbitrator panel, *id.* § 50-46 (2003) comes into play, requiring majority action unless parties agree otherwise. Basic R. 14, in Handbook, *supra*, echoes this principle.

333 *E.g.*, 5 Ian R. Macneil et al., Federal Arbitration Law, appx. 5 (1995); 3 Oehmke, *supra* note 212, pts. 17, 18; 2 Gabriel M. Wilner, Domke on Commercial Arbitration, Appx. H, *American Arbitration Association Forms* (Rev. ed. 2002); Rodolfe J.A. de Seife, *Practice Guide*, in *id.*

334 *See supra* notes 8-10, 75-81, 301-316 and accompanying text.

335 *See supra* notes 4, 47, 138, 151-66 and accompanying text.

336 *See supra* note 140 and accompanying text.

337 *See supra* notes 135-47 and accompanying text.

338 *See supra* notes 114-34 and accompanying text.

339 *See supra* notes 135-47 and accompanying text.

that some family law practitioners incorporated them by reference in marital agreements to arbitrate.[340] Unless tailored to remove some provisions related to AAA administration of the arbitration, they could cause problems of inclusion of unsuitable terms, *e.g.*, referring an arbitration to AAA,[341] or omitting provisions useful to a particular arbitration, *e.g.*, language used when dissolution of a marriage of a spouse whose primary language is English and the other spouse whose primary language is other than English is subject to arbitration.[342]

There is no requirement that parties incorporate rules by reference in an agreement to arbitrate; they may write the rules into an agreement, although this practice seems rare today. As noted above, if parties agree to arbitrate a matter and do not recite rules, perhaps by reference, the arbitrator(s) in a FLAA-governed case may select rules of procedure under which the proceedings will operate, subject in all cases to binding law and with "particular reference to model rules developed by arbitration institutions or similar sources."[343] Thus recalcitrant parties may end up with the same rules upon which they could not agree, perhaps the rules the Bar Association formulated for FLAA arbitrations. If the arbitrators cannot agree on rules, a party may apply to a court, and the court may order use of rules, again with particular reference to model rules developed by arbitration institutions or similar sources[,]"[344] *e.g.*, the Bar Association rules for FLAA arbitrations. Because the AAA rules are have been

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340 *See supra* note 33 and accompanying text.

341 *See* AAA Com. Arb. R. R-1 - R-7, L-1 - L-3, O-1 - O-2, O-8. The NCBA or its Family Law Section is not an administering organization for FLAA arbitrations. The NCBA Section is a focal point for studying and recommending proposed amendments to the Act or arbitration forms and rules for FLAA-based arbitrations. Nothing in the Act bars parties from agreeing that a marital dispute subject to the Act be arbitrated under auspices of an arbitration institution like AAA and perhaps subject to its rules, NCBA-recommended forms and rules, other forms and rules, or a mix of some or all of them.

342 The AAA International Commercial Arbitration Rules include such a provision. AAA Int'l Com. Arb. R., Art. 14 (language[s] of the arbitration must be that of documents containing arbitration agreement unless otherwise agreed, subject to arbitrators' decision otherwise based on parties' contentions and circumstances of an arbitration); Optional R. 103, in Handbook, *supra* note 33, follows it.

343 N.C. Gen. Stat. § 50-45(e) (2003).

344 *Id.* § 50-45(e) (2003).

so popular and therefore are relatively familiar in format, the FLAA drafters used the AAA Commercial Arbitration Rules as a primary format for Basic Rules for arbitrations under the Act. The AAA International Commercial Arbitration Rules supplied ideas for some Optional Rules.[345] Other arbitration rules, particularly the AAA Separation Agreement Rules, also suggested terms.[346] These rules, except where they recite nonwaivable provisions of law, are not the only ones that may be applied. The Basic and Optional Rules may be modified or deleted if parties think it appropriate.[347] Other rules may be added.[348] And although the Basic Rules provide for FLAA rules primacy in a consolidated case,[349] this too is subject to negotiation and modification.

Part I.B will not repeat Part I.A's rules analysis, but it is worth reiterating that a smoothly-functioning, efficient and fair arbitration must operate under a good set of clauses in the agreement and arbitral rules for mortar around the flagstone path of arbitration legislation. Clauses or rules, no matter how well drafted, also depend on how they are used. As a colleague wrote concerning the rules of civil procedure, "[T]he real test comes with use[;] . . . trial and appellate judges will play a large part in developing the philosophy of the rules. A mere rule, regardless of how polished the draft, is [neither] flexible nor workable per se. It is the use which makes it so."[350] The same is true for arbitration clauses and rules, prepared and employed in the context of state and federal legislation and perhaps treaties to which the United States is a party. Parties and their counsel play a larger and more important role in the arbitral process as they craft and

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345 Optional R. 101-04, in Handbook, *supra* note 33 (arbitrator's nationality, interpreters, language for arbitration, experts) *see also id. Comments* on Optional R. 101-04.

346 *See generally* Handbook, *supra* note 33, Part II, *Introduction*; for rules analysis in the context of the Act, *see supra* Part I.A.

347 Forms B.2, B.4, B.5, B.6, in Handbook, *supra* note 33; *see also id.*, *Comment* on Forms B.1-B.6.

348 Form E, in Handbook, *supra* note 33; *see also, e.g.*, Basic R. 38, in Handbook, *supra* (review of errors of law); *id., Comments* on Form E, Basic R. 38.

349 Basic R. 1; *see also* Handbook, *supra* note 33, *Comment* on Basic R. 1.

350 James E. Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intram. L. Rev. 1, 6 (1969).

then use what they have drafted to resolve family law disputes. If the arbitration proceeds according to what has been planned through the chosen clauses and rules, the result may be relatively efficient dispute resolution and little or no court intervention, which are the primary goals of arbitration generally and the Family Law Act in particular.

II. Scope of the Act and Other Issues

North Carolina's General Assembly enacted the FLAA to enable arbitrating by agreement all incidents of a marriage breakup and related family law issues incident to divorce and its aftermath, *e.g.*, postseparation support, alimony and child support and custody claims perhaps years after divorce.[351] The Act anticipated some RUAA curative provisions while paralleling the state's Uniform Act and International Commercial Arbitration and Conciliation Act in many respects. Since 1999, when the FLAA was enacted, developments in state legislation, *e.g.*, enactment of the Revised Uniform Arbitration Act,[352] suggest that revisions for the Family Law Act might be considered.

There are also problems of applying federal arbitration law that family law practitioners must consider today and in the future. Moreover, critics continue to argue that arbitrating certain kinds of cases (*e.g.*, stockholder claims against brokers and brokerage houses), or involving parties with relatively low or no bargaining power (*e.g.*, consumers) can be fundamentally unfair unless there are "due process" protections engrafted in legislation.[353] Although the Family Law Act contemplates attorneys on both sides of a marriage breakup and arbitration under the Act, there may be relatively one-sided situations. The FLAA, *e.g.*, its special provisions for postseparation support, alimony and child custody or support, and the Basic and Optional Rules, if incorporated in an agreement to arbitrate, should promote fairness. However, suppose one party, with advice of counsel, proffers a

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351 *See supra* notes 82-92 and accompanying text.

352 *E.g.*, N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2003); *see also supra* notes 25-27 and accompanying text.

353 *E.g.*, the Model Act, *supra* note 30, enacted in New Mexico as part of its RUAA version, New Mex. Stat. Ann. §§ 44-7A-1 - 44.7A-32 (2002 Cum. Supp.); *Due Process Principles, supra* note 30; *see also* Williams, *supra* note 30, at 4.

one-sided arbitration agreement to the other party as part of a prenuptial agreement? What if one party obtains signature of a spouse, anxious to get out of a marriage, to a one-sided arbitration agreement? What if these agreements waive, among other things, access to the courts? (There are, of course some access issues, *e.g.*, child support and child custody, that can never be waived.[354]) Here one party is close to the status of a consumer in a situation that he or she may perceive as take-it-or-leave-it. It is these situations that the RUAA nonwaiver provisions may help rectify. Other RUAA standards, *e.g.*, for court-ordered consolidation if two arbitrations have common fact issues, might promote efficiency as well as avoiding claim or issue preclusion problems.

