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Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law

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I. INTRODUCTION

A. *History*

Arbitration in the State of California has a long history. Originally governed by statute under Title 10, enacted in 1872,[1] arbitration in California has undergone many changes. In 1955, the Uniform Law Commissioners promulgated the Uniform Arbitration Act ("UAA").[2] The UAA has been remarkably successful. Forty-nine jurisdictions have arbitration statutes; thirty-five of these have adopted the UAA and fourteen have adopted substantially similar legislation.[3] California adopted the UAA in 1961, repealing the obsolete Title 10 and providing that the new and improved Title 9 govern arbitration. [4]

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This report was prepared for the California Law Revision Commission by Prof. Roger Alford, Associate Professor of Law, Pepperdine University School of Law. No part of this report may be published without prior written consent of the Commission.

The Law Revision Commission assumes no responsibility for any statement made in this report, and no statement in this report is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation, which will be separate and distinct from this report. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

1. CAL. CIV. PROC. CODE tit. 9, § 3(West 2002) (Current through ch. 51 of 2002 Reg. Sess. urgency legislation & ch. 3 of 3rd Ex.Sess. & March 5, 2002 election).

2. *See* UNIFORM ARBITRATION ACT, *available at* http://www.law.upenn.edu/library/ulc/fnact99/1920_69/uaa55.htm; (hereinafter "UAA") attached hereto as Appendix III.

3. *See* REVISED UNIFORM ARBITRATION ACT, (hereinafter "RUAA"), Prefatory Note (2000) *available at* http://www.law.upenn.edu/library/ulc/uarba/arbitrat1213.htm , attached hereto as Appendix II.

4. Jevne v. Superior Court, 6 Cal. Rptr. 3d 542, 549-50 (2003) (discussing history of Title 9)

The 1955 Uniform Arbitration Act as adopted in California accomplished two things.[5] First, the Act expressly countered the common law rule that parties could not agree to arbitration before a dispute arose.[6] Although parties have always been free to arbitrate after disputes arose, common law rules prohibited enforcement of pre-dispute arbitration agreements.[7] Second, the Uniform Arbitration Act established basic rules to govern the conduct of arbitration proceedings.[8]

The 1955 Uniform Arbitration Act, echoing the provisions of the 1925 Federal Arbitration Act, provided a general framework for California courts to enforce arbitration-related disputes.[9] As court dockets have filled over the years and trials have become longer and more expensive, there has been a corresponding increase in the number of parties agreeing to arbitrate their disputes.[10] Since the adoption of the UAA in 1961, California legislators have attempted to keep pace with the increasing use of arbitration as an alternative to litigation. [11]

For example, although the 1955 UAA did not address the consolidation of separate arbitration proceedings, California legislators amended the statute in 1978 to include such provisions.[12] Section 1281.3 provides that a party to an arbitration proceeding may petition the court to order a consolidation of separate arbitration proceedings where the separate proceedings stem from a dispute involving the same transaction and where there is a common issue of law or fact.[13] As a result of Section 1281.3, arbitration is more adaptable to widespread use as an acceptable method of dispute resolution.

California has also kept pace in other ways. As originally enacted, the UAA provided that a neutral arbitrator's bias permitted vacation of an award, but the UAA did not require the disclosure of interests that might cause bias.[14]

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5. RUAA Summary (2000) *available at* http://nccusl.org/nccusl/uniformact_summaries/uniformacts-s-aa.asp.

6. *Id.*

7. For a recent summary of common law enforcement of arbitration prior to enactment of the Federal Arbitration Act, see Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 Ohio State J. Dis. Res. 249, 259, 277 (2003).

8. *Id.*

9. RUAA, Policy Statement (2000) *available at* http://www.law.upenn.edu/bll/ulc/uarba/arbps0500.htm. (hereinafter "Policy Statement").

10. CAL. CIV. PROC. CODE § 1141.10(a) ("The Legislature finds and declares that litigation involving small civil cases can be so costly and complex that efficiently resolving these civil cases is difficult, and that the resulting delays and expenses may deny parties their right to a timely resolution of minor civil disputes. The Legislature further finds and declares that arbitration has proven to be an efficient and equitable method for resolving small civil cases, and that courts should encourage or require the use of arbitration for those actions whenever possible.")

11. *Id.*

12. CAL. CIV. PROC. CODE § 1281.3

13. CAL. CIV. PROC. CODE § 1281.3.

14. *See* UAA § 12(a).

California responded in 1994 with Section 1281.9, and later amended it in 1997 and 2001 to specifically address that issue.[15] Currently, the statute requires a proposed neutral arbitrator to disclose, among other things, any financial or personal interests and any past or present relationships with the parties involved.[16]

In 1988, California became one of the few states to adopt a statute on international arbitration, Section 1297, modeled on the UNCITRAL Model Law. [17]

The following year, California enacted Section 1281.8, providing the court with the power to grant provisional remedies to parties involved in an arbitration proceeding. Consequently, one party could no longer postpone choosing an arbitrator in an effort to nullify the benefits of any award the opposing party might receive.[18]

It is startling to note that despite attempts to reflect modern trends in dispute resolution, the bulk of the statute has remained unchanged for more than three-quarters of a century. "[The] UAA closely tracks the provisions of the Federal Arbitration Act ("FAA") which was adopted in 1925. Neither the UAA nor FAA have been amended since each were enacted. Therefore, for all practical purposes, American arbitration statutes have not been revised over the past 75 years."[19]

B. General Description

The general purpose of arbitration law is to advance arbitration as an alternative to litigation. Arbitration is generally viewed as an attractive alternative to litigation, affording parties with an economical, efficient, confidential, and neutral forum to resolve their contractual disputes.

Arbitration is generally a faster means of resolving disputes than litigation. Parties may bypass crowded court dockets, and instead may schedule an arbitra-

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15. CAL. CIV. PROC. CODE § 1281.9.

16. *Id.*

17. CAL. CIV. PROC. CODE § 1297 *et. seq.* The UNCITRAL Model Law is a proposed law promulgated by the United Nations Commission on International Trade Law for adoption by national and state legislatures. It embodies a comprehensive collection of modern, well-thought-through solutions to issues that are prevalent in international commercial arbitration. JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT, 88 & n.210 (1997).

18. CAL. CIV. PROC. CODE § 1281.8.

19. Policy Statement.

tion hearing at their own time and convenience.[20] Additionally, the informality associated with an arbitration proceeding — minimal pleading, discovery, motion practice, and other pre-trial procedures — can dramatically reduce the time to settlement or review the merits by an impartial tribunal.[21] The limited opportunity for appeal or court review has the same effect of favoring arbitration.[22] Furthermore, parties may choose to appoint arbitrators with professional knowledge of the matter being disputed, thus sparing the time and expense associated with educating a judge or jury.[23] A reduced trial time may translate into cost savings as well.[24] Other benefits to arbitration include fewer hostilities among the parties as well as complete confidentiality.[25]

The benefits and goals of arbitration law are reflected in the California statute. In most instances, the California statute recognizes the autonomy necessary for these benefits to be conferred. For example, arbitration agreements are generally valid and enforceable except where there are legitimate contractual or public policy grounds to refuse enforcement of the agreement.[26] In addition, agreements providing for the selection of a particular arbitrator and those establishing the procedures for appointing an arbitrator are enforceable as well.[27] The court is allowed to step in only when all prior attempts to fulfill the agreements fail.[28] Further, a party may elect to be represented by counsel, or may waive that right.[29]

However, arbitration agreements and awards are not self-enforcing. Compliance with an arbitration agreement may require judicial supervision to compel arbitration.[30] Judicial assistance during the arbitration process may also be required to enforce provisional orders, address challenges to an arbitrator, or assist with discovery.[31] After an award has been rendered, any party dissatisfied with an arbitration award may petition the court to vacate the award.[32] The court may vacate, correct or modify the award, or require a rehearing in appropriate circumstances.[33] If the court decides to confirm the award, judgment is entered and

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20. DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 17, 26 (1998).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. CAL. CIV. PROC. CODE § 1281.
27. *Id.* at § 1281.6.
28. *Id.* at § 1281.2.
29. *Id.* at § 1282.4.
30. *Id.* at § 1281.2.
31. CAL. CIV. PROC. CODE §§ 1281.8, 1281.91, 1282.6.
32. *Id.* at § 1285.
33. *Id.* at §§ 1286.2, 1286.4, 1286.6, 1286.8, 1287.

the award is enforceable like any other court judgment.[34] In this way, private arbitration and the public judicial process are inextricably intertwined. For arbitration to be effective, judicial supervision at the beginning, middle, and final stages must be available.

C. Assumptions of the Report

Recommendations reflected in this report assume a legislative policy that is friendly to arbitration and that desires to promote effective judicial assistance of arbitration. From this general assumption arise a number of subsidiary assumptions that directly impact the recommendations in this report.

First, it is assumed that party autonomy should be a fundamental principle that is respected, except in the face of clear overriding legislative priorities. This assumption recognizes that the courts will not uphold arbitration agreements that would violate public policy or in circumstances where mutual assent is lacking. However, the judicial branch should generally promote the enforceability of arbitration agreements and any resulting awards.

Second, these recommendations assume that parties choose arbitration as a viable alternative to litigation, and they do so for well-recognized reasons (speed, efficiency, lower cost, confidentiality, etc.). This choice reflects a preference for these benefits over the benefits inherent in traditional litigation. Legislative initiatives that thwart the objectives reflected in this contractual choice – such as non-waivable mandatory statutory requirements – should generally be discouraged as they undermine the attractiveness of arbitration.

Third, these recommendations assume that the legislature seeks to avoid preemption conflicts with the Federal Arbitration Act (FAA). The Supreme Court has articulated clear rules of preemption, and to the extent state law is inconsistent with the FAA, it is unlikely that state law would prevail. Furthermore, resolving preemption issues would require additional litigation. This assumption favors uniformity between state and federal law, absent a clear basis justifying a lack of uniformity.

Fourth, these recommendations assume that uniformity of laws is desirable in arbitration. The legislature has demonstrated a commitment to uniformity in the adoption of the Uniform Arbitration Act in 1961, the UNCITRAL Model Law in 1988, and uniform contractual laws such as the Uniform Commercial Code. Therefore, it is presumed that a preference exists for the Revised Uni-

34. *Id.* at § 1286.

form Arbitration Act ("RUAA") wherever possible. Although only enacted in 2000, it already appears likely that the RUAA will be the basis for uniformity of state arbitration laws. The RUAA has been approved by the American Bar Association and endorsed by the American Arbitration Association. It also has been adopted in Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon and Utah, and has been introduced in at least eleven states.[35]

Finally, these recommendations assume that the revisions embodied in the RUAA reflect solutions to address major developments in arbitration. Although the California statute has not been subject to significant revision since 1961, there have been significant developments in arbitration law since that time, and the RUAA attempts to incorporate and address those issues. Where California has adopted recent amendments to the arbitration statute, it is assumed that the legislature did so to address specific areas of concern and, if necessary, depart from a uniform standard to address those concerns.

As a result, this report recommends adoption of the RUAA with modifications. This approach attempts to reconcile, coordinate, and supplement the RUAA with existing provisions of California law. These recommendations are set forth in detail below.

II. CHAPTER 1 – GENERAL PROVISIONS

Section 1280 of the California Arbitration Statute provides definitions for six terms: "Agreement", "Award", "Controversy", "Neutral arbitrator", "Party to the arbitration", and "Written agreement".[36]

Consistent with the UAA, the overwhelming majority of states do not have a definition section in their arbitration statutes.[37]

Section 1 of the RUAA includes definitions for six terms: "Arbitration organization", "Arbitrator", "Court", "Knowledge", "Person", "Record".[38] With one exception, the RUAA terms are separate from and not inconsistent with the definitions provided in Section 1280 of the California statute.

The one potential inconsistency pertains to "Record." The RUAA's use of the term "Record" is a significant improvement over Section 1280(f)'s reference to a "Written agreement."[39] As the RUAA comments indicate, "Record" better accommodates "the use of electronic evidence in business and governmental

35. *See* A FEW FACTS ABOUT THE UNIFORM ARBITRATION ACT (2000) *available at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp.

36. CAL. CIV. PROC. CODE § 1280.

37. Of the states that have not adopted the RUAA, only a few states, such as California, Utah, and Maryland, have a definition section in their arbitration statues.