A. *Developments in State Legislation*

The principal development since 1999 is a final version of the Revised Uniform Act, in force in eight states including North Carolina, with expectation of more to come.[355] The North Carolina Bar Association undertook analysis of the RUAA to advocate passage by the 2003 General Assembly. That analysis also proposed an ICACA amendment, based on its RUAA adoption recommendations.[356] The Assembly enacted a RUAA version following the model legislation, albeit with North Carolina variations, and has conformed the ICACA to the RUAA.[357] The North Carolina RUAA will phase in over the next two years.[358]

There are 14 principal differences between the UAA and the RUAA. The Revised Act would declare standards for:

(1) who decides arbitrability of a dispute and by what criteria;
(2) whether or 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;

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354 *See supra* notes 87, 115, 192-200, 373, 376-77, 407 and accompanying text.

355 *See supra* notes 24-27 and accompanying text.

356 *See generally* Group Proposals, *supra* note 26.

357 *See supra* notes 20, 26 and accompanying text.

358 2003 N.C. Sess. Laws, ch. 2003-345 § 4, referring to N.C. Gen. Stat. § 1-569.3(b) (2003).

(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 RUAA sections would not be waivable, which may be 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 arbitration.[359]

These amendments, emerging from the NCCUSL Drafting Committee's work, reflected that Committee's goals:

(1) to modernize outdated provisions, clarify ambiguities under [the UAA], and codify important case-law developments;
(2) to give primary consideration to the autonomy of contracting parties, provided their arbitration agreement conforms to basic notions of fundamental fairness because arbitration is a consensual process;
(3) to maintain the essential character of arbitration as a means of dispute resolution distinct from litigation, particularly in regard to efficiency, timeliness and cost; and
(4) because most parties intend arbitral decisions to be final and binding, to limit court involvement in the arbitration process unless unfairness or denial of justice produces clear need for such involvement.[360]

Commentators say the Act is "an important and edifying act of realism[, t]he product of a methodical, thoughtful efforts to bal-

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359 *Compare* RUAA, *supra* note 8, §§ 4, 6, 8-10, 12, 14, 17, 18, 21, 25(c), 29 at 10, 12, 18, 20, 21, 25, 29, 33, 37, 40, 50, 53 *with* N.C. Gen. Stat. §§ 1-569.4, 1-569.8 - 1-569.10, 1-569.12, 1-569.14, 1-569.17, 1-569.18, 1-569.21, 1-569.25(c), 1-569.29 (2003); *see also* Hayford & Palmiter, *supra* note 26, at 209-10.

360 Heinsz, *supra* note 23, at 29-30; *see also id.* 36-37.

ance the limits on state arbitration authority and provide a framework for contemporary commercial arbitration[.]"[361]

Should the Family Law Act be amended to parallel the RUAA and its goals, now that the North Carolina General Assembly has enacted the RUAA to replace the Uniform Act? When the Family Law Act and its recommended Basic and Optional Rules are compared as a whole with the RUAA, there are parallels between the two. The FLAA drafters had the benefit of an intermediate draft of the RUAA and incorporated provisions projected for inclusion in the RUAA.[362]

A principal difference is the extent to which statutory provisions may be waived, varied or restricted by parties' agreement before or after a controversy subject to arbitration arises. The RUAA, acknowledging a cardinal principle of party autonomy in shaping an agreement, includes a comprehensive list, ranging from absolute bars to waiver or varying the effect of some RUAA provisions through limits before a controversy arises that is subject to arbitrate, to total freedom of contract.[363] The Family Law Act, following the UAA, ICACA and anticipating the RUAA, leaves much more to party autonomy, barring only certain waivers, *e.g.*, waiving right to counsel and waiving mandatory rights for support under North Carolina and federal law.[364] A 2003 amendment allows contracts that an award will not be confirmed.[365] Recommended Basic and Optional Rules, largely based on arbitration rules like those used in AAA commercial arbitration, cover many situations where the RUAA imposes positive standards; if parties agree on use of the Rules,[366] one-sided circumstances will be minimal. To be sure, FLAA-based agreements can include provisions approximating those the

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361 Hayford & Palmiter, *supra* note 26, at 227.

362 *See supra* notes 34, 40 and accompanying text.

363 *Compare* RUAA, *supra* note 8, § 4, at 10; *id., Comment* to § 4; *with* N.C. Gen. Stat. § 1-569.4 (2003); *see also* Heinsz, *supra* note 23, at 29-30.

364 N.C. Gen. Stat. §§ 1-569.4(b)(4), 1-569.16 (no waiver before controversy arises subject to agreement to arbitrate); *id.* 50-48 (2003); *see also* Heinsz, *supra* note 23, at 29-30, 34.

365 2003 N.C. Sess. Laws ch. 2003-61, amending N.C. Gen. Stat. § 50-53 (2003).

366 *See* Form B, *Rules for Arbitration (Six Options)*; AA, *Rules in Force for Arbitration*; Basic R. 1, in Handbook, *supra* note 33.

RUAA would limit or bar.[367] However, particularly if these amendatory limiting provisions are numerous in an agreement, they may be subject to successful claims of unconscionability, manifest disregard of law, or violation of public policy. Those considering inserting such clauses should consider the matter carefully, given the risks and trends in the law.[368] Parties and counsel examining a FLAA-based agreement to arbitrate should review the document carefully. Legislative amendments based on the RUAA, declaring what may or may not be waived and under what circumstances, might be a positive step toward eliminating waiver clauses, otherwise subject to unconscionability, etc. claims, by statute. The result could then be that these kinds of claims, which would result in delay and expense litigating finality of an arbitral award, would be fewer in number. Antiwaiver amendments for the FLAA would promote more certainty. However, not all waivers useful in a general arbitration statute are suitable for a family law arbitration act; the 2003 amendment to the FLAA award confirmation provision is an example of the latter.[369]

The RUAA declares that a court must decide on arbitrability; the FLAA does not address the issue directly, but it may be decided during proceedings to stay or compel arbitration.[370] This might be another topic for amendment.

The RUAA and the FLAA provide for provisional remedies, *i.e.*, interim relief and interim measures, through different statutory formulas; the FLAA follows the state International Commercial Arbitration and Conciliation Act. Special Family Law Act provisions forbid contractual waiver of emergency protections for spouses and children under state or federal law.[371] These protections might be reviewed in the context of the RUAA format. It may be that retaining the current FLAA provision,

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367 *Cf.* Form E, *Additional Provisions or Terms (Two Options)*, in *id.*

368 Undue influence or fraud can also vitiate an agreement. *See supra* note 94 and accompanying text.

369 2003 N.C. Sess. Laws, ch. 2003-61, amending N.C. Gen. Stat. § 50-53 (2003).

370 *Compare* RUAA, *supra* note 8, § 6(b), at 12 *with* N.C. Gen. Stat. §§ 1-569.6(b), 50-43 (2003); *see also* Heinsz, *supra* note 23, at 29-31.

371 *Compare* RUAA, *supra* note 8, § 8, at 17 *with* N.C. Gen. Stat. §§ 1-567.39, 1-567.47, 1-569.8, 50-44 (2003); *see also* Heinsz, *supra* note 23, at 29-32.

perhaps with amendments to parallel the RUAA formula, would be the best course.

The FLAA, unlike the RUAA, does not declare how a party may initiate an arbitration, although recommended rules for the FLAA cover this gap.[372] This might be an appropriate amendment.

The RUAA and the FLAA provide for consolidating arbitrations, the RUAA being more pro-active in allowing a court to order consolidation without the parties' agreement if there are common questions of fact in each arbitration. The Family Law Act, reflecting the ICACA, allows a court order only if parties, having agreed to consolidate, refuse to do so.[373] Arbitration consolidation is probably a rare issue, but if use of agreements to arbitrate grows, there may be more opportunities in the future. It might be wise to consider a stronger procedure based on the RUAA, giving a judge positive authority to order consolidation if parties refuse to agree on consolidation if there are common issues in multiple arbitration proceedings.

Class action issues are a related problem. The Supreme Court recently held that whether a claim in an agreement to arbitrate is subject to class action treatment by arbitrators is subject to state law and terms in the agreement in a case otherwise FAA-governed.[374] Unless there is an egregious polyandrous or polygamous case involving 25 or more parties, or a case involving custody or support for 25 or more minors, it is unlikely that class actions will be arbitrated under the Family Law Act.[375] How-

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372 *Compare* RUAA, *supra* note 8, § 9, at 20 *with* N.C. Gen. Stat. § 1-569.9 (2003); Basic R. 3, 4 in Handbook, *supra* note 33; *see also id.*, *Comments* on Basic R. 3, 4; Heinsz, *supra* note 23, at 29-30, 32-33.

373 *Compare* RUAA, *supra* note 8, § 10, at 21 *with* N.C. Gen. Stat. §§ 1-567.57(b),1-569.10, 50-50 (2003); *see also* Heinsz, *supra* note 23, at 29-30, 33.

374 Green Tree Finan. Corp. v. Bazzle, 123 S.Ct. 2402, 2406-09 (2003) (Breyer, J., plurality op.; Stevens, J., concurring) (whether arbitrator can hear a class action a matter of state law and interpretation of agreement to arbitrate); *see also* 2 Macneil et al. *supra* note 8, § 18.9.

375 Twenty-one to 25 seems the minimum number of parties for maintaining a class action. *See also*, *e.g.*, Fed. R. Civ. P. 23(a)(1); N.C.R. Civ. P. 23; 7A Charles Alan Wright et al., Federal Practice & Procedure § 1762 (2d ed. 1986, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, § 72; Jerold S. Solovy et al., *Class Actions*, in 5 Moore's Federal Practice § 23.22[3][a] (Daniel R. Coquillette et al. eds., 3d ed. 2003).

ever, if a FLAA-governed case is consolidated with another, *e.g.*, business-related arbitration subject to class treatment because of, *e.g.*, product liability claims against a family business, class action issues could come in the back door. The solution might be a party-drafted rule[376] or a FLAA amendment[377] allowing or forbidding including family law aspects of the case in the class action.[378] Folding a family law arbitration into a class action arbitration can be a two-edged sword. Involvement in class action arbitration can mean heavy expenses, time and complexity, although attorney fees may accrue. However, failure to join a class action arbitration after due notice and opportunity to opt out[379] may result in a diminished fund for use in resolving marital

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376 Such a rule might read: "Class actions. Arbitrations under this agreement shall not be subject to consolidation with any class action subject to arbitration." If parties would want class action treatment after consolidation, the rule might read: "Class actions. Arbitrations under this agreement shall be subject to consolidation with any class action subject to arbitration." Livingston v. Associates Finan., Inc., 339 F.3d 553, 558-59 (7th Cir. 2003) enforced an arbitration agreement clause precluding class actions.

377 A statute might read: "Class actions. Arbitrations subject to this Act shall not be subject to consolidation with any class action otherwise subject to arbitration." If the legislature would allow class action treatment after consolidation, a statute might read: "Class actions. Arbitrations subject to this Act shall be subject to consolidation with any class action subject to arbitration." A permissive statute might read: "Class actions. Arbitrations subject to this Act may be subject to class action treatment if parties to an agreement to arbitrate under this Act so agree."

378 If parties use Basic Rule 1, declaring that the FLAA rules trump other, inconsistent rules, that should give primacy to the parties' decision to enter or stay out of a class action arbitration.

379 *Cf.* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811-12 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-79 (1974); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 545-49 (1974); Hansberry v. Lee, 311 U.S. 32, 42 (1940); Fed. R. Civ. P. 23(a)(4), 23(c)(2), 23(d)(2); N.C.R. Civ. P. 23(a); 7B Charles Alan Wright et al., Federal Practice and Procedure §§ 1786-89 (2d ed. 1986, 2003 Cum. Ann. Pocket Pt.); 18A *id.* § 4455 (2002, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, § 72, at 521-24; Solovy et al., *supra* note 375, §§ 23.62-23.64, 23.66. To be sure, these rules and cases involve class actions in the courts, but given the constitutional underpinnings of representativeness and notice, failure to give reasonable notice and opportunity to opt out invites a trip to the courthouse to set aside an award or an award converted to a judgment and sought to be used as res judicata or under full faith and credit principles.

disputes if the class action arbitral award goes against a marriage partner, for example.[380]

Following the state's Uniform Act, the Family Law Act does not include arbitrator disclosure provisions like the RUAA. Counsel can negotiate these, perhaps adding arbitrator ethics standards. A standard form for FLAA arbitrations incorporates arbitrator ethics standards, although parties may draft their own.[381] Statute-mandated disclosure appears to be the trend; a FLAA revision might include this requirement, based on the RUAA.

The RUAA and the FLAA provide for arbitrator and arbitration institution immunity; the RUAA is more comprehensive, including limits on arbitrator testimony in other proceedings.[382] Examining the RUAA rules might be in order for recommended amendments. Under the RUAA, arbitrators may order discovery, issue protective orders, decide motions for summary disposition analogous to civil litigation summary judgment, hold prehearing conferences analogous to civil litigation pretrial conferences and otherwise manage the arbitration process. The Family Law Act, taking a cue from the state's ICACA, has similar but not identical provisions; there is no explicit prehearing conference authority, authority to issue protective orders, or authority to grant summary disposition, although these can be inferred. All three Acts have stronger provisions for court orders compelling discovery while minimizing court intervention if parties comply with discovery.[383] The FLAA might be harmonized with the RUAA in this regard.

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380 One purpose of the FLAA was to bring all claims, except the divorce itself, before one tribunal, *i.e.*, the arbitrator, rather than having some in court and others in arbitration. *See supra* notes 82-92 and accompanying text.

381 The state ICACA includes arbitrator disclosure standards. *Compare* RUAA, *supra* note 8, § 12, at 25, enacted as N.C. Gen. Stat. § 1-569.12 (2003) *with id.* § 1-567.42 (2003); Form C, *Ethical Standards for Arbitrators*; Form E, *Additional Provisions or Terms (Two Options)*, in Handbook, *supra* note 33; *see also* Heinsz, *supra* note 23, at 29-30, 33.

382 *Compare* RUAA, *supra* note 8, § 14, at 29 *with* N.C. Gen. Stat. §§ 1-569.14, 50-45 (2003); *see also id.* § 1-567.87 (2003); Heinsz, *supra* note 23, at 29-30, 33-34.

383 *Compare* RUAA, *supra* note 8, §§ 15, 17 at 31, 33 *with* N.C. Gen. Stat. §§ 1-567.57(a), 1-569.15, 1-569.17, 50-47, 50-49 (2003); *see also* Heinsz, *supra* note 23, at 29-30, 34-35.

The RUAA provides explicitly for enforcing a court's preaward arbitrator ruling; the Family Law Act allows court enforcement of preaward interim measures, as does the RUAA. The FLAA, following the state's Uniform Act, should be construed to allow enforcement of other arbitrator awards before the final award.[384] This gap might be filled by an amendment.