38. RUAA § 1, *available at* http://www.law.upenn.edu/library/ulc/uarba/arbitrat1213.htm.

39. CAL. CIV. PROC. CODE § 1280(f).

transactions", although it is not meant to imply that the term "written" used elsewhere "may not be given equally broad interpretation".[40] The definition of record is identical to the definition of record in the Uniform Commercial Code, Section 5-102(a)(14).[41] It is recommended that the current definitions in Section 1280 be incorporated into and made part of Section 1 of the RUAA. The definition for "written agreement" should be modified to incorporate a Record.

Section 2 of the RUAA concerns Notice.[42] The notice provision is based on terminology reflected in the Uniform Commercial Code (California Commercial Code, section 1-201(25)).[43]

Section 3 of the RUAA concerns the effective date of the Act.[44] The provision provides that the act governs an agreement made on or after the effective date of the act, or an agreement to arbitrate made before the act, if all the parties so agree. It also provides for retroactive application in Section 3(c), after a delayed date for all contracts whenever made, presumably several years following the adoption of the act.[45] This approach allows for prospective application for future contracts as of the effective date under Sections 3(a) and 3(b), and retroactive application for all other contracts after a further period of time. The approach is outlined in some detail in the comments to the RUAA.[46] It is noteworthy that the California statute did not adopt Section 20 of the Uniform Arbitration Act, which provides only for prospective application of the act. A new provision of Section 3 should be included.

Section 1280.2 of the California Arbitration Statute includes a provision on reference to statutes.[47] There is no comparable provision in the RUAA.

Recommendation: The definitions in Section 1280 should be retained and incorporated into Section 1 of the RUAA. The proposed section 1 would include eleven definitions, six from Section 1280 and six from the Section 1 of the RUAA. The definition for "written agreement" should be modified to read, "Written agreement shall be deemed to include a Record or a written agreement which has been extended or renewed by an oral or implied agreement." Sections 2 and 3 of the RUAA should be adopted. Section 3(c) should include a delayed date for retroactive application that is four years after the effective date

40. RUAA § 1, cmt. 5.
41. *Id.*
42. *Id.* § 2.
43. *Id.*, cmt. 1.
44. *Id.* § 3.
45. *Id.* § 3(c).
46. *Id.*, cmt. 4.
47. CAL. CIV. PROC. CODE § 1280.2.

identified in section 3(a) and 3(b). Section 1280.2 should be retained and incorporated into a new Section 3(d) of the RUAA. The title to the new Section 3 should be revised to read "When Act Applies; Reference to Statute."

III. CHAPTER 2 – ENFORCEMENT OF ARBITRATION AGREEMENTS

The RUAA also has important provisions relating to party autonomy and mandatory rules. As noted above, party autonomy should form the basis of arbitration and the rules reflected in California law should promote that autonomy. The RUAA supports this position in Section 4(a). It provides that "[e]xcept as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law."[48] The RUAA also identifies in section 4(b) statutory provisions that may not be prospectively waived.[49] This section does not apply to agreements to arbitrate after a dispute has arisen.[50] Neither the UAA nor the California statute contains similar provisions, although section 4(a) is consistent with California common law. Section 4(b) finds no corollary in California law. Section 4(b) is significant as a limitation on party autonomy, but does not wholly compromise that autonomy to the extent the parties address such matters after a dispute has arisen.[51]

Section 1281 of the California Arbitration Statute provides the basic rule that a "written agreement to submit to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[52] This is based on Section 1 of the UAA, which in turn is based on Section 2 of the FAA.[53] The RUAA also incorporates this general rule, but includes significant clarifications in the remaining provisions of Section 6. Section 6(b) codifies two general rules. First, Section 6(b) codifies the general rule that "issues of substantive arbitrability, *i.e.*, whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide."[54] Section 6(b) also codifies that rule that "issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obliga-

48. RUAA § 4(a).
49. *Id.* § 4(b).
50. *Id.*, cmt. 4.
51. RUAA § 4, cmt. 4.
52. CAL. CIV. PROC. CODE § 1281.
53. *See* RUAA § 6, cmt. 1. Section 6(a) of the RUAA incorporates this general rule as well. ("The language in Section 6(a) as to the validity of arbitration agreements is the same as UAA Section 1 and almost the same as the language of FAA Section 2 which states that arbitration agreements 'shall be valid irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'").
54. *Id.*, cmt. 2.

tion to arbitrate have been met, are for the arbitrators to decide."[55] Section 6(c) is consistent with the common law understandings applying the FAA.[56] Accordingly, absent allegations that the arbitration clause was induced by fraud, "challenges to the enforceability of the underlying contract on grounds such as fraud, illegality, mutual mistake, duress, unconscionability and the like are to be decided by the arbitrator." This approach has been adopted in California as well.[57]

Significantly, the proposed Section 6(b) and (c) are default rules that can be waived under Section 4(a).[58] Many arbitration rules, including the AAA Rules, provide for the arbitrator to "determine the existence or validity of a contract of which an arbitration clause forms a part."[59] RUAA's approach of codifying the arbitrability and separability doctrines, subject to contractual modification, is helpful and should be incorporated into California's statutory regime.

Section 6(d) incorporates a statutory provision consistent with the rules of most arbitration organizations, including the American Arbitration Association, to permit arbitrators to proceed pending final decision by the court, unless otherwise specified by the court.[60]

On the matter of compelling arbitration, Section 1281.2 specifies that upon motion a court shall order arbitration if it determines that an agreement to arbitrate exists, unless (1) the right to compel arbitration was waived; (2) grounds for revocation of the agreement exists; or (3) a party to the arbitration agreement is also a party to a pending court action and there is a possibility of conflicting judgments.[61] Denial of a petition on other grounds is reversible error.[62] In addition, under 1281.2, a court may delay the order to arbitrate if there are other

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55. *Id.*

56. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 673 P.2d 251 (1983); Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (1996).

57. Rosenthal v. Great Western Fin. Sec. Corp. 58 Cal. Rptr. 2d 875, 888-89 (1996).

58. RUAA § 6, cmt. 2. Furthermore, most states that have not adopted the RUAA do not specify which rights may be waived by parties to an arbitration.

59. AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-7 (effective July 1, 2003), *available at http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm.*

60. *See* RUAA § 6, cmt. 6.

61. CAL. CIV. PROC. CODE § 1281.2.

62. Valsan Partners Ltd P'ship v. Calcor Space Facility, Inc., 25 Cal. App.4th 809, 817 (1994).

issues not subject to arbitration which are the subject of pending action between the parties.[63]

Section 1281.4 addresses motions to stay litigation.[64] If an order compelling arbitration has been issued, a court shall, upon motion, stay any pending court action until arbitration is had in accordance with the arbitration agreement. If an order compelling arbitration has been sought but not yet issued, a court shall, upon motion, stay pending court action until the application for an order compelling arbitration has been determined.

Finally, Section 1281.2 has special provisions with respect to compelling arbitration and third party litigation.[65] If a court determines that a party to an arbitration agreement is also a party to pending litigation with a third party, it (1) may refuse to order arbitration and order intervention or joinder of all parties in a single action for all or certain issues; (2) may order arbitration among the parties who agreed to arbitrate and stay pending court action; (3) may stay arbitration among the parties who agreed to arbitrate pending the outcome of court action.[66] This permits courts to refuse enforcement of an otherwise valid arbitration agreement in order to join all relevant parties in litigation.[67] Under 1281.2, determinations as to the existence of an arbitration agreement, and waiver thereof, are made by the court without a jury trial.[68] Waiver of an arbitration agreement may be express or implied, but the presumption favoring arbitration places a heavy burden on a party arguing such a right has been waived.[69]

The California statute is unusual in the latitude it grants the court to compel arbitration, and to stay both judicial proceedings and pending arbitration hearings. Although the majority of states allow the court to stay arbitration and judicial proceedings, those states require that the proceedings be severed and the stay granted as to a particular issue.[70] Under Section 1281, there is no severabil-

63. CAL. CIV. PROC. CODE § 1281.2(c).

64. *Id.* § 1281.4.

65. *Id.* § 1281.2(c)(1)-(3).

66. *Id.*

67. Mercury Ins. Group. v. Sup. Ct., 19 Cal. 4th 332, 339-40 (1998); Prudential Prop. & Cas. Ins. Co. v. Sup. Ct., 36 Cal. App. 4th 275, 279 (1995).

68. Rosenthal v. Great Western Fin. Sec. Corp., 14 Cal. 4th 394, 410 (1996); Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 982 (1997).

69. Thorup v. Dean Witter Reynolds, Inc. 180 Cal. App. 3d 228, 234 (1986); Davis v. Blue Cross of N. Cal., 25 Cal. 3d 418, 425 (1979); Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (1986).

70. For example, in Florida the court has the ability to stay or compel an arbitration proceeding. If, however the issue is severable, then the arbitration proceeding is stayed as to that issue only. There is no provision for the courts ability to stay an existing judicial proceeding. In Massachusetts, New York, Pennsylvania, Texas and the District of Columbia, a court may compel or stay arbitration as well a stay a court proceeding. If the issue is severable then the proceeding is stayed as to that issue only.

ity requirement, thus allowing the court to compel or stay proceedings as to a particular issue or to all issues.

Section 7 of the RUAA is notably different from Sections 1281.2 and 1281.4. There are several distinctions worthy of mention. First, Section 1281.2 provides enumerated grounds for refusing to order arbitration.[71] Under the RUAA, the only express limitation on an order to compel arbitration is a summary finding that there is an "enforceable agreement to arbitrate."[72] This language may limit orders compelling arbitration in any instance in which the agreement cannot be enforced, including 1281.2's reference to waiver and revocation. Unlike 1281.2, Section 7 provides no authority to refuse to order arbitration because of pending third party litigation.[73]

Second, Section 7 expressly excludes certain defenses to orders compelling arbitration. These include contentions that the claim subject to arbitration lacks merit or the grounds for the claim have not been established.[74] This is similar, but broader than Section 1281.2, which provides that an order to arbitrate cannot be refused because the "petitioner's contentions lack substantive merit."[75]

Third, Section 7 makes no reference to third party litigation. While 1281.2 grants the court significant discretion in how to proceed in the event of third party litigation, Section 7 ignores third party litigation altogether.[76] Under the RUAA, the fact that a party is involved in litigation with a third party has no bearing on the obligation of the court to order arbitration pursuant to an enforce-

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71. CAL. CIV. PROC. CODE § 1281.2(a)-(c).

72. RUAA § 7(a)(2).

73. Compare RUAA § 7(a)(2) with CAL. CIV. PROC. CODE § 1281.2(a)-(c). The RUAA provides that "on [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement...if the refusing party opposes the [motion], the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." On the other hand, Section 1281.2 states that a court is not required to enforce an arbitration agreement when the right to compel arbitration has been waived, the arbitration agreement should be revoked, or a party to the arbitration is also a party to a pending court action.

74. RUAA § 7(d) "The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established."

75. CAL. CIV. PROC. CODE § 1281.2.

76. Under Section 1281.2, if a party to an arbitration is also involved in third-party litigation, the court "(1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

able arbitration agreement. This is consistent with the Federal Arbitration Act.[77] The distinction suggests that 1281.2 reflects greater concern for efficient process, while Section 7 reflects greater concern for fidelity to the parties' binding obligations to arbitrate. Adoption of Section 7 will bring California law into line with federal law.[78]

Fourth, Section 7 provides significant guidance regarding the process for issuing orders to arbitrate. If the motion to compel arbitration is opposed, the court shall proceed "summarily" to decide the issue and order arbitration unless it finds there is no enforceable agreement to arbitrate.[79] The comment to section 7 of the RUAA states that the term "summarily" has been defined to mean that a trial court should act expeditiously and without a jury trial.[80] This is consistent with California law. In addition, if the refusing party does not appear, or does not oppose the motion, the court shall compel arbitration with any summary determination regarding the existence of an enforceable arbitration agreement.[81] Finally, Section 7 limits the venue for seeking a motion to compel arbitration to the situs of pending court litigation, or in the absence thereof, pursuant to the venue provisions of Section 27.[82] Section 1281.4 has no such venue limitations on motions to compel arbitration where court litigation is pending.[83]

Fifth, section 1281.4 grants greater discretion to the court in issuing orders to stay pending litigation. That section authorizes a court to stay litigation where an order compelling arbitration has been issued "until an arbitration has been had in accordance with the order to arbitrate or until such earlier time as the court specifies."[84] By contrast, Section 7 of the RUAA requires a stay "on just terms" without an express temporal limitation.[85] Section 1281.4 and Section 7 similarly obligate a court to stay litigation where an order compelling arbitra-

77. Similarly, the Federal Arbitration Act does not mention third-party litigation when addressing a court's ability to compel arbitration. FAA § 4. "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

78. Although the California courts have yet to officially recognize the preemption conflict that exists between Section 1281.2 and the FAA, the court has ruled in an unpublished opinion that this provision of the California arbitration statute has been preempted. Film Fins., Inc. v. Sup. Ct., 2002 WL 228205 (Cal. Ct. App. 2d Dist.).

79. RUAA § 7(a)(2).

80. *Id.*, cmt.

81. RUAA § 7(a)(1).

82. *Id.* at § 7(e).

83. CAL. CIV. PROC. CODE § 1281.4.

84. *Id.*

85. RUAA § 7(f) ("If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.").

tion has been issued, or where an application for an order to compel arbitration is pending.[86]

Regarding provisional remedies, Section 1281.8 provides a detailed mechanism for provisional measures.[87] This section specifies (1) the four types of remedies available for provisional relief;[88] (2) the place, manner and form for requesting provisional relief;[89] (3) limitations on defending against provisional relief based on an allegation that the controversy is not subject to arbitration;[90] and (4) limitations on effect of provisional measures to operate as a waiver.[91] California courts have applied 1281.8 to grant provisional relief for disputes that will ultimately be resolved by arbitration.[92]

Section 8 of the RUAA on provisional remedies applies a broader scope than 1281.8 for court orders of provisional remedies prior to appointment of an arbitrator. Unlike 1281.8(a), Section 8 does not specifically enumerate the types of remedies available for provisional relief, stating that any remedy is available if it "protects the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action."[93] The absence of such enumerated grounds for provisional relief will afford courts greater freedom to ensure the effectiveness of the arbitral process.

The RUAA also clarifies the basis for provisional relief in court following the appointment of an arbitrator. Section 1281.8 makes no distinction between

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86. Compare CAL. CIV. PROC CODE § 1281.4 ("If a court of competent jurisdiction . . . has ordered arbitration of a controversy . . . the court . . . shall, upon motion of a party . . . stay the action or proceeding . . .. If an application has been made to a court of competent jurisdiction . . .for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court . . . the court in which such action or proceeding is pending shall, upon motion of a party...stay the action or proceeding . . . .") with RUAA § 7(f) ("If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.") and RUAA § 7(g) ("If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.").

87. California is in a minority of states that allows for provisional remedies, including Connecticut, Georgia, New Jersey, New York, and Texas.

88. CAL. CIV. PROC. CODE § 1281.8(a)(1)-(4).

89. *Id.* at § 1281.8(b).

90. *Id.* at § 1281.8(c).

91. *Id.* at § 1281.8 (d).

92. *See* Davenport v. Blue Cross of CA, 641 Cal. App. 4th (1994); *see also* Titan/Value Equities Group, Inc. v. Sup. Ct., 29 Cal. App. 4th 482 (1994).

93. RUAA § 8(a).

seeking provisional relief before or after appointment of an arbitrator.[94] Provided the arbitration award may be rendered ineffectual without provisional relief, a court may grant provisional relief before or after commencement of an arbitration proceeding. By contrast, Section 8 authorizes a court to act prior to appointment of an arbitrator if such an order would protect the effectiveness of the arbitration proceeding. However, following the appointment of an arbitrator, a court may only act if "the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy."[95] The urgency requirement protects the integrity of the arbitral process from unnecessary judicial action after the arbitrator's have been appointed.

Unlike Section 1281.8, the RUAA also grants statutory authority for an arbitrator to provide provisional remedies. By authorizing the arbitrator to issue such provisional remedies "to the same extent and under the same conditions as if the controversy were the subject of a civil action," the RUAA has significantly enhanced the authority of the arbitrator to protect the effectiveness of the arbitral process. This enhanced authority granted to arbitrators is complementary and necessitates the diminished authority granted to the court to order provisional remedies following appointment of an arbitrator.

The RUAA goes further than Section 1281.8(d) in protecting against waiver. Section 1281.8(d) limits the possibility that a provisional remedy application will operate as a waiver provided the application for provisional relief is accompanied by a motion to stay all other court proceedings.[96] This suggests that such an application may operate as a waiver in the absence of such an accompanying request for a stay. The RUAA has no such limitation, stating that a party does not waive a right of arbitration by applying for provisional relief. The RUAA anticipates that an application for provisional relief may be appropriate without recourse to an application to compel or stay arbitration.

The RUAA also differs from Section 1281.8 in that the RUAA does not include any reference to defenses to an application for provisional relief. Section 1281.8 states that a claim that the controversy is not subject to arbitration shall not be grounds for denial of any provisional remedy.[97] However, the failure in Section 8 to include such a provision does not imply that such a defense should be effective to deny provisional relief. In fact, the RUAA does address such a defense that there is no agreement to arbitrate in Section 7. Section 7(a) and (b)

94. CAL. CIV. PROC. CODE § 1281.8(b) ("A party, to an arbitration proceeding agreement, may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy...").

95. RUAA § 8(b)(2).

96. CAL. CIV. PROC. CODE § 1281.8(d)

97. CAL. CIV. PROC. CODE § 1281.8(c) ("A claim by the party opposing issuance of a provisional remedy, that the controversy is not subject to arbitration shall not be grounds for denial of any provisional remedy.").

requires a court, upon a motion of a party alleging there is — or in the case of 7(b) that there is not — an agreement to arbitrate, to "proceed summarily to decide the issue."[98] Under Section 7(c), if the court finds that there is no enforceable agreement, it may not order the parties to arbitrate under Section 7(a) or (b).[99] The requirement for summary decision in Section 7(a) and (b) suggests that the absence of such a procedure in Section 8 renders ineffective such a defense for purposes of securing provisional relief, at least until such time as a court renders a Section 7 decision on the validity of an arbitration agreement.

The California statute has no provision for the initiation of arbitration. This is consistent with the UAA and most other state arbitration laws.[100] However, California common law recognizes that due process requires that a party against whom an award is sought be named in the demand and served with a copy of the demand.[101] The requirements for the initiation of arbitration generally have been addressed by contract through the incorporation of arbitration rules.[102]

Section 9 of the RUAA addresses three key aspects concerning the initiation of arbitration: the means of notice[103], the content of the notice[104], and the waiver of objection to notice.[105] Section 9 specifies strict rules for providing notice in the absence of agreement. However, the right to specify the rules on the initiation of arbitration are protected by virtue of Section 9(a), which provide that notice shall be given to the other parties to the agreement "in the agreed manner."[106] In addition, Section 4(b)(2) provides that "[b]efore a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not . . . agree to unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding."[107] This provision will allow for notice of arbitra-

98. RUAA § 7 (a) ("On [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement...if the refusing party opposes the [motion], the court shall proceed summarily to decide the issue..."); *Id.* at § 7(b) ("On [motion] of a person alleging that an arbitration proceeding has been initiatied or threatended but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue.").

99. *Id.* at § 7(c).

100. *See* RUAA § 9, cmt. 1. This section, which provides for the initiation of arbitration, was an addition to the UAA. It was based primarily on the Florida and Indiana arbitration statutes. FLA. STAT. ANN. § 648.08 (1990); IND. CODE. § 34-57-2-2 (1998).

101. Ikerd v. Warren T. Merrill & Sons, 9 Cal. App. 4th 1833, 1842 (1992).

102. *See* AAA COMMERCIAL ARBITRATION RULES, Rule R-4(a); R-41.

103. RUAA § 9(a).

104. *Id.*

105. *Id.* at § 9(b).

106. *Id.* at § 9(a).

107. RUAA § 4(b); RUAA § 9, cmt. 2.

tion by contractual agreement using informal means, including regular mail and electronic mail.

Significantly, Section 9 requires notice to be given to all parties to the agreement to arbitrate, not simply all parties to the dispute.[108] This approach gives notice to all parties interested in the arbitration who may have an interest in initiating arbitration or consolidation, whether or not they are claimants or defendants in the particular dispute.[109] The content of the notice of arbitration is limited to the nature of the controversy and the remedy sought.[110] The RUAA reflects the minimum statutory requirements necessary to provide the defendant notice of the arbitration.

Section 1281.3 addresses the consolidation of arbitration proceedings.[111] The essential requirements for consolidation are (1) separate arbitration agreements with one or more common parties; (2) the dispute arises from the same transaction; and (3) there is a common issue of law or fact that might create conflicting rulings.[112] California is at the forefront in providing a statutory regime for consolidation.[113]

Section 10 is an adaptation of the consolidation provisions in the California and Georgia statutes.[114] Section 10(a)(4) adds an additional threshold requirement that "prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of ... parties opposing consolidation."[115] The purpose of this additional requirement is to recognize that parties opposing consolidation have the right to prove that consolidation would undermine their stated expectations, especially regarding delay or arbitrator selection procedures.[116] This change appears consistent with California common law.[117] It is therefore recommended that 1281.3 be repealed and replaced with Section 10.

Section 1281.9 imposes strict requirements on disclosure of "all matters that could cause a person ... to reasonably entertain a doubt that the proposed neutral

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108. RUAA § 9(a).

109. *Id.* at § 9, cmt. 4.

110. *Id.* at § 9, cmt. 5. "Section 9(a) also includes a content requirement that the initiating party inf the other parties of the 'nature of the controversy and the remedy sought." This requirement is similar to the language found in the Florida and Indiana arbitration statutes, as well as the AAA and NYSE rules.

111. CAL. CIV. PROC. CODE § 1281.3.

112. *Id.*

113. Currently only Massachusetts, New Jersey, California and Georgia include provisions on consolidation and severance of proceedings. California is unique, however, in that it includes rules on determining an arbitrator after consolidation. *See id.*

114. RUAA, § 10 cmt. 3.

115. RUAA, § 10(a)(1)(4).

116. RUAA, § 10 cmt. 3.

117. Blue Cross of Ca. v. Sup. Ct., 67 Cal. App. 4th 42, 53-55 (Cal. Ct. App. 2d Dist. 1998).

arbitrator would be able to be impartial..."[118] California has among the most stringent disclosure requirements of any state. In particular, California is considered more stringent because the level and detail of disclosure required of arbitrators is unusual in scope. For example, Section 12(a) of the RUAA requires disclosure of "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator," including financial or personal interests and existing or past relationships with any party.[119] By contrast, Section 1281.9 enumerates in detail six types of information that must be disclosed, some of which are extremely tenuous to the matter in dispute.[120] A good summary of the disclosure rules is set forth in *Michael v. Aetna Life & Cas. Ins. Co.*[121]

There are distinct advantages and disadvantages to California's stringent approach. The integrity of the process is enhanced by having strict standards and reducing instances of improper conduct between the neutral arbitrator and a party. On the other hand, the stringent requirements are beyond the scope of most other arbitral forums, suggesting a hostility toward arbitration and diminishing California as an attractive venue for arbitration.[122] In addition, to the extent California law conflicts with federal law, there will be significant preemption issues.[123] Significant unintended consequences have developed as a result of these disclosure requirements.[124] It is recommended that California revisit the disclosure requirements and modify them to address some of the perceived excesses created by the California regime.

California law also includes several provisions that address unique problems with consumer arbitration, construction arbitration, and private arbitration companies.[125] These provisions all reflect strong legislative commitment to curb abuses in the consumer and residential construction context.[126] Section 1281.92

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118. CAL. CIV. PROC. CODE § 1281.9(a).

119. RUAA § 12.

120. CAL. CIV. PROC. CODE § 1281.9(a)(1)-(6); *see* Jay Folberg, *Arbitration Ethics – Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 349-57 (2003).

121. 106 Cal. Rptr. 2d 240, 249-51.

122. *See, e.g.*, NASD Dispute Resolution, Inc. v. Judicial Council of Ca., 232 F. Supp. 2d 1055, 1058 (N.D. Cal. 2002).