The FLAA and the RUAA allow punitive damages as part of an award. The model RUAA authorizes them unless parties opt out by agreement; the FLAA requires parties to opt in. North Carolina's version of the RUAA follows the FLAA, requiring parties to opt in for punitive damages, unless the law otherwise allows them. The FLAA and the model RUAA allow arbitrators to award attorney fees unless parties opt out. Both allow attorney fees to a prevailing party after a successful appeal. North Carolina's RUAA version allows attorney fees if parties agree to them, or the law otherwise provides for them.[385] The FLAA needs no amendment for punitive damages or attorney fees, unless a change in state law seems appropriate. Many states, including North Carolina, would oppose giving arbitrators powers for awarding attorney fees or punitive damages that are different from those accorded courts under similar circumstances. The RUAA authorizes electronic information and other modern technology in arbitration; the Family Law Act has no comparable provision, although parties can agree to this.[386] This gap might be the subject of an amendment. Reflecting its specialized nature, the Family Law Act also includes provisions to

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384 *Compare* RUAA, *supra* note 8, §§ 8, 18 at 17, 37 *with* N.C. Gen. Stat. §§ 1-569.8, 1-569.18, 50-44, 50-53, 50-57 (2003); *see also* Heinsz, *supra* note 23, at 29-30.

385 *Compare* RUAA, *supra* note 8, §§ 20(e), 21(a), 25(c) at 39, 40, 50 *with* N.C. Gen. Stat. §§ 1-569.20(e), 1-569.21(a), 1-569.25(c), 50-51(e), 50-51(f)(2)(b), 50-52, 50-53, 50-54(d), 50-55(d), 50-56(f) (2003); *see also* Heinsz, *supra* note 23, at 29-30, 32-33, 35.

386 *Compare* RUAA, *supra* note 8, § 30, at 53 *with* N.C. Gen. Stat. § 1-569.30 (2003), which casts its net more broadly than the RUAA, to take into account future legislation; *see also* Heinsz, *supra* note 23, at 29-30. Like 40 other jurisdictions, North Carolina has enacted the Uniform Electronic Transactions Act; *compare id.*, 7A(1) U.L.A. 211 (2002) & *id.* 15 (2003 Cum. Ann. Pocket Pt.) *with* N.C. Gen. Stat. §§ 66-311 - 66-330 (2003), similar to United Nations Commission on International Trade Law, Status of Conventions and Model Laws, *UNCITRAL Model Law on Electronic Commerce (1996), available at* http://www.uncitral.org/en-index.htm.

vacate awards granting child custody or support, or awards modifying or correcting awards granting alimony, postseparation support, child support or child custody.[387] The Act also provides for court review and appeal of arbitrator errors of law if the parties so agree, a feature of an early RUAA draft the NCCUSL later dropped.[388] A 2003 amendment allows parties to contract separately, *e.g.*, for a nonmodifiable property settlement or nonmodifiable alimony instead of incorporating them in an arbitral award;[389] this should not be revisited. The special statute for vacating awards related to child custody or support, or awards modifying or correcting awards granting alimony, postseparation support, child support or child custody should not be changed unless there is a comparable change in general law to disallow modifying these components of a divorce. Whether the provision for court review and appeal of arbitrator errors of law if the parties so agree might be reconsidered, in view of the final version of the RUAA's having dropped it; the North Carolina RUAA follows the model Act in this regard.[390] On the other hand, it might be useful to observe for a while how this unique procedure operates. A few jurisdictions have similar legislation or allow court review and appeal of arbitrator errors of law if parties so agree.[391]

Uniformity of legislation and uniformity of interpretation of uniform statutes is another goal. The UAA, RUAA and FLAA all have provisions advocating this.[392] If the FLAA can come

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387 N.C. Gen. Stat. §§ 50-41(a), 50-54(a)(6), 50-56 (2003).

388 *Compare* RUAA Draft, *supra* note 34, §§ 18(b), 25(a)(6) *with* N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2003).

389 2003 N.C. Sess. Laws ch. 2003-61, amending N.C. Gen. Stat. § 50-53 (2003).

390 *Compare* N.C. Gen. Stat. § 1-569.28 (2003), following RUAA § 28, *supra* at 52, *with* N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2003); *see also* Heinsz, *supra* note 23, at 29-30, 35.

391 *See supra* notes 320-22 and accompanying text.

392 *See* N.C. Gen. Stat. §§ 1-567.20, 1-569.29, 50-62 (2001, 2003), the latter also advocating uniformity with state family law legislation; *see also* UAA, *supra* note 7, § 21, at 467; RUAA, *supra* note 8, § 29, at 53. The ICACA, *supra* note 20, also has UAA-related legislation, but it mostly follows the UNCITRAL Model Law, *supra* note 43, and international commercial arbitration and conciliation legislation in other states and nearly 40 countries. *See generally* China Minmetals Mat'ls Import & Export Co. v. Chi Mei Corp., 334 F.3d 274, 289 (3d Cir. 2003), citing United Nations Commission on International Trade

closer to paralleling the RUAA in common statutory areas, this goal will be promoted.

The issue of revising the Family Law Act to conform to the Revised Uniform Act will not arise until preparations for the 2005 North Carolina General Assembly begin.[393] In this regard drafters might propose amendatory provisions, leaving the unrevised parts of the FLAA untouched. Revisers might consider advocating a soup-to-nuts new Act, as was done before the 1999 legislation,[394] with modifications thought appropriate for family law cases. Similar problems will confront other jurisdictions with statutes governing family law arbitration,[395] or those that would wish to enact such legislation. They may choose to attach special family law provisions to their RUAA version, as some have done where the Uniform Act or similar statutes have been in force.[396] They may elect to use the RUAA as a guide and enact separate, comprehensive legislation on the North Carolina FLAA model. Last, for those states that have no special legislation, although it would not seem as useful, the Uniform Act could be used as a model, with special provisions taken from the now-available RUAA and from state family law legislation and decisions. This was the course the FLAA drafters and the state legislature followed in 1999.[397]

Another problem is Act's current scope. Should the FLAA, or legislation like it elsewhere, cover child custody and support

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Law Status of Conventions and Model Laws, *UNCITRAL Model Law on International Commercial Arbitrations (1992)*, *available at* http://www.uncitral.org/en-index.htm, listing inter alia California, Connecticut, Illinois, Oregon, and Texas and major U.S. trading partners, *e.g.*, Canada and Mexico; Walker, *Trends, supra* note 29, compares the ICACA as enacted in 1991 with the UNCITRAL Model Law.

393 Although the state ICACA was amended to parallel the RUAA, *supra* note 8, *see supra* note 20, the Bar Association Family Law Section expressed the wish to leave the FLAA in its present form to give practitioners and courts a chance to assimilate current legislation before considering major changes. An amendment, 2003 N.C. Sess. Laws ch. 2003-61, amending N.C. Gen. Stat. § 50-53 (2003), passed in 2003. New legislative proposals may only be introduced in odd-year legislative sessions. N.C. Const. art. II, § 11(1); N.C. Gen. Stat. § 120-11.1 (2003).

394 *See supra* notes 17-20, 37-53 and accompanying text.

395 *See supra* note 17 and accompanying text.

396 *See supra* notes 17-20 and accompanying text.

397 *See supra* notes 17-20, 37-53 and accompanying text.

disputes, *e.g.*, where a child is a joint ward of people who are not married? For example, married grandparents awarded custody of a deceased couple's child could arbitrate under the FLAA, but an unmarried aunt and uncle, brother and sister who live in the same household with joint custody of a child, could not. Given thorny problems of, *e.g.*, visitation, etc., in these situations, should the Act be amended, and if so, how?[398]

Interstate travel of FLAA awards reduced to judgments may pose problems. Under traditional law arbitral awards are not entitled to full faith and credit[399] like sister state judgments within the United States.[400] However, if an arbitral award is confirmed and is in force as a judgment, it is as subject to full faith and credit as any other judgment.[401] Given the recency of the FLAA, and only a few counterparts among the 50 states, it is too early to tell whether there will be recognition and enforcement problems

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398 *See also supra* notes 91-92 and accompanying text.