123. *See generally* Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

124. Folberg, *supra* note 120, at 352-53.

125. CAL. CIV. PROC. CODE §§ 1281.92, 1281.95, 1281.96 (2003).

126. "As with the other bills focused on private judging companies, this bill is designed to deter actual or perceived misconduct by private judging companies, and promote independence and neutrality in consumer arbitrations." ASSEMBLY FLOOR ANALYSIS ON A.B. 2574, 2001-2002 Session (August 29, 2002).

prohibits private arbitration companies from administering consumer arbitration services if the company has a financial interest in any party.[127] Section 1281.95 addresses disclosure requirements in residential construction arbitration.[128] Section 1281.96 imposes additional disclosure and disqualification requirements.[129] All of these provisions reflect legislative concern about matters of special import, and it is recommended that these provisions be retained without modification.

Recommendation: Section 4 of the RUAA should be adopted without modification. Section 1281 should be repealed and Section 6 should be adopted without modification. It is recommended that Sections 1281.2 and 1281.4 be repealed and that RUAA Section 7 be adopted without modification. Section 1281.8 should be repealed and Section 8 should be adopted without modification. Section 9 of the RUAA should be adopted. Section 1281.3 should be repealed and Section 10 of the RUAA should be adopted. Section 1281.8 should be revised and modified in light of Section 12 of the RUAA as well as the current experience in applying the disclosure requirements. Section 1281.92 through 1281.96 should be retained without modification.

IV. CHAPTER 3 – CONDUCT OF ARBITRATION PROCEEDINGS

Section 1282 provides detailed rules for the exercise of powers and duties of arbitrators. Section 1282 should be read in conjunction with Section 1281.6.

Section 1282.2 addresses arbitration hearings and, unless the arbitration agreement provides otherwise, imposes six essential obligations. First, it provides that the neutral arbitrator shall schedule a hearing and provide notice to the parties of the hearing.[130] In the event the amount in dispute exceeds $50,000, parties are entitled in advance of the hearing to witness and document lists.[131] Second, it empowers the neutral arbitrator to adjourn or postpone the hearing.[132] Third, it empowers the neutral arbitrator to preside at the hearing.[133] Fourth, it entitles parties to present evidence and cross-examine witnesses.[134] Fifth, it authorizes the neutral arbitrator to resolve a dispute in the absence of a party or an arbitrator.[135] Sixth, it obligates a neutral arbitrator to disclose information that forms the basis of the award and was not obtained at the hearing.[136]

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127. CAL. CIV. PROC. CODE § 1281.92.
128. *Id.* at § 1281.95.
129. *Id.* at § 1281.96.
130. CAL. CIV. PROC. CODE § 1282.2(a)(1).
131. *Id.* at § 1282.2(a)(2)(A).
132. *Id.* at § 1282.2(a)(2)(F)(b).
133. *Id.* at § 1282.2(a)(2)(F)(c).
134. *Id.* at § 1282.2(a)(2)(F)(d).
135. *Id.* at § 1282.2(a)(2)(F)(e).
136. *Id.* at 1282.2(a)(2)(F)(g).

The RUAA is notably different from Section 1282.2. Most importantly, it provides the arbitrator with general discretion to "conduct an arbitration in such manner as the arbitrator considers appropriate."[137] This reflects a fundamentally different policy choice from Section 1282.2, which imposes strict requirements on the arbitrator relating to the arbitration process. The RUAA, like the UAA and most state statutes, is intended to give an arbitrator wide latitude in conducting an arbitration proceeding.

Under Section 15(b) of the RUAA, an arbitrator may decide to resolve a dispute based on "summary disposition" without holding a hearing.[138] Section 1282.2 does not require a formal hearing, with courts holding that this provision should not be read "as requiring that an arbitrator always resolve disputes through the oral presentation of evidence or the taking of live testimony."[139] Thus, Section 1282.2 may permit summary dispositions without a hearing.

Section 15 of the RUAA and Section 1282.2 vary in important respects. For example, if the arbitrator decides to hold a hearing, under Section 15(c) of the RUAA, notice must be provided within five days.[140] Section 15 imposes no obligation for advance notification of witness and document lists. Unlike Section 1282.2(f), Section 15(e) does not permit truncated arbitral tribunals, requiring any arbitrator who is unable to act to be replaced.[141] In this respect, California is out of line with the other states, which generally allow for truncated arbitral tribunals to decide a case.

There are, however, areas in which the RUAA and Section 1282.2 parallel one another. Most significantly, both Section 1282.2 and Section 15 are default

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137. RUAA § 15(a).

138. RUAA § 15(b)(1)-(2). An arbitrator may rule on summary disposition without a hearing if all the parties agree, or if there is proper notice given to the opposing party and that party has an opportunity to respond.

139. Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 656 (Cal. App. Ct. 2d 1995); *see also* Reed v. Mutual Service Corp., 131 Cal. Rptr.2d 524, 530 (Cal. App. Ct. 2d 2003) ("implicit in the arbitrators' express power to deem a claim eligible for arbitration is the corresponding authority to make that determination in advance of and without the necessity for a full hearing on the merits."); Lewis v. Superior Court, 82 Cal. Rptr. 2d 85, 97 (1999) ("California courts have concluded that use of the terms 'heard' and 'hearing' does not require an opportunity for an oral presentation, unless the context or other language indicates a contrary intent.").

140. RUAA § 15(c) ("If an arbitrator orders a hearing, the arbitrator...shall...give notice of the hearing not less than five days before the hearing begins.").

141. CAL. CIV. PROC. CODE § 1282.2(f) ("If an arbitrator...for any reason fails to participate in the arbitration, the arbitration shall continue but only the remaining neutral arbitrator[s] may make the award."). *Compare with* RUAA § 15(e) ("If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed...").

procedures and are subject to modification by agreement of the parties.[142] Regarding specific elements of the arbitration proceeding, Section 1282.2(b) and (e) parallel Section 15(c), while Section 1282.2(d) parallels Section 15(d).[143] In these provisions, there are no significant differences between the RUAA and Section 1282.2.

The statutory requirements pertaining to the conduct of hearings in Section 1282.2 are unusually detailed and find no corollary in other states. [144] In most states, parties are sufficiently protected from arbitrator misconduct by virtue of the *vacatur* rules, which authorize an award to be vacated if a party's rights were substantially prejudiced as a result of how the arbitration was conducted such that the proceeding was fundamentally unfair.[145]

In sum, with regard to the conduct of the arbitration hearing, it is recommended that Section 1282.2 should be repealed and replaced with Section 15 of the RUAA. The California provision expresses a fundamental reluctance to grant the arbitrators leeway in how an arbitration proceeding is conducted, an approach that is antithetical to the basic pro-arbitration policies that otherwise adumbrates arbitration law in California. Moreover, California courts have interpreted Section 1282.2 as to substantially eliminate the requirement of a formal hearing, thus limiting the utility of this provision.

As to representation by counsel, Section 1282.4 is one of the most important provisions in California arbitration law, limiting the ability of out-of-state attorneys to represent parties involved in arbitration in California. The provision has its origins in the California Supreme Court's decision in *Birbrower v. Superior Court*[146]. In that case, the court ruled that a lawyer engaged in the unauthorized practice of law in California when he, *inter alia*, "traveled to California to initiate arbitration proceedings."[147] The court declined to create an exception for work incidental to private arbitration or other alternative dispute resolution pro-

142. Section 1282.2 ("Unless the arbitration agreement otherwise provides..."); RUAA § 15, cmt. 1 ("Section 15 [of the RUAA] is a default provision and Section 4(a) is subject to agreement of the parties).

143. Section 1282.2 (b) and (e) and RUAA § 15(c) authorize an arbitrator to postpone or adjourn the proceeding, and to hear evidence and decide the controversy. Section 1282.2(d) and RUAA § 15(d) authorize the parties to present evidence and cross-examine witnesses.

144. California is among the few states that has legislation explicitly governing the conduct of an arbitration hearing. The majority of states, including Florida, Massachusetts, New York, Texas and Virginia, give great latitude to arbitrators. The only limits generally required in those states regard proper notice, adjournment of the hearing, and the right to cross-examine.

145. *See, e.g.*, Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (arbitration panel's refusal to continue hearing to allow witness to testify amounts to fundamental unfairness and misconduct sufficient to vacate the award); Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580, 592-93 (7th Cir. 2001) (citing cases applying fundamental fairness rule).

146. Birbrower v. Superior Court, 70 Cal. Rptr.2d 304, (1998).

147. *Id.* at 310-12.

ceedings. The shock effects of *Birbrower* were "acute and widespread."[148] The legislature responded to *Birbrower* by adopting the current 1282.4 provisions, which adopt a *pro hac vice* approach for out-of state attorney arbitration counsel.[149] The current version of Section 1282.4 expires on January 1, 2006, at which time the statute provides simply that "a party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title." Presumably after this date, the *Birbrower* rule will be in effect.[150]

While the current 1282.4 provides temporary relief to the problems raised by *Birbrower*, it also will have a chilling effect on parties considering California as the *situs* for arbitration. The sunset clause in 1282.4 will restrict their choice of counsel in any dispute arising from the contract after January 1, 2006. Rather than continue renewing a sunset provision, it is recommended that the current version of 1282.4 should be retained indefinitely. Maintaining the current rule of 1282.4 would be among the most significant steps the legislature could take to foster the perception that California is a friendly forum for arbitration. At a minimum, California law regarding international arbitration should be liberalized to permit lawyers not licensed in California to represent parties in arbitrations in California.[151]

The RUAA does not address of out-of-state representation. Nor does Section 16 of the RUAA directly address *Birbrower*.[152] The comments to Section 16 confirm that the RUAA was drafted without reference to this issue, stating that "[t]his section is not intended to preclude, where authorized by law, representation in an arbitration proceeding by individuals who are not licensed to practice either generally or in the jurisdiction in which the arbitration is held."[153] Because the RUAA does not address the fundamental problem posed by *Birbrower*, it is not recommended that Section 16 be followed. It is recommended

148. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 819 (2003).

149. CAL CIV. PROC. CODE § 1282.4(b) ("an attorney admitted to the bar of any other state may represent parties in the course of...an arbitration proceeding in this state, provided that the attorney...timely files the [required] certificate..."). This provision is effective through December 31, 2005.

150. CAL. CIV. PROC. CODE § 1282.4(a). This provision is effective January 1, 2006.

151. *Compare* Section 1297.351 providing with respect to conciliation that "a person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California."

152. RUAA § 16 simply states that "[a] party to an arbitration proceeding may be represented by a lawyer."

153. RUAA, § 16, cmt. 2.

that the current version of Section 1282.4 should be retained, with the sunset provision in Section 1282.4(j) repealed.

California has special provisions for discovery in arbitrations involving personal injury and death claims due to negligence or wrongful acts. Under Section 1283.05 and Section 1283.1, mandatory rules guarantee parties the right to take depositions and obtain discovery in the same manner as litigation in California courts.[154] These provisions, while imposing a mandatory rule of discovery, evince clear legislative intent to secure discovery rights for parties in personal injury tort claims. It is not, however, without problems. First, California courts have limited the impact of these provisions, finding that they grant arbitrators the authority to order certain types of discovery, but are not explicitly and unambiguously binding on arbitrators.[155] In addition, what constitutes an "injury" is unclear;[156] a qualifier such as "personal injury" or "bodily injury" would assist in clarifying the legislative intent. If the term "injury" were broadly construed to include business torts, such as fraud claims, this provision could dramatically impact commercial arbitration. Failure to clarify the matter could result in a mandatory rule that inadvertently undermines party autonomy in commercial arbitration. Presumably these provisions were included to address negligent and intentional torts. If so, it should be so limited. Section 1283.05 and 1283.1 should be retained with the clarification of what constitutes an "injury" within the meaning of Section 1283.1.

The most important substantive issue pertaining to discovery concerns requests for documents and depositions. Section 1282.6 authorizes arbitrators to issue subpoenas requiring attendance of witnesses and subpoenas *duces tecum* for the production of documents.[157] Section 1282.8 likewise authorizes an arbitrator to administer oaths,[158] and Section 1283 addresses the authority of arbitrators to take depositions.[159] These provisions are modeled on Section 7 of the UAA.[160] Under Section 1282.6, third parties may be issued subpoenas, but, with the exception of Section 1283.05 discussed above, arbitrators do not have the power to enforce subpoenas for discovery purposes in the same manner as a judge does in a civil proceeding.[161] Under Section 1282.6(c), subpoenas shall be

154. CAL. CIV. PROC. CODE § 1283.05 (After the appointment of the arbitrator...the parties to the arbitration shall have...all of the same rights, remedies, and procedures...as if the subject matter of the arbitration were pending before a superior court of this state...).