399 28 U.S.C. §§ 1738 (2000) (judgments), 1738A (2000) (child custody determinations), 1738B (2000) (child support orders), *implementing* U.S. Const. art. I, § 8, cl. 9; art. III, § 1; art. IV, § 1; ICARA, *supra* note 4, 42 U.S.C. § 11603(g) (2000) (implementing Abduction Convention, *supra* note 4); *see also* Embry v. Palmer, 120 U.S. 3, 9-10 (1883); Defense of Marriage Act, 28 U.S.C. § 1738C (2000) (no state required to give effect to judicial proceedings related to same-sex relationships treated as marriages).

400 However, there is a trend toward recognition like judgments as long as no public policies of the receiving state are at stake, the arbitral tribunal had personal jurisdiction over defendant and afforded defendant a reasonable opportunity to be heard. Restatement (Second) of Conflict of Laws § 220 (1971); Eugene F. Scoles et al., Conflict of Laws § 24.47 (2002).

401 *Cf.* Fauntleroy v. Lum, 210 U.S. 230 (1908). Besides the Full Faith and Credit Act, 28 U.S.C. § 1738 (2000), which implements U.S. Const. art. IV § 1 and includes authority under *id.* art. III, § 1, *cf.* Embry v. Palmer, 107 U.S. 3 (1883), 28 U.S.C. §§ 1738A-38B (2000) and legislation, *e.g.*, Uniform Child Custody Jurisdiction Act, 9 U.L.A. 143 (1988), adopted by all states, are also at play in recognizing and enforcing judgments affecting family law issues that move state to state. Like other sister state judgments, there are recognition and enforcement limits. *See generally* Baker v. General Motors Corp., 522 U.S. 222, 231-36 (1998). *Baker* limitations on recognizing and enforcing injunctive relief are subject to Congressional override, *e.g.* in 28 U.S.C. §§ 1738A-38B, comity recognition and enforcement as the Uniform Acts, *supra*, provide, or perhaps comity recognition and enforcement as *Baker*, 522 U.S. 235-41, suggests. *See also* Stoll v. Gottlieb, 305 U.S. 165 (1938) (state courts must recognize federal court judgments; 28 U.S.C. § 1738 does not address issue); Scoles et al. *supra* note 400, §§ 15.30, 15.33-15.39, 15.42, 24.9, 24.12.

because of FLAA-based judgments' origins in arbitration. It is clear that there is "no roving public policy exception" to sister state judgment recognition and enforcement.[402]

If legislation modeled on the RUAA, or for other statutes amending the FLAA for other reasons, dealing with nonparental custody or perhaps recognition and enforcement of awards or judgments, is enacted, forms and rules for the current Act should be revised.[403]

B. *Federalism, Federal Court Jurisdiction, Transnational Cases*

Other problems relate to federalism and the federal courts' possible role in FLAA-based disputes and issues related to transnational family law cases.[404] Suppose an agreement to arbitrate's scope clause[405] includes issues related to interstate or foreign commerce.[406] Suppose there are two arbitrations, one related to a marriage breakup under the FLAA and the other related to, *e.g.*, a husband-wife business in interstate or foreign commerce,

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402 *Baker*, 522 U.S. at 231-36.

403 *E.g.*, Handbook, *supra* note 33, should be revised to account for amended N.C. Gen. Stat. § 50-53 (2003) and enactment of the North Carolina RUAA, *supra* note 8. If other amendments seem in order, a book like Proposal or Group Proposals, *supra* notes 25, 33, might be prepared to brief lawyers and the General Assembly on reasons for recommended changes. Proposal, *supra*, served as a basis for the Handbook, *supra*; a revised Handbook could be prepared if the Assembly enacts proposed amendments for North Carolina, after the legislative session ends.

404 *See generally* Hayford & Palmiter, *supra* note 26, at 194-208 for a more detailed analysis of the federal preemption problem in the commercial arbitration context.

405 *See supra* notes 336, 339, 398 and accompanying text.

406 Citizens Bank v. Alafabco, Inc., 123 S.Ct. 2037, 2040-41 (2003) (per curiam) reaffirmed Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995)'s holding, that the FAA's "involving commerce" provision, 9 U.S.C. § 1 (2000), extends the FAA scope to the Commerce Clause constitutional limits. There has been no comparable Court decision related to the FAA's scope in arbitrations involving foreign commerce. Given the Court's strong support of FAA-based international arbitration, it is almost certain that a similar broad interpretation would apply to these arbitrations. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (international antitrust issues arbitrable when arbitrability of U.S.-based claim may not be); Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974) (arbitration under FAA before legislation implementing treaty-based legislation in force).

and consolidation is ordered.[407] What part of the case(s) will the FAA govern, in what part of the case(s) will the FLAA or perhaps the ICACA apply, will other federal law, *e.g.*, that related to child abduction and emergency support govern,[408] and when will rules the parties choose govern? This could happen, *e.g.*, on as straightforward a matter as appointing an arbitrator if a party refuses to do so.[409] Moreover, the Supreme Court continues to emphasize that some (and perhaps, for the future, many) issues remain for resolution under state law or state contract law because the FAA does not address them.[410] The foregoing assumes an arbitration remains in state court. Problems can become more complex if a case arrives in federal court. If such a multi-issue case involving arbitration is filed in state court, the state court must enforce the FAA to the extent that FAA provisions bind both state and federal courts.[411] If there is original or removal jurisdiction, and the case is in federal court under the FAA,[412]

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407 *See* N.C. Gen. Stat. §§ 1-567.57(b) (2003) (international arbitration consolidation), 50-50 (2003) (family law arbitration consolidation); RUAA, *supra* note 8, § 10 at 21, enacted as N.C. Gen. Stat. § 1-569.10 (2003), which unlike *id.* § 50-50 would allow court-ordered consolidation without parties' agreement if issues in separate arbitral proceedings relate to each other.

408 *See generally* Abduction Convention, *supra* note 4; 42 U.S.C. §§ 11601-10 (2000).

409 *See generally* 9 U.S.C. §§ 5, 206, 208, 303(a), 307 (2000); N.C. Gen. Stat. §§ 1-567.4, 1-567.41, 1-569.11, 50-45 (2001, 2003); UAA, *supra* note 7, § 3, at 167; RUAA, *supra* note 8, § 11 at 24, all of which are similar in intent but which have variants from the basic rule, and perhaps variants in interpretation.

410 Green Tree Finan. Corp. v. Bazzle, 123 S.Ct. 2402, 2406-09 (2003) (Breyer, J., plurality op.; Stevens, J., concurring) (whether arbitrator can hear a class action a matter of state law and terms of agreement to arbitrate); Doctor's Assocs. v. Cassarotto, 517 U.S. 681, 686-87 (1996) (fraud, duress, unconscionability defenses matters of state law) (dictum); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54-64 (1995) (parties' choice of New York law allowing punitive damages applied in arbitration governed by FAA, *supra* note 15); Volt Info. Sci., Inc. v. Board of Trustees, 489 U.S. 468, 474-77 (1989) (state statute, judicial procedures; reaffirming strong Congressional policy for arbitration).

411 *Volt*, 489 U.S. at 477.