155. Alexander v. Blue Cross of Cal., 106 Cal. Rptr. 2d 431, 436, 437, n.4 (Cal. App. Ct. 1 Dist. 2001).

156. Armandariz v. Found. Health Psychcare Servs, Inc., 99 Cal. 2d 745, 761 (2000).

157. CAL. CIV. PROC. CODE § 1282.6 (2003).

158. *Id.* at § 1282.8.

159. *Id.* at § 1283.

160. UAA § 7 (1956).

161. CAL. CIV. PROC. CODE § 1282.6(a) ("A subpoena...at an arbitration proceeding or a deposition under Section 1283, and if Section 1283.05 is applicable...shall be issued as provided in this section.").

served and enforced utilizing the procedures set forth in Section 1985 *et seq.*[162] Consequently, any such subpoena must be enforced by a court.

California is not alone in its procedures for administering subpoenas and oaths. Almost every state allows arbitrators to issue subpoenas, including Florida, Georgia, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas and Virginia.[163] These same states generally allow arbitrators to administer oaths as well. There is, however, a difference in how the states enforce subpoenas issued in arbitration. Mississippi is the only state that requires subpoenas to be issued, and therefore enforced, by the court. A handful of states, including New Jersey, North Carolina and Pennsylvania, allow for arbitrators to enforce subpoenas as if they were ordered by a court. A larger minority of states, however, requires that subpoenas be enforced in the same manner as subpoenas issued in civil actions – much like the current California rule. These states include Minnesota, South Carolina, Vermont, Virginia and the District of Columbia.

Section 17 of the RUAA does not depart in significant ways from Section 7 of the UAA. Sections 17(a) and (b) grant the arbitrator the inherent power to provide a fair hearing, and these provisions are not waivable.[164] Sections 17(c) and (d) likewise grants the arbitrator power to permit discovery as the arbitrator deems appropriate, although these provisions may be waived, permitting the precise contours of discovery to be stipulated by contract.[165] Section 17(c) further makes clear that discovery of third parties is permitted.[166] Among the advancements reflected in Section 17, is the authority to issue protective orders under Section 17(d)[167] and enhanced authority to enforce out-of-state subpoenas and orders under Section 17(g).[168]

Regarding arbitrator and administrative fees, Section 1284.2 provides that parties shall share fees and expenses of the arbitration, unless the parties other-

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162. *Id.* at § 1282.6(c) ("Subpoenas shall be served and enforced in accordance with [Section 1985] of this code.").

163. See, e.g., 34 FLA. COMM. REL. § 682.08; GA CODE § 9-9-9; MD. CODE § 3-217; MASS. GEN. LAWS 251 § 7; NEW JERSEY S.A. 2A:23A-24; N.Y. MCKINNEY'S CPLR § 7505; 42 PA. C.S.A.§ 7309; VERNON'S CIVIL PRACTICE & REM. CODE § 171.051; VA CODE ANN. § 8.01-581.05.

164. RUAA § 17, cmt. 2 ("Section 17(a) and (b) are not waivable under Section 4(b) because they go to the inherent power of an arbitrator to provide a fair hearing...").

165. *Id.* at cmt. 3 ("Because Section 17(c) is waivable under Section 4(a), the provision is intended to encourage parties to negotiate their own discovery procedures.").

166. RUAA § 17(c) ("An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances...").

167. *Id.* at § 17(d).

168. *Id.* at § 17(g).

wise agree.[169] The majority of states, including Florida, Massachusetts, New York, Pennsylvania, Texas and Virginia, require that administrative fees are issued as part of the final award.[170] Although these states do not have provisions for reimbursement of attorney's fees, the arbitrator may compel the losing party to pay administrative costs as part of the award.[171] The approach of these states is more consistent with Section 21(d) of the RUAA and Section 10 of the UAA.[172]

Section 21(d) of the RUAA departs from the California standard, leaving to the arbitrator the discretion to determine who should pay arbitrator and administrative fees and expenses.[173] Regarding attorney fees and expenses, Section 1284.2 is consistent with Section 10 of UAA in prohibiting the arbitrator from awarding attorney's fees, unless the agreement otherwise provides.[174] Section 21(b) departs from Section 1284.2 and authorizes the arbitrator to award reasonable attorneys' fees and other reasonable expenses.[175]

Section 21 also clarifies that the arbitrator may award punitive damages, but that any such award must specify the legal and factual basis for the award.[176] California courts have confirmed the authority of arbitrators to award punitive damages,[177] despite no clear statutory authorization for such damages. Section 21(a) and (e) provide a useful statutory limitation on this authority, opening awards to challenge if punitive damages are assessed without an articulated legal or factual basis.[178] Nonetheless, the codification of the arbitrator's authority to award punitive damages has led to strong objections by the defense bar in other states, with the result that this provision is among the more controversial in the RUAA. These objections are unfounded given that Section 21 actually curtails the arbitrator's existing authority to issue punitive damages. Accordingly, Section 1284.2 should be repealed and replaced with Section 21 of the RUAA.

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169. CAL. CIV. PROC. CODE § 1284.2.

170. 34 FLA. COMM. REL § 682.11; MASS. GEN. LAWS 251 § 10; N.Y. MCKINNEY'S CPLR § 7513. 42 PA. C.S.A.§ 7309; VERNON'S CIVIL PRACTICE & REM. CODE § 171.055; VA CODE ANN. § 8.01-581.07.

171. *Id.*

172. RUAA § 21(d); UAA § 10.

173. RUAA § 21(d) ("An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award."). *See* UAA supra note 2, § 10, which requires that "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees...shall be paid as provided in the award."

174. Villinger/Nicholls Dev. Co. v. Meleyco, 37 Cal. Rptr. 2d 36, 40 (Cal. Ct. App. 1995); Austin v. Allstate Ins. Co., 21 Cal. Rptr. 2d 56, 57 (Cal. Ct. App. 1993).

175. RUAA § 21(b).

176. *Id.* at § 21(a) ("An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim...").

177. *See, e.g.*,Baker v. Sadick, 208 Cal. Rptr. 676, 681-82 (Cal. Ct. App. 4th1984).

178. RUAA § 21(e) ("If an arbitrator awards punitive damages or other exemplary relief...the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award...").

In 2002, California adopted a new provision on fees in consumer arbitrations.[179] The import of Section 1284.3 is to set parameters for the payment of fees and expenses by consumers, including (1) the right of indigent consumers not to pay for the costs of arbitration, (2) limitations on the payment of fees and expenses if the consumer is the non-prevailing party, and (3) petitions for the waiver of fees by a consumer.[180] These modifications reflect an enlightened development to curb some of the abuses associated with consumer arbitration.

Two issues relating to 1284.3 are of particular concern. First, Section 1284.3 does not define what constitutes a "consumer," thus leaving to the courts this difficult interpretative issue.[181] Section 1284.3(c) also stipulates that the provisions apply to "all consumer arbitration agreements subject to this article *and* to all consumer arbitration proceedings conducted in California."[182] This gives rise to preemption concerns, to the extent that California is imposing an obligation that is inconsistent with federal law, imposing special burdens on consumer arbitration that are not imposed at the federal level. However, such preemption is far from obvious. Given the understandable concerns of the legislature to protect consumers involved in arbitration, Section 1284.3 should be retained without modification.[183]

Section 18 of the RUAA includes an important new provision relating to judicial enforcement of pre-award rulings by the arbitrator.[184] There is no comparable provision in California law or most other state laws.[185] Section 18 converts such an order into an award at the request of a party, and authorizes judicial enforcement of that award in the same manner as any other award.[186] The objectives of Section 18 are to provide a statutory basis for enforcement of such orders and limit the grounds for challenge to such enforcement to those estab-

179. CAL. CIV. PROC. CODE § 1284.3.

180. *Id.*

181. *Id.*

182. *Id.* at § 1284.3(c) (emphasis added).

183. Other states have been slow to develop procedures for consumer arbitrations. Thus far, only New Mexico has adopted separate consumer arbitration guidelines in the form of a Fair Bargaining Act.

184. RUAA § 18 ("If an arbitrator makes a pre-award ruling in favor of a party...the party may request the arbitrator to incorporate the ruling into an award...").

185. At least 40 states do not have such a pre-award provision, including Florida, Georgia, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas and Virginia. However, most jurisdictions interpret the FAA provisions on interim measures much in the same way as Section 18 was intended. *See, e.g.,* Southern Seas Navigation, Ltd. of Monrovia v.Petroleos Mexicanos of Mexico City, 606 F. Supp. 692 (S.D.N.Y. 1985); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1049 (6th Cir. 1984).

186. RUAA § 18.

lished for vacation, modification, or correction.[187] Section 18 of the RUAA should be adopted without modification.

Section 1283.4 addresses the form and content of awards.[188] It is unremarkable and, with one significant exception, follows the UAA.[189] The RUAA is a modest improvement, requiring the arbitrator to make a signed or authenticated "record" of an award.[190] This is intended to permit electronic signatures and awards. Sections 1283.6 and 1283.8 are consistent with Section 19 of the RUAA.[191] Because Section 19 offers a modest improvement over Sections 1283.4 through 1283.8, those provisions should be repealed and Section 19 adopted.

As to correction of awards, Section 20 of the RUAA marks a significant improvement over Section 1284. It provides the grounds for seeking correction of an award.[192] Sections 20(a) & (d) include additional grounds for correcting an award: to request that the arbitrator to clarify the award and make a final and definite award upon a claim.[193] Any correction may be made directly by the arbitrator immediately following an award, or upon submission by the court to the arbitrator pursuant to Section 20(d).[194] In so providing, the RUAA has modified the traditional doctrine of *functus officio* that prevents an arbitrator after issuing an award from acting further.[195] By allowing an arbitrator to correct or clarify an award, this provision enhances the authority of arbitrators to fulfill their mandate, rendering the arbitral process more efficient.[196] Section 1284 should be repealed and Section 20 adopted without modification.

Recommendation: On the conduct of the arbitration hearing, Section 1282.2 should be repealed and replaced with Section 15 of the RUAA. The California provision expresses a fundamental reluctance to grant the arbitrators leeway in how an arbitration proceeding is conducted. This approach is antithetical to the basic pro-arbitration policies that otherwise adumbrates arbitration law in California. Regarding the unauthorized practice of law, the current ver-

187. RUAA § 18, cmt. 1.

188. CAL. CIV. PROC. CODE § 1283.4.

189. Compare Section 1283.4 (adding a provision stipulating that there must be a "determination of all the questions submitted to the arbitrators..."), with UAA, supra note 2, § 8.

190. RUAA § 19(a).

191. Section 1283.6 deals with the service of an award, and Section 1283.8 deals with the time for making an award. These provisions correspond with RUAA § 19(a), (b). In general, the law of California, and the laws of the several states are consistent with the RUAA.

192. Under this section, an arbitrator may correct an award for four reasons: (1) to fix miscalculations or an evident mistake; (2) the award is imperfect in a matter of form; (3) because the arbitrator has not made a final and definite award upon each claim; or (4) to clarify the award. Section 1284 allows an arbitrator to correct an award for only two of these four reasons: (1) to fix miscalculations or an evident mistake or (2) the award is imperfect in a matter of form.

193. RUAA §§ 20(a) & (d).

194. RUAA § 20(d).

195. RUAA § 20, cmt. 2.

196. RUAA § 20, cmt. 4.

sion of Section 1282.4 should be retained and the sunset provision in Section 1282.4(j) should be repealed. Section 1282.4 through 1283 should be repealed and Section 17 should be adopted. Section 1283.05 and 1283.1 should be retained with the clarification of what constitutes an "injury" within the meaning of Section 1283.1. Section 1284.2 should be repealed and replaced with Section 21. Section 1284.3 should be retained without modification. Section 18 of the RUAA should be adopted regarding judicial enforcement of pre-award rulings of an arbitrator. Section 1283.4 through 1283.8 should be repealed and Section 19 should be adopted. Section 1284 should be repealed and Section 20 should be adopted without modification.