412 The FAA, 9 U.S.C. §§ 1-16 (2003), depends on an independent jurisdictional head, *e.g.*, 28 U.S.C. §§ 1331 (2000) (federal question jurisdiction), 1332 (2000) (general diversity), 1333(1) (2000) (admiralty and maritime jurisdiction). In these cases, federal courts sitting in diversity must apply the FAA if by its terms it applies; otherwise, statutes like the UAA, *supra* note 7, apply. Prima

how should those courts treat family law claims in the case(s), given their historic propensity to abstention or nonremoval in these matters? Will a federal court bifurcate a case, remitting or remanding family law issues to state court?[413] Until precedents

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Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401-05 (1967); Bernhardt v. Polygraphic Co., 350 U.S. 198, 199-203 (1956). Although commentators say federal law should apply, citing trends in Federal Rules of Civil Procedure decisions through Hanna v. Plumer, 380 U.S. 460 (1965), *see* Hayford & Palmiter, *supra* note 26, at 186-89, analysis may follow a slightly different path. For matters the FAA covers, the federal courts should apply the statute if it applies and is constitutional in application. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988). If the FAA does not cover the issue, a court must examine the statute's text and may apply state law or a federal common law rule, depending on the language of the statute and the policies involved. *Stewart* found a state policy opposing enforcing forum selection clauses among 28 U.S.C. § 1404(a) (2000)'s "interests of justice," for example. The Court has oscillated between state law for aspects of FAA-governed arbitrations and federal common law where a state rule would frustrate the strong policy for arbitration, particularly in international arbitrations. How it will strike the balance in the future remains an interesting question, given trends toward restrictive application of federal common law in other arenas. *See generally* 19 Charles Alan Wright et al., Federal Practice and Procedure §§ 4508-20 (2d ed. 1996, 2003 Pocket Pt.); Wright & Kane, *supra* note 4, §§ 59-60; Linda S. Mullenix, *The* Erie *Doctrine and Applicable Law*, in 17A Moore's Federal Practice §§ 124.40-124.47 (Daniel R. Coquillette et al. eds., 3d ed. 2003). U.N. or Panama Convention, *supra* note 30 arbitrations are deemed to involve a federal question; a special statute assures removal. 9 U.S.C. §§ 203, 205, 302 (2000). *See also* 28 U.S.C. § 1441(a) (2000) (general removal statutes govern unless there is an otherwise applicable federal statute); 14B Charles Alan Wright et al., Federal Practice and Procedure §§ 3721, at 302 (3d ed. 1998, 2003 Cum. Ann. Pocket Pt.); § 3729, at 38 (2003 Pocket Pt.); § 3729.1, at 247-48 (3d ed. 1998); Wright & Kane, *supra* § 38 at 229; Georgene Vairo, *Removal*, in 16 Moore's Federal Practice § 107.15[9] (Daniel R. Coquillette et al. eds., 3d ed. 2003).

413 *See* 28 U.S.C. § 1367 (2000). When Congress enacted the Violence Against Women Act (VAWA), it included 28 U.S.C. § 1445(d) (2000) to forbid removing VAWA-based claims, thereby closing the federal courthouse door to these suits, including, *e.g.*, VAWA-based claims supplemental to divorce suits. Otherwise, thousands of these cases would have traveled across the street to federal court. Section 1445(d) is a dead letter today; United States v. Morrison, 529 U.S. 598 (2000) held VAWA unconstitutional. Congress might resurrect VAWA to bring it within constitutional parameters. It is a reasonable bet that federal courts confronted with a removed or original case with family law issues might remit or remand these issues to state court under abstention principles despite a policy for enforcing agreements to arbitrate, particularly if the underlying jurisdictional base is diversity of citizenship. *Cf.* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 212, 216-24 (1985). How federal question or admiralty

resolving these and similar problems are in place, there may be interesting litigation in the federal courts, where family law practitioners seldom venture. If international commercial matters enter cases otherwise under the FLAA because of a broad scope clause or consolidation,[414] one issue is recognizing and enforcing an arbitral award overseas. Is the award "commercial" in nature and therefore within the scope of treaties to which the United States is party, such that a foreign country's court must recognize and enforce it?[415] If the award is confirmed as a judgment in a U.S. court, what about recognition and enforcement of the judgment abroad? U.S. full faith and credit principles[416] do not apply to these judgments;[417] absent a governing treaty like the Abduction Convention,[418] foreign courts may be reluctant to enforce some kinds of judgments on public policy or other grounds.[419] When an incoming foreign country arbitral award on a commercial matter is grounded in treaties to which the United States is party, U.S. case law is very clear. If the award involves commer-

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jurisdiction-based claims paired with family law issues would fare is less clear. *See also supra* note 4 and accompanying text. The American Law Institute has proposed revisions for the supplemental jurisdiction statute and general removal legislation, 28 U.S.C. §§ 1367, 1441-47 (2000). *See generally* George K. Walker, *Supplemental, Pendent and Ancillary Jurisdiction in Admiralty and Maritime Cases: The ALI Federal Judicial Code Revision Project and Admiralty Practice*, 32 J. Mar. L. & Com. 567, 618-45 (2003).

414 *See supra* notes 336, 339, 398, 405 and accompanying text.

415 *See supra* notes 24-27 and accompanying text.

416 *See supra* notes 399-401 and accompanying text.

417 Treaties for recognizing and enforcing incoming foreign judgments bind many countries, particularly those in the European Union; the United States is party to no treaty. U.S. negotiators recently participated in drafting a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, still in the negotiation phase. U.K.-U.S. bilateral treaty negotiations failed in 1977 because of U.K. fears of high-dollar U.S. judgments in product liability cases and the wide reach of U.S. antitrust jurisdiction and likelihood of treble damages. Foreign country recognition and enforcement may be subject to reciprocity and excluding family law matters under treaties or national laws. *See generally* Scoles et al., *supra* note 400, §§ 24.3, 24.7, 24.38-24.39, 24.42, 24.44-24.45.

418 Abduction Convention, *supra* note 4, implemented by ICARA, *supra* note 4, 42 U.S.C. § 11603(g) (2000); *see also* Holder v. Holder, 305 F.3d at 864-66 (also illustrating that divorcing couples who are U.S. citizens may invoke Convention).

419 Scoles et al., *supra* note 400, §§ 24.39, at 1202; 24.44.

cial matters and there are no defenses, the award must be recognized and enforced.[420] Incoming foreign country judgments based on an award involving family law and perhaps other (*e.g.*, commercial) issues are another matter; here again full faith and credit principles do not apply, unless, of course, treaties implemented by federal statutes so provide.[421] Where there is no federal legislation on point, U.S. courts generally look to state law for standards.[422] The Family Law Act, and arbitration legislation like the Uniform Act or the Revised Uniform Act, are geared to arbitrations within the states that enact them and do not apply.[423] However, if a foreign country's courts note that a state court will not enforce a family law-based judgment, what happens the next time around under comity or reciprocity principles when a FLAA-based judgment travels overseas? The Family Law Act provides no answers to this question.

Suggested Optional Rules for cases otherwise governed by the Act do, however, include provisions that can be used to ensure fairness in the arbitration that may be useful in arguing for recognizing and enforcing awards or judgments overseas, however.[424]

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420 *See, e.g.*, Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

421 *See, e.g.*, ICARA, *supra* note 4, 42 U.S.C. § 11603(g) (2000), implementing Abduction Convention, *supra* note 4.

422 The Uniform Foreign Money-Judgments Recognition Act § 2(2), 12(2) U.L.A. 39, 43 (2002), today in force in 31 jurisdictions, *id.* 39, and enacted, *e.g.*, in North Carolina as N.C. Gen. Stat. § 1C-1801(1) (2003), excludes money judgments for support in matrimonial or family matters. Although the Act might bar relitigating a money judgment based on a commercial transaction, *cf.* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), it might not bar inquiry into an incoming judgment related to family law. Hilton v. Guyot, 159 U.S. 113 (1895) spoke of comity and reciprocity, but that federal common law-based case has no force in federal court after Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Mullenix et al., *supra* note 4, chs. 15A, 15E; Scoles et al., *supra* note 400, § 24.6; 19 Wright et al., *supra* note 412, §§ 4503-04, 4514-19; Wright & Kane, *supra* note 4, §§ 55, 60; Mullenix, *supra* note 412, § 124.01[1].

423 *See generally* N.C. Gen. Stat. § 50-59 (2003) (North Carolina state court actions); *compare id.* §§ 1-567.17, 1-567.66, 1-569.1(3) (2001, 2003); UAA, *supra* note 7, § 17, at 429; RUAA, *supra* note 8, § 1(3), at 6; Handbook, *supra* note 33, *Comment* to § 50-59; Scoles et al., *supra* note 400, § 24.47.

424 *See generally* Optional R. 101-04, in Handbook, *supra* note 33 (arbitrator nationality, interpreter, language, experts). Parties seeking overseas recog-

If Congress overhauls the FAA,[425] *e.g.*, adding consolidation and other provisions, how will this affect family law arbitrations, or arbitrations in general?[426] If Congress amends statutes governing international arbitration to mirror the UNCITRAL Model Law, which a few states (including North Carolina) follow, other analytical issues may arise.[427]

C. *Arbitrations by Agreement and Fundamental Fairness; Public Policy and Arbitration*

Although one might think that only "little guys" claiming redress, or consumers asserting small sums, would be the only parties hurt because of agreements to arbitrate, particularly where these contracts include a situs clause for a faraway place,[428] major players can wind up on the short end of matters.

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nition and enforcement should invite a foreign tribunal's attention to the similarity between the FLAA rules and those of the AAA. Outgoing arbitral awards given under standard rules may fare better abroad than those rendered under rules specially crafted for a particular arbitration. Paul D. Friedland, Arbitration Clauses for International Contracts 28 (2000); Earl McLaren, *Effective Use of International Commercial Arbitration: A Primer for In-house Counsel*, 19 J. Int'l Arb. 473, 481 (No. 5, 2002). Although the FLAA rules are unique to one state, their kinship to generally-used rules should help in these situations. Parties crafting special rules for family law arbitrations should be aware of this potential problem, consider agreeing on rules akin to institutional arbitration rules, and be prepared to note this if an award goes overseas for recognition and enforcement.

425 Heinsz, *supra* note 23, at 29 advocates updating the FAA, *supra* note 15, because of "this federal statute's paramount role."

426 *See* RUAA § 10, at 21, enacted as N.C. Gen. Stat. § 1-569.10 (2003). *E.g.*, how will a consolidation statute interface with the supplemental jurisdiction statute, 28 U.S.C. § 1367 (2000), which also may be the subject of amendments?

427 If there is a comprehensive federal enactment, perhaps covering international arbitrations involving entities from countries not party to any treaty to which the United States is party, will there be a need for state international arbitration acts? Even if legislation covering New York or Panama Convention-based arbitrations passes, difficult analyses may ensue for family law cases tied to international commercial arbitration claims, perhaps through consolidation. *See supra* notes 336, 339, 398, 405, 414 and accompanying text.

428 Perkins v. CCH Computax, Inc., 423 S.E.2d 780 (N.C. 1992) (4-3, with Chief Justice-to-be Burley Mitchell's strong dissent, arguing against enforcement of a West Coast forum selection clause for a proceeding involving a small sum) is typical. Within a year, N.C. Gen. Stat. § 22B-3 (2003) superseded *Perkins*. Previously it had been thought that North Carolina law invalidated forum

The Supreme Court has upheld arbitration of an importer's relatively large claim (over $ 1 million) involving the Carriage of Goods by Sea Act (COGSA) in a case considering an arbitration situs for Tokyo, Japan against COGSA objections.[429] Other decisions have supported arbitration in litigation involving small claims or consumers and others with slight bargaining power; others have denied it, primarily on unconscionability,[430] fraud or

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selection clauses as an ouster of legislature-imposed venue rules. Gaither v. Charlotte Motor Car Co., 109 S.E. 362 (N.C. 1921). *Perkins*, 423 S.E.2d at 782, distinguished *Gaither* on the ground that *Gaither* involved an intrastate choice of forum. Section 22B-3 also invalidates arbitration situs clauses in large part. It purports to supersede *Perkins* on choice of forum clauses, but it does not appear to affect otherwise valid consent to jurisdiction clauses recited independently of an arbitration situs clause that implies consent to jurisdiction, *cf.* Doctor's Assocs, Inc. v. Stuart, 85 F.3d 975, 983 (2d Cir. 1996). *Perkins* noted Johnston County v. R.N. Rouse & Co., 414 S.E.2d 30 (N.C. 1992)'s approval of these. At least on the face of the statute, a consent to jurisdiction clause for outside North Carolina appears to have continued validity. Whether § 22B-3 will withstand Constitutional muster as to situs clauses in federal court is an open question, given the strong policies favoring federal law in arbitrations involving interstate or foreign commerce or admiralty claims. Thus far § 22B-3 has not fared well, even in the North Carolina courts. *See* Boynton v. ESC Med. Sys., Inc., 566 S.E.2d 730, 733-34 (2002); Newman ex rel. Wallace v. First Atl. Res. Corp., 170 F.Supp.2d 585, 592 (M.D.N.C. 2001).

429 Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533-39 (1995) (upholding foreign arbitration situs clause despite Carriage of Goods by Sea Act, 46 U.S.C. App. § 1303(8) [2000] provision invalidating clauses lessening liability).

430 *Compare, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109-24 (2001) (employment contract for other than mariners, railway workers, other transportation workers arbitrable); Green Tree Finan. Corp. v. Randolph, 531 U.S. 79, 90-91 (2000) (arbitration upheld because plaintiff failed to show, factually, that arbitration's high cost precluded her from presenting her claim); *Doctor's Assocs.*, 517 U.S. 681 (franchise arbitration clause upheld); *Allied-Bruce*, 513 U.S. 265 (homeowner claim must be arbitrated); *Mitsubishi*, 473 U.S. 614 (international antitrust issue must be arbitrated in Japan, although arbitrating antitrust claims involving activity within the United States might not be); *Southland*, 465 U.S. 1 (franchise arbitration clause upheld); *with, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1169-80 (9th Cir. 2003) (employment contract procedurally, substantively unenforceable under California law), following Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (same; *Circuit City*, 532 U.S. 105, *supra* on remand); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (anti-class action clause void as unconscionable; California law), *petition for cert. filed*, 71 U.S.L.W. 3680 (Apr. 16, 2003); Ticknor v. Choice Hotels Int'l,

undue influence[431] grounds.[432] A battle involving the issue of whether an agreement clause can support class action arbitration has been resolved in favor of allowing state law to determine the question in FAA-governed cases. Unless the agreement forbids them, the Supreme Court said, state law can allow them.[433]

Besides commentator response, some unfavorable to and some supporting arbitration,[434] state legislatures have begun attempts to erode these clauses' impact, with mixed results. A few states have legislation limiting use of arbitration situs clauses.[435] These can implicate Supremacy Clause issues; trumping federal arbitration legislation's reach is less than clear on this point.[436] The impact of state law decisions on unconscionability, fraud or undue influence grounds may be a force.[437] Here RUAA provisions reflecting "due process" considerations may be an important factor,[438] as may those promulgated by arbitration organizations, *i.e.*, the AAA, JAMS and the National Arbitration Forum (NAF).[439] For states enacting the RUAA, its standards will bind; the AAA-JAMS-NAF guidelines may only bind arbitrations sponsored by those provider organizations, unless parties incorporate them in agreements.[440] There are also issues involv-

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Inc., 265 F.3d 931, 935-41 (9th Cir. 2001) (franchise arbitration clauses void as unconscionable; Montana law).

431 *See supra* note 94 and accompanying text.

432 Commentators divide on whether massive use of arbitration clauses may result in adhesion contracts. *See* Hayford & Palmiter, *supra* note 26, at 213-14.

433 Green Tree Finan. Corp. v. Bazzle, 123 S.Ct. 2402, 2404-08 (2003) (Breyer, J., plurality op.; Stevens, J., concurring).

434 *See, e.g.*, Hayford & Neesemann, *supra* note 26; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000); Jackson Williams, *What the Growing Use of Pre-Dispute Binding Arbitration Means for Industry*, 85 Judicature 266 (2002).