V. CHAPTER 4 — ENFORCEMENT OF THE AWARD

A. Confirmation, Correction or Vacation of the Award

Sections 1285 through 1287.6 provide for detailed requirements relating to the confirmation, correction, or vacation of an award.[197] The essence of these provisions is that any award shall be confirmed unless there are grounds to vacate or correct the award.[198] Consequently, the core provisions are the enumerated grounds for vacation or correction of an award.[199] A judgment confirming an award has the same force and effect as any judgment in a civil action, while an unconfirmed award generally has the same status as a contract,[200] although an arbitral award may have res judicata effect depending on whether or not it is confirmed.[201]

Section 1285 provides that "[a]ny party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award."[202] Section 1286 then provides that "the court shall confirm the award as made, whether rendered in this state or another state, unless . . . it corrects the

197. CAL. CIV. PROC. CODE §§ 1285-1287.6.

198. CAL. CIV. PROC. CODE § 1286 ("[T]he court shall confirm the award...unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding.")

199. An award shall be vacated for the grounds listed in CAL. CIV. PROC. CODE § 1286.2. The court may correct an award under section 1286.8.

200. Ikerd v. Warren T. Merrill & Sons, 12 Cal. Rptr. 2d 398, 402 (Cal. Ct. App. 1992) ("As an arbitration award, once confirmed, leads to a judgment which has the same force and effect as a judgment in a civil action. . .").

201. In re Ter Bush, 273 B.R. 625, 628 (Bankr. S.D. Cal. 2002); Brinton v. Bankers Pension Servs., Inc., 90 Cal. Rptr. 2d 469, 473 (Cal. Ct. App. 1999).

202. CAL. CIV. PROC. CODE § 1285 (West 2003).

award and confirms it as corrected, vacates the award or dismisses the proceeding."[203] Courts have interpreted Section 1286 to impose a mandatory obligation on courts, once a petition has been filed, to confirm, correct or vacate a final and binding award.[204]

Sections 1285 and 1286 depart slightly from Section 11 of the UAA, followed by the majority of states. Section 11 provides that "[u]pon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award. . . ."[205]

Section 22 of the RUAA is similar to the UAA, providing that "[a]fter a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected . . . or is vacated. . . ." Section 25(a) provides that [u]pon granting an order confirming, vacating . . . , modifying, or correcting an award, the court shall enter a judgment in conformity therewith."

Sections 1285.2 through 1285.8 appear to be unique to California, stipulating the contents that must be included in any petition or response to confirm, correct, or vacate an award. Failure to respond to a petition may also deprive a party to the arbitration of "litigant status" in the confirmation proceeding, thereby preventing their participation in subsequent stages of the judicial proceeding.[206] Parties must substantially comply with these procedures and provide the court with access to the agreement, the names of the arbitrators, and the award.[207] It appears that the provisions in these sections are unnecessary and find no parallel in other state statutes. It is not recommended that these provisions be retained.

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203. *Id.* at § 1286.

204. Encino Homeowners' Ass'n, Inc. v. Truck Ins. Exch., Inc., 98 Cal. Rptr. 2d 378, 385 (Cal. Ct. App. 2000). ("Upon a petition seeking any of those results, the court *must confirm* the award, *unless* it either vacates or corrects it."). *But see* Heenan v. Sobati, 117 Cal. Rptr. 2d 532, 538-39. (Cal. Ct. App. 2002) (no obligation of court to "confirm" decision if it is not an arbitration award).

205. The states that follow the example of UAA § 11 include Delaware, Florida, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Texas, Virginia and the District of Columbia.

206. Reisman v. Shahverdian, 201 Cal.Rptr. 194, 202 (Cal. App. 2 Dist. 1984) ("[D]efendants failed to file a response to the petition, as permitted by Code of Civil Procedure, section 1285.2; more importantly, they failed to appear at ... hearing on this motion, despite receiving adequate notice of this hearing. Party litigant status can be lost by a party who fails to appear at trial despite receipt of proper notice.").

207. Puccinelli v. Nestor, 301 P.2d 921 (Cal. App. 1956); Horn v. Gurewitz, 67 Cal. Rptr. 791, 794 (Cal. App. 1968) (requirements of section 1285 met with oral agreement to arbitrate when substance of agreement was set forth was filed in pleadings). *But see* Nohre v. W.J. Gallagher & Co., 2002 WL 31424914 (2002) (unpublished decision) (a court refused to review an award where the petitioner failed to provide a copy of the arbitration agreement).

The most important provision in this chapter relates to vacation of arbitral awards in section 1286.2. Consistent with other states, judicial review of arbitral awards is limited to major procedural irregularities.[208] This enhances the finality of arbitral awards and the success of arbitration as an efficient process. The bases set forth for *vacatur* are virtually identical to the UAA and the RUAA. These include vacating awards if (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality of the neutral arbitrator; (3) corruption of any arbitrator; (4) the arbitrators exceeded their powers; and (5) substantial prejudice resulting from failure to postpone hearing, hear evidence or by other conduct.[209]

However, there are a few key differences between the 1286.2 and the RUAA. First, like the UAA, Section 23(a)(5) of the RUAA allows for the vacation of an award based on a party's assertion that there is no valid arbitration agreement.[210] Second, Section 23(a)(6) of the RUAA authorizes the court to vacate an arbitral award if one of the parties did not receive proper notice of the arbitration proceeding.[211] Finally, section 1286.2(6) of the California code includes a separate enumeration for vacation of awards based on improper arbitrator disclosures.[212]

To the extent the California grounds for *vacatur* depart from federal law, there is a significant potential that litigation will ensue over whether an award involves interstate commerce and if so, whether such ground for vacation are pre-empted by federal law. In a recent case, the North District of California held that "[a]pplication of the California standards would impose inconsistent and conflicting procedural rules upon those specifically agreed upon by the parties.

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208. Harris v. Sandro, 117 Cal. Rptr. 2d 910, 912 (Cal. Ct. App. 2002) ("Judicial review is severely limited because that result 'vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law . . .'") (citing Moncharsh v. Heily & Blase, 832 P.2d 899, 900 (Cal. 1992)). Most states authorize vacation of awards if there is evidence of (1) corruption (2) partiality (3) an arbitrator exceeding his powers (4) a refusal to hear evidence or postpone a hearing or (5) no valid arbitration agreement existed.

209. *Compare* RUAA § 23 ("Vacating Award"), *with* CAL. CIV. PROC. CODE § 1286.2 ("Grounds for vacation of award").

210. RUAA § 23(a)(5) ("[T]he court shall vacate an award made in the arbitration proceeding if...there was no agreement to arbitrate...").

211. RUAA § 23(a)(6) ("[T]he court shall vacate an award made in the arbitration proceeding if...the arbitration was conducted without proper notice of the initiation of an arbitration...").

212. CAL. CIV. PROC. CODE § 1286.2(a)(6) ("[T]he court shall vacate an award made in the arbitration proceeding if...An arbitrator making the award...failed to disclose...a ground for disqualification..."). This Section also has a significant and recent exclusion for arbitration agreements conducted under a collective bargaining agreement. *See id.* ("However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement...").

Because such a result is impermissible under § 2 of the FAA, the California standards...conflict with the FAA and the federal policy embedded therein."[213] In particular, Section 1286.2(6) provisions for *vacatur* for improper disclosure raise the specter of federal preemption.[214] This provision is unique to California, with almost all other states identifying such conduct as falling under provisions for arbitrator bias or misconduct. Indeed, California courts have interpreted failure to disclose as arbitrator misconduct under Section 1286.2(a)(3).[215] Given that failure to disclose has been interpreted as falling under other provisions of Section 1286, Section 1286.2(6) is in many respects superfluous.[216]

In addition, there are a number of word variations that are significant. Section 23(a)(4) of the RUAA on exceeding powers has no provision for correcting the award in lieu of *vacatur*.[217] Sections 23(a)(2)(A) and (C) provide for *vacatur* if there was "evident partiality by an arbitrator appointed as a neutral"[218] or "misconduct by an arbitrator prejudicing the rights of a party"[219] while Section 1286.2 provides for vacation if "[t]he rights of the party were substantially prejudiced by misconduct of a neutral arbitrator."[220] Both of these variations reflect greater concern for procedural irregularities and will result in more awards vacated under the RUAA.

There are two well-known non-statutory common law bases for vacation of arbitration awards that are not included in the RUAA. The first concerns manifest disregard of the law and the second concerns awards that violate public policy. According to extensive commentary in the RUAA,[221] neither of these

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213. Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

214. Section 1286.2 has been subject to preemption analysis by the courts. *See, e.g.*, Muao v. Grosvenor Props., 122 Cal. Rptr. 2d 131 (Cal. Ct. App. 2002) (finding that the FAA did not preempt section 1286.2's procedures for reviewing arbitral awards); Siegel v. Prudential Ins. Co. of Am., 79 Cal. Rptr. 2d 726 (Cal. Ct. App. 1998) (finding that the FAA does not preempt section 1286.2 even though the FAA and 1286.2 differ on the judicial review process for claims of manifest disregard).

215. Section 1286.2 (a)(3) states that an award shall be vacated if the "rights of the party were substantially prejudiced by the misconduct of a neutral arbitrator." In using Section 1286.2 to vacate awards, the courts have often blurred the lines between the subsections of the statute. *See* Ceriale v. AMCO Ins. Co., 55 Cal. Rptr. 2d 685, 689 (Cal. Ct. App. 1996) (vacating an award based on common law standard of arbitrator bias); Michael v. Aetna Life & Cas. Ins. Co., 106 Cal. Rptr. 2d 240 (Cal. Ct. App. 2001) (finding that the vacation of an award for "corruption, fraud and undue means" can include an arbitrator's failure to make disclosures as required by statute).

216. *See, e.g.*, Michael v. Aetna Life & Cas. Ins. Co., 106 Cal. Rptr. 2d 240, 248 (Cal. App. 2d 2001) ("where an ... arbitrator fails to disclose matters required to be disclosed by section 1281.9 and a party later discovers disclosure should have been made, that failure to disclose constitutes one form of "corruption" for purposes of section 1286.2, subdivision (b) and thus provides a ground for vacating an award.).

217. RUAA § 23(a)(4) ("[T]he court shall vacate an award...if...the arbitrator exceeded the arbitrator's powers...").

218. RUAA § 23(a)(2)(A).

219. RUAA § 23(a)(2)(C).

220. CAL. CIV. PROC. CODE § 1286.2 (2003).

221. *See* RUAA § 23, cmt. C.

common law grounds for vacation are codified in the FAA or any state law,[222] and the RUAA does not endorse such codification.[223] The RUAA drafters refused to do so because of uncertainty surrounding these doctrines and because attempts at codification likely would be preempted.[224]

California state courts have been reluctant to adopt the doctrine of manifest disregard of the law as part of California arbitration law. In *Siegel v. Prudential Insurance Co.*, the court rejected a claim that the federal common law doctrine of manifest disregard of the law should apply to a petition to vacate an arbitration award under section 1286.2, holding that that federal common law doctrine does not preempt state law and has no application to judicial review of arbitration awards in state courts.[225] Numerous cases confirm that California courts will not vacate an award on the basis of errors of fact or law, unless such mistake falls within one of the grounds set forth in 1286.2.[226]

California courts also have been reluctant to vacate arbitration awards based on the doctrine of violations of public policy. "Courts will vacate or correct an award at the behest of a party who demonstrates it is invalid insofar as it orders an illegal act.... This stems from the general principle that the judiciary will not enforce a contract so as to compel the performance of an illegal act."[227] But courts will treat such a violation as grounds for vacation because an arbitrator "exceeded their powers" within the meaning of Section 1286.2(4).[228]

One final ground for *vacatur,* that is not included in the RUAA, is worth mentioning. In the public construction context, Section 1296 provides that the parties may expressly agree in writing that the arbitrator's award shall be supported by law and substantial evidence.[229] It then provides for *vacatur* of the award if "after review of the award it determines either that the award is not

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222. *Id.* at cmt. C(1). ("The Drafting Committee also considered the advisability of adding two new subsections to Section 23(a) sanctioning vacatur of awards that result from a 'manifest disregard of the law' or for an award that violates 'public policy.' Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts.").

223. *Id.* at cmt. C(5).

224. *Id.*

225. Siegel v. Prudential Ins. Co. of Amer., 79 Cal. Rptr. 2d 726, 740 & n.7 (Cal. Ct. App. 1998) (*citing* Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co., 77 Cal. Rptr. 100 (1969)).

226. *See, e.g.,* Moncharsh v. Heily & Blase, 10 Cal. Rptr. 2d 183, 203 (1992); Roitz v. Coldwell Banker Resid.Brok. Co., 73 Cal. Rptr. 2d 85, 88 (Cal. Ct. App. 1998); Schlessinger v. Rosenfeld, Meyer & Susman, 47 Cal. Rptr. 2d 650, 659 (Cal. Ct. App. 1995).

227. Pac. Gas & Elec. Co. v. Sup. Ct., 19 Cal. Rptr. 2d 295, 318-19 (Cal. Ct. App. 1993), *rev'd on other grounds*, Advanced Micro Devices, Inc. v. Intel Corp., 36 Cal. Rptr. 2d 581, 590 (1994).

228. *Id.*

229. CAL. CIV. PROC. CODE § 1296 (2003).

supported by substantial evidence or that it is based on an error of law."[230] The drafters of the RUAA debated at length a proposal to add a provision permitting heightened judicial scrutiny as a basis for vacating an award under section 23 of the RUAA. In the end, the drafters determined that the law was in a state of flux and decided not to include a statutory sanction of expanded judicial review, leaving the parties "free to agree to contractual provisions for judicial review of challenged awards . . . until the courts finally determine the propriety of such clauses."[231] The inclusion of expanded judicial review in the context of public construction arbitration has led one court to conclude that such expanded review is excluded in all other contexts.[232] It is unclear why the California legislature would grant the right to expanded judicial review in one context but not others.

On the issue of rehearing, Section 1287 permits a rehearing if the award is vacated and such rehearing may be before the same arbitrators if it is vacated on the grounds set forth in Section 1286.2(d) or (e).[233] The approach taken by Section 23(c) of the RUAA is virtually identical. A rehearing is permitted in almost all cases in which there is vacation,[234] but a court may refer the matter back to the same arbitrator or a new arbitrator, depending on the ground for vacation.[235] Furthermore, the majority of states include provisions on rehearing. Like California, those states generally allow a rehearing before the same arbitrator unless the award was vacated for bias or corruption.

On the subject of correcting awards, the provisions of Section 1286.6 and Section 24 of the RUAA are almost identical. The only significant difference is Section 24(a)(2), which permits corrections if "the arbitrator has made an award on a claim not submitted to the arbitrator" while Section 1286.6 uses the phrase "the arbitrators exceeded their powers." The California provision permits correction of an award if the arbitrators exceeded their powers and the award may be corrected without affecting the merits of the decision. If an arbitrator's excess of power affects the merits, the award may not be corrected, but may be vacated under Section 1286.2.

Recommendations: Perhaps the California's legislature's most important decision regarding revisions to the California arbitration statute concern this section of the statute. It goes to the heart of judicial supervision of arbitration awards. Based on the foregoing discussion, it is recommended that the Califor-

230. *Id.*
231. RUAA § 23, cmt. B.
232. Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 815-17 (Cal. Ct. App. 2002).
233. Section 1287 failed to reflect the statutory renumeration of Section 1286.2 following recent amendments. Presumably, Section 1287 should read "If the award is vacated on the grounds set forth in subdivision a(4) or a(5)..."
234. Except the absence of an agreement to arbitrate under Section 23(a)(5).
235. RUAA § 23(a)(5).

nia statute be revised to establish greater consistency and uniformity with other states and the RUAA. Specifically, it is recommended that Sections 1285 through 1286 be repealed and replaced with Section 22 of the RUAA. It is further recommended that the provisions on vacation, correction, and rehearing in Sections 1286.2 through Section 1287 be repealed and replaced with Section 23 and 24. If the provisions of 1286.2 are retained, Section 23(a)(5) and Section 23(a)(6) should be added to the grounds for vacation. The provisions for contractually requested expanded review and vacation under Section 1296 should be incorporated in Section 23 and expanded beyond public construction contracts.

B. Limitations of Time

Sections 1288 through 1288.8 provides the time for service and filing of petitions and responses. The most important provision is Section 1288 which relates to the deadline for confirming the award, stipulating that it is "not later than four years after the date of service of a signed copy of the award."[236] In addition, a party seeking to vacate an award must do so within 100 days after receiving service of the award.[237]

The FAA includes a one-year provision for confirming an award[238] and a 90-day deadline for motions to vacate.[239] The RUAA considered but rejected a specific statute of limitation for confirmations, opting instead for "the general statute of limitations in a State for the filing and execution on a judgment should apply."[240] Like the FAA, the RUAA includes a 90-day provision for motions to vacate under Section 23(b).[241]

Section 1288.6 precludes a party from filing a petition to confirm, modify or correct an award if an application has been made to the arbitrators to correct the award.[242] Section 20(d) of the RUAA takes a different and more efficient approach, permitting such a filing but authorizing a court to submit the claim to the arbitrators.[243]

Recommendation: The four-year confirmation deadline in Section 1288 should be retained and included as a modified Section 22 of the RUAA. Section

236. CAL. CIV. PROC. CODE § 1288 .
237. *Id.*
238. FAA § 9, 9 U.S.C. § 9 (2003).
239. FAA § 12, 9 U.S.C. § 12 (2003).
240. RUAA, § 2, cmt. 2.
241. RUAA § 23(b).
242. CAL. CIV. PROC. CODE § 1288.6 .
243. RUAA § 20(d).

22 should be revised with the introductory clause reading, "[w]ithin four years after a party to an arbitration proceeding receives notice of an award ...." The 100-day provision of Section 1288 should be repealed in light of the previous recommendation to adopt Section 23, which incorporates a 90-day deadline. Section 1288.6 and Section 1288.8 should be repealed in light of the recommendation to adopt Section 20, which anticipates court referral to arbitrators of claims for modification or correction. The remaining provisions, Section 1288.2 and Section 1288.4 are unique to California and serve little purpose. If they are retained, they should be incorporated into Sections 22 through 24.

VI. CHAPTER 5 — GENERAL PROVISIONS RELATING TO JUDICIAL PROCEEDINGS

A. Petitions and Responses

Sections 1290 through 1291.2 were originally based on Section 16 of the UAA and provide that legal actions to a court involving arbitration will be resolved by motion and not by trial.[244] It incorporates detailed provisions on commencement, summary hearing, service and notice, timing and manner of serving response, statement of decision and setting for hearing; hearing; and preference.

Most states have adopted provisions that are based upon Section 16 of the UAA.[245] States generally recognize that legal actions involving an arbitration matter are to be resolved by motion, not by trial, and that the motions will be filed in the same manner as in a civil action.[246] This is consistent with the general view that such actions are fundamentally similar to motions for specific performance of a contract, which, at common law, were resolved by courts of equity without a jury trial.

Section 5(a) and 5(b) of the RUAA are comparable to Section 1290.2 and 1290.4, respectively.[247] However, the RUAA is far more skeletal than the California provisions and creates significantly greater ambiguities as a result.

It is noteworthy that the California Supreme Court has upheld the constitutionality of Section 1290, holding that summary procedure for decision as to

244. In addition, sections 5(a) and 5(b) of the RUAA were based on section 16 of the UAA. RUAA § 5, cmt. 1.

245. States that have adopted Section 16 include Delaware, Florida, Georgia, Massachusetts, New Jersey, Pennsylvania, Texas, Virginia, and the District of Columbia.

246. Under UAA § 16, "an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions."

247. Both Section 1290.2 and Section 5(a) of the RUAA mirror Section 16 of the UAA by stating that arbitrations should be conducted via motion and not by trials. Section 1290.4 and RUAA § 5(b) both pertain to the requirement of proper notice.

whether a valid arbitration agreement exists does not violate state constitutional rights to due process and jury trial.[248]

Recommendations: Section 5 of the RUAA should not be adopted and the language in Sections 1290 through 1291.2 should be retained without modification. The provisions of 1290 through 1291.2 should be included as a modified Section 5 of the RUAA. Section 4(b)(1), which references Section 5(a), should be modified accordingly.

B. Venue, Jurisdiction, and Costs

Sections 1292 through 1293.2 have detailed provisions as to venue, jurisdiction, and costs. The essential import of the provisions is to establish criteria for jurisdiction and venue based on the contractual agreement. Under Section 1292, prior to commencement of the arbitration, venue is proper in the county where the agreement was made or is to be performed.[249] The statute also incorporates venue rules in the absence of such a stipulation. Under Section 1292.2, following commencement of the arbitration proceeding, venue is proper where the arbitration is being or has been held".[250]

Most states follow the UAA Sections 17 and 18 and provide that jurisdiction and venue is proper in the county "in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held".[251] Section 27 of the RUAA is similar, providing for venue where the agreement to arbitrate "specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the [county] in which it was held."[252]

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248. Rosenthal v. Great Western Financial Sec. Corp., 58 Cal. Rptr. 2d 875, 885-86 (1996) (A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract. Because actions for specific performance were not recognized at common law, the California Constitution does not guarantee the parties to such a proceeding a jury trial. Moreover, the fact that in an action for specific performance of an agreement the court must determine the existence of the agreement does not itself transform the action into one at law. Under these principles, plaintiffs are not constitutionally entitled to a jury trial on whether the arbitration agreements should be specifically enforced, including the question whether they are void for fraud.)

249. CAL. CIV. PROC. CODE § 1292 (2003).

250. *Id.* at § 1292.2.

251. UAA §§ 17-18 (1956). States that have adopted language similar to the UAA include Delaware, Florida, New York, Pennsylvania and Texas. Several states, including Massachusetts and the District of Columbia, do not address venue in their arbitration provisions.

252. RUAA § 27.

It appears that the California provisions on venue depart from the RUAA in at least one important respect.[253] Section 1292 permits venue in a forum other than where the arbitration is to be held, by stipulating that an action may be commenced in "[t]he county where the agreement is to be performed or was made."[254] This invites forum shopping in confirmation proceedings in either the place of performance or the place where the contract was made. Moreover, by using the phrase "to be performed" it creates an ambiguity as to whether the statute is identifying the county where the arbitration is to be held, or where the underlying substantive performance of the contract is to be undertaken. Assuming "to be performed" refers to the latter, there is a potential inconsistency if the contract is performed in a venue other than where the arbitration hearing is to be held. The RUAA was drafted with this concern, and recognizes that forum-selection clauses can raise issues of forum-shopping and unconscionability.[255]

Specifically, the RUAA includes a provision in Section 26 that expressly grants exclusive jurisdiction in the state, if the agreement to arbitrate provides for arbitration in the state.[256] This provision prevents forum-shopping in confirmation proceedings[257] and promotes "party autonomy in the choice of the location of the arbitration."[258] This provision is substantially similar to Section 1293, which confers jurisdiction on California courts if the parties agree to arbitrate in California.[259] Unlike Section 26, however, Section 1293 does not contain exclusivity language.

Section 26 is less complete than section 1293 in one important respect. While Section 26(b) provides that an agreement to arbitrate in the State "confers exclusive jurisdiction on the court to enter judgment on an award",[260] Section 26(a) does not clearly provide that such an agreement also constitutes consent to enforce an arbitration agreement.[261] The comments suggest that this change was made to afford consumers the right to challenge an arbitration agreement in any state that has personal and subject matter jurisdiction over a corporation. But it

253. In addition, there are a number of venue provisions in the California statute – Sections 1292.4 through 1292.8 – that have no corollary in the RUAA. CAL. CIV. CODE §§ 1292.4 (Order to arbitrate), 1292.6 (Continuing Jurisdiction), 1292.8 (Motion for stay of action). These provisions, however, do not appear inconsistent with anything contained in the RUAA.

254. CAL. CIV. PROC. CODE § 1292 .

255. RUAA § 27, cmt. 2.

256. RUAA § 26.

257. *Id.* at § 26, cmt. 3.

258. *Id.*

259. CAL. CIV. PROC. CODE § 1293.

260. RUAA § 26(b) ("An agreement to arbitrate...in this State confers exclusive jurisdiction on the court...").

261. *Id.* at § 26(a) ("A court of this State having jurisdiction...may enforce an agreement to arbitrate.").

also has had the undesirable effect of omitting any reference to consent as a basis for personal jurisdiction under Section 26(a).[262]

Section 1293.2 provides that a "court shall award costs upon any judicial proceeding" as provided by Chapter 6 of title 14 (commencing with Section 1021).[263] Section 25(b) and (c) of the RUAA permits the award of attorney's fees and reasonable expenses of litigation to prevailing parties in contested judicial actions to confirm, vacate, modify or correct an award.[264] Section 1293.2, which incorporates Section 1021, does not clearly permit the award of attorney's fees to prevailing parties in contested confirmation proceedings. As noted in the comments to noted in the comments to the RUAA, granting courts the power to award attorney's fees in appropriate circumstances promotes the finality of arbitration awards and will "discourage all but the most meritorious challenges of arbitration awards."[265]

Recommendation: Section 1293.2 should be repealed and Section 25 should be adopted without modification. Section 26 of the RUAA should not be adopted and the language of section 1293 should be retained with the inclusion of the word "exclusive" prior to the word "jurisdiction." Section 1293 should be included as a modified Section 26 of the RUAA. Section 4(b)(1), which references Section 26, should not be modified. Section 27 of the RUAA should not be adopted and the language of Sections 1292 through 1292.8 should be retained, except that Section 1292 should be modified to clarify that venue prior to commencement of a proceeding should be in the country where the agreement stipulates the arbitration hearing is to be held.