435 *See, e.g.*, N.C. Gen. Stat. § 22B-3 (2003); S.C. Code Ann. § 15-7-120(B) (West 2002 Cum. Supp.).

436 *Compare Doctor's Assocs.*, 517 U.S. 681 *with Volt*, 489 U.S. 468.

437 *See supra* note 94 and accompanying text.

438 *See supra* note 30 and accompanying text.

439 *Due Process Principles*, *supra* note 30, at 16, draws on AAA, JAMS and/or NAF standards for a 21-point composite list. The FLAA often meets these goals. Future amendments might follow others.

440 *Cf.* Hayford & Neesemann, *supra* note 26, at 16.

ing arbitrator ethics; can a clear ethics violation by an arbitrator be a predicate for setting aside an award?[441]

D. *Summary*

As Parts II.A-II.C suggest, arbitration remains a fluid field for the future. How its general contours, or family law arbitration's contours, will develop will be the product of developments in many arenas: Congress; state legislatures; Supreme Court decisions; opinions of the federal and state courts, arbitration provider organizations and rules these organizations develop; lawyer and other groups like the NCCUSL,[442] ABA[443] and state bar associations;[444] and commentators, will all play roles in developing the legal terrain. A single, large bulldozer or other earth mover will not perform the work; more often than not many individual shovels will spade the field of arbitration. The trick may be even, consistent digging and arriving at the end of furrows.

III. Conclusions and Projections for the Future

Comparing the North Carolina Family Law Act, largely based on the Uniform Arbitration Act, North Carolina's International Commercial Arbitration Act and an early draft of the Revised Uniform Arbitration Act, with the Revised Uniform Act as adopted by the NCCUSL and enacted in several states including North Carolina, reveals some differences but no major defects in the North Carolina Family Law Act.[445]

Future state legislation may result in FLAA amendments for greater conformity with the RUAA, *e.g.*, rules for who decides on

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441 *See supra* notes 126-31 and accompanying text.

442 Amendments may come; NCCUSL amended the UAA in 1956, a year after intial adoption. *See supra* note 22 and accompanying text.

443 The ABA and the AAA have cosponsored developing arbitrator ethics principles for commercial arbitration. *See supra* notes 126-31 and accompanying text.

444 *E.g.*, the NCBA drafted the FLAA for North Carolina General Assembly consideration and enactment and arbitrator ethics principles for Supreme Court of North Carolina adoption. *See supra* notes 17-20, 37-52, 126-31 and accompanying text.

445 The first appellate decision citing the FLAA, Semon v. Semon, 587 S.E.2d 460, 462-64 (N.C. App. 2003), considered the Act's modification and correction of award provisions and cited the parallel Uniform Act.

arbitrability; who may initiate arbitration; arbitrator disclosure; use of electronic communications; and what statutory provisions are waivable or nonwaivable, and under what circumstances. Although the FLAA has standards for, *e.g.*, consolidation, discovery and arbitrator immunity, these statutes might be reconsidered for greater conformity with the RUAA.[446]

Revisors might consider desirability of expanding the FLAA's scope, *e.g.*, to account for child custody and support issues when a child is a ward of two persons who are not married, like an uncle and aunt who are brother and sister with joint custody of deceased parents' children. The current Act contemplates child custody and support issues incident to a divorce.

There are also complex issues of recognizing and enforcing family law arbitral awards, or judgments based on them, particularly in the relatively rare, at least thus far, international context. What, if anything, should drafters consider? Whether amended or not, Family Law Act arbitrations may present unconscionability, fraud or undue influence issues, matters thus far not the subject of legislation. There may be more generalized "due process" issues, or matters related to arbitrator ethics where legislative disclosure requirements do not control.

Federalism issues, *e.g.*, breakup of a business in interstate or foreign commerce that implicates the Federal Arbitration Act, that are not present in the usual divorce case, may arise. As more marriages and divorces involve persons of other than U.S. nationality, and as businesses these spouses conduct become more international in commercial scope, the possibility of implicating arbitration treaties to which the United States is party will increase. There is little that drafters proposing amendatory state legislation can do about these issues, but they must keep them in mind as amendment proposals go forward. For those jurisdictions with family law arbitration statutes in force, these problems are always present.

A handful of other jurisdictions provide for arbitrating family law issues by agreement.[447] Comparing existing legislation with the FLAA; enacting legislation based on it, with ideas taken

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446 These issues are on a North Carolina Bar Association Family Law Section committee agenda. *See* Letter of Lynn P. Burleson, *supra* note 36; *supra* note 36 and accompanying text.

447 *See supra* notes 17-19 and accompanying text.

from the RUAA, other arbitration legislation such as international arbitration statutes, and tailored to a particular state's family law legislation and cases, may be a useful way to update existing statutes. For states with family law arbitration statutes that have enacted, or are considering adoption of, the RUAA to replace the UAA, the option is comparing the RUAA with the FLAA; enacting legislation based on the RUAA, with ideas taken from the FLAA; other arbitration legislation such as international arbitration statutes, and tailored to a particular state's family law legislation and cases, to update existing statutes. Another option is adding family law provisions to the Revised Uniform Act as it proceeds through the drafting and legislative processes in a particular jurisdiction. States content with the Uniform Act could use the same method, *i.e.*, adding family law provisions to those states' Uniform Act versions. All jurisdictions, including those with no family law arbitration legislation, could consider the North Carolina model of its Family Law Arbitration Act, *i.e.*, separate, soup-to-nuts comprehensive family law arbitration legislation based on the UAA or the RUAA,[448] perhaps inserted in chapters dealing with family law issues.[449]

The American Academy of Matrimonial Lawyers Arbitration Committee is studying proposals for a model act based on the UAA and the RUAA, with a view to presenting its findings at the AAML November 2004 AAML annual meeting. The Committee's preliminary thinking is to draft model generic legislation following the North Carolina Family Law Act and parallelling the UAA or the RUAA.[450]

The Family Law Act or legislation like it appears to be a useful additional dispute resolution method, apart from litigation, other ADR methods or negotiated settlement.[451] Anecdo-

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448 Although the states are beginning to supersede the UAA, *supra* note 7, with the RUAA, *supra* note 8, some jurisdictions may elect to retain the UAA, *supra*, or the legislative agenda for change may be a few years in the future. *See also supra* notes 22-27 and accompanying text.

449 For those states that have other provisions governing family law arbitration, *e.g.*, special statutes incorporated in uniform arbitration legislation, repeal of those statutes would be necessary.

450 *See* Letter of Lynn P. Burleson, *supra* note 36; *supra* note 36 and accompanying text.

451 Whether resolving disputes outside the courthouse through arbitration or other ADR methods benefits the justice system has been debated for years.

tal evidence among North Carolina family law practitioners reveals that the procedure has worked reasonably well. It is essential, however, that counsel understand implications of arbitration by careful study of the law and proposed forms and rules for the procedure.[452] Parties should be advised of these implications. Arbitration by agreement will not cure warts, but it may resolve some family law disputes short of litigation for which other processes, *e.g.*, negotiated settlement, collaborative law or mediation, are not suitable or feasible.

Compare, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982); Burger, *Using Arbitration to Achieve Justice*, Arb. J. 3 (Dec. 1985); Philbrick, *supra* note 8, at 419 n.1 (Burger advocated out of court child custody dispute resolution in 1982); William H. Rehnquist, *A Jurist's View of Arbitration*, *id.* 1 (Mar. 1977) *with* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. Disp. Resol. 211, 261-65 (1995); Samborn, *supra* note 4; Schwartz, *supra* note 92; Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. Miami L. Rev. 831, 864 (2002). *See also supra* notes 8-11 and accompanying text (noting limited availablility of some ADR techniques for family law disputes).

452 *See* Handbook, *supra* note 33.