C. Appeals

Sections 1294 through 1294.2 address appealable orders and the manner of taking appeal. Regarding orders that may be appealed, Section 1294 addresses only five such orders.[266] Section 1294 is based on section 19 of the UAA[267] and

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262. *Id.* at § 26, cmts. 2-3. Although the comments indicate broad jurisdictional possibilities, venue provisions in Section 27 appear to limit where a jurisdictional challenge could be made.

263. CAL. CIV. PROC. CODE § 1293.2.

264. RUAA § 25(b)-(c).

265. *Id.* at § 25, cmt. c.

266. Under Section 1294, a party may appeal from (1) an order dismissing or denying a petition to compel arbitration (2) an order dismissing a petition to confirm, correct or vacate (3) an order vacating an award unless a rehearing in arbitration is ordered (4) a judgment entered pursuant to this title (5) a special order after final judgment. CAL. CIV. PROC. CODE § 1294.

267. Under Section 19 of the UAA, "An appeal may be taken from: (1) An order denying an application to compel arbitration made under Section 2; (2) An order granting an application to stay

is consistent with the approach taken by many states.[268] The appealable orders enumerated in Section 28 of the RUAA are virtually identical in nature with Section 1294, with two exceptions:[269] (1) the RUAA includes orders granting a motion to stay arbitration; and (2) Section 1294 includes a "special order" after final judgment.[270]

More significantly, Section 1294.2 includes detailed provisions on the scope of review of orders that are appealed. This provision is quite unusual and is not reflected in the UAA, the RUAA, or other states. Nor is Section 1294.2 subject to any significant precedential authority.[271] It appears that Section 1294.2 corresponds with other provisions of the California Code of Civil Procedure, particularly Section 906, and confirms that the scope of review of appealable orders in arbitration are consistent with the scope of review for other appealable judgments and orders under 904.1.[272]

Recommendation: Section 1294 should be repealed and replaced with Section 28(a) of the RUAA. The language and enumerated list of appealable orders constitutes a slight improvement over the UAA, on which Section 1294 is based. Section 1294.2 should be included as a modified Section 28(b) of the RUAA, as it clarifies that the scope of review for orders appealed in arbitration is the same as orders appealed in other civil actions under section 904.1.

VII. TITLE 9.1 — ARBITRATION OF MEDICAL MALPRACTICE

Section 1295 (Title 9.1 of the Arbitration Code) was specifically added to the arbitration statute in 1975 "to alleviate the escalating cost of medical malpractice insurance premiums (and resulting problems of health care availability) due to the surge of medical malpractice actions and high jury awards."[273] The

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arbitration made under Section 2(b); (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 or decree entered pursuant to the provisions of this act." UAA § 19 (1956).

268. Those states include Delaware, Florida, Massachusetts, Pennsylvania, Texas, Virginia, and the District of Columbia.

269. Under RUAA § 28, an appeal may be heard from (1) an order denying the ability to arbitrate (2) granting a stay of an arbitration proceeding (3) confirming or denying an award (4) modification or correction of an award (4) vacating an award (5) or a final judgment.

270. CAL. CIV. PROC. CODE § 1294; UAA § 9 ; RUAA § 28.

271. *See, e.g.*, Merrick v. Writers Guild of America, West, Inc., 181 Cal. Rptr. 530, 534-35 (1982).

272. Section 906 limits the subject matter that is reviewable by the courts, and section 904.1 outlines the types of court judgments and orders that are reviewable. CAL. CIV. PROC. CODE §§ 904.1, 906 .

273. Rosenfield v. Sup. Ct., 191 Cal. Rptr. 611, 612-614 (Cal. Ct. App. 1983) (Section 1295 "enacted in an extraordinary session of the Legislature called by the Governor to alleviate the escalating cost of medical malpractice insurance premiums (and resulting problems of health care availability) due to the surge of medical malpractice actions and high jury awards.")

basic function of Section 1295 is to establish criteria for uniform language and conspicuous appearance of an arbitration provisions contained in medical service contracts.[274] The result of Section 1295 is to bind patients to arbitration provisions that could otherwise be challenged as adhesion contracts.[275] Since 1975, California courts have upheld arbitration agreements drafted consistent with Section 1295, generally finding that the public policy of encouraging arbitration justifies the enforcement of arbitration provisions that comply with the statute.[276] As a result, Section 1295 serves a determinative function — if the arbitration provision contained in a medical service contract complies with Section 1295, then the provision itself cannot be challenged. However, a patient's knowledge of and consent to arbitration are not assumed, and a challenge to the arbitration provision for lack of consent can made even if the provision meets the standards of Section 1295.[277]

Recommendation: Section 1295 should be retained unmodified. Section 1295 was adopted to meet a specific legislative objective to "facilitate arbitration of medical malpractice disputes."[278] There is no evidence to indicate that this provision has not furthered that legislative objective. In the absence of an apparent overriding policy that justifies amendment of this provision, section 1295 should remain unchanged.

VIII. TITLE 9.2 — PUBLIC CONSTRUCTION CONTRACT ARBITRATION

Section 1296 (Title 9.2) was added to the California arbitration statute in 1979 to provide an exemption to the default rule that arbitration awards cannot be vacated for errors of law or fact. It does so by allowing parties to a public construction contract to change the standard of review for arbitration awards.[279] Such heightened review must be specified in the contract; parties cannot rely on Title 9.2 unless they have expressed an intent to allow the court to vacate an award if it "is not supported by substantial evidence or that is based on an error

274. County of Contra Costa v. Kaiser Found. Health Plan, Inc., 54 Cal. Rptr. 2d 628, 634 (Cal. Ct. App. 1996) ("The purpose of that statute is to encourage and facilitate the arbitration of medical malpractice claims by specifying uniform language to be used in binding arbitration agreements, so that the patient knows what he or she is signing and knows its ramifications.")

275. Coon v. Nicola, 21 Cal. Rptr. 2d 846, 851 (Cal. Ct. App. 1993).

276. Pietrelli v. Peacock, 16 Cal. Rptr. 2d 688, 689 (Cal. Ct. App. 1993) (the purpose of Section 1295 "was to encourage and facilitate arbitration of medical malpractice disputes.")

277. *Coon*, 21 Cal. Rptr. 2d at 851.

278. *Pietrelli*, 16 Cal. Rptr. 2d at 689.

279. Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 815-16. (Cal. Ct. App. 2002).

of law."[280] However, California courts have interpreted this provision very narrowly. As recently as 2002, the courts have applied the default rule, holding that Title 9.2 does not extend beyond public construction contracts.[281]

Thus, Section 1296 achieves two important results. It permits contractual agreements for heightened judicial review of public construction contracts and it expresses a legislative intent to preclude heightened judicial review in all other contexts.

It should be noted the topic of contractual agreements for heightened judicial scrutiny is a matter of intense public debate.[282] Those who favor heightened judicial scrutiny believe it affords a safety net that will encourage parties who fear a wrongly decided award to take comfort in judicial scrutiny. This option will increase recourse to arbitration. Those who oppose heightened judicial scrutiny suggest that parties unwilling to accept the risk of binding awards because of an inherent mistrust of the process and arbitrators should contract for non-binding procedures, forego arbitration entirely, and rely instead on traditional litigation.

As noted above, the drafters of the RUAA debated at length a proposal to add a provision permitting heightened judicial scrutiny as a basis for vacating an award under section 23 of the RUAA. In the end, the drafters determined that the law was in a state of flux and decided not to include a statutory sanction of expanded judicial review, leaving the parties "free to agree to contractual provisions for judicial review of challenged awards . . . until the courts finally determine the propriety of such clauses."[283]

Section 1296 largely settles the debate as to the propriety of heightened judicial scrutiny under the California Arbitration Act.[284] "The Legislature specifically authorized the parties to agree to a review of the merits of a construction contract arbitration. No such review is authorized for other forms of arbitration

280. Pac. Gas & Elec. Co. v. Sup. Ct, 19 Cal. Rptr. 2d 295, 304-05. (Cal. Ct. App. 1993).

281. *Crowell*, 115 Cal. Rptr. 2d at 815-16.

282. Kyocera Corp. v. Prudential-Bache Trade Servs, Inc., 341 F.3d 987 (9th Cir. 2003); LaPine Tech. Corp. v. Kyocera, 130 F.3d 884 (9th Cir. 1997); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992 (8th Cir. 1998); Gateway Techs, Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995); Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1994); Chicago, Southshore and South Bend R.R. *v.* N. Indiana Commuter Transportation Dist., 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev'd on other grounds*, 184 Ill. 151 (1998); NAB Constr. Corp. v. Metro.Transp. Auth., 579 N.Y.S.2d 375 (1992); Eric van Genkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal v. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157 (2003); Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. OF INT'L ARB. 225 (1997); Stephen J. Ware, "Opt-In" for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act, 8 AM. REV. OF INT'L ARB. 263 (1997).

283. RUAA § 23, cmt. B (5).

284. However it does not settle the issue for arbitration agreements in California governed by the FEDERAL ARBITRATION ACT.

in the Act. This suggests the legislative intent that parties cannot agree to a review on the merits."[285]

Recommendation: Section 1296 should be retained unmodified. It has been interpreted to reflect a decision of the Legislature to limit heightened judicial scrutiny to a very narrow context of public construction contracts. Although other jurisdictions have upheld contractual attempts for heightened judicial scrutiny, the RUAA refused to sanction a statutory provision authorizing its use and there appears to be insufficient support at this time to justify a statutory change to California law.

IX. TITLE 9.3 — INTERNATIONAL COMMERCIAL ARBITRATION

Section 1297 (Title 9.3)[286] was adopted in 1988 to make California a more attractive venue for international arbitration.[287] It is unclear whether this objective has been realized. Judicial opinions applying and interpreting Section 1297 are extremely rare.[288] Most international arbitration proceedings conducted in California are governed by the Federal Arbitration Act,[289] which in most contexts preempts the state statute to the extent there is any inconsistency between the two laws. However, given the skeletal nature of the Federal Arbitration Act, there will be situations in which provisions of both statutes are relevant.

Section 1297 is based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").[290] California remains one of the few states that has adopted the Model Law as part of its state arbitration statute.[291] Only seven states have based their statutes on the UNCITRAL Model Law. "Other States have approached international arbitration in a variety of ways, such as adopting parts of the UNCITRAL Model Law together with provisions taken directly from the [New York Convention] or by devising their own inter-

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285. Crowell, 115 Cal. Rptr. 2d at 815-16.

286. CAL. CIV. CODE § 1297.

287. Albert S. Golbert & Daniel M. Kolkey, *California's New International Arbitration and Conciliation Code: California is a More Attractive Venue for Resolving International Commercial Disputes*, LOS ANGELES LAW., November 1988, at 46.

288. Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 108 Cal. Rptr. 2d 642. (2001); *see also* CAL. CODE CIV. PROC. § 1297, Notes and Decisions (West 1982, Supp. 2003).

289. 9 U.S.C. § 1 *et seq.*

290. 24 I.L.M. 1302 (1985); Golbert & Kolkey, *supra* note 287, at 46. For a tabular section-by-section analysis of the California statute's conformity with the Model Law, see Peter Binder, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS, 241-313 (2000).

291. Coe, *supra* note 18 at 88.

national arbitration provisions."[292] The RUAA does not address international arbitration as a specific subject of revision of the Uniform Arbitration Act.

Section 1297 is quite flexible and leaves many of the procedures to the discretion of the parties and the arbitrators.[293] However, Section 1297 varies from the Model Law in four significant ways. In each case, it attempts to solve ambiguity within the Model Law, or to make international commercial arbitration in California more attractive than it is under the Model Law.

First, the default number of arbitrators under the Model Law is three,[294] but under Section 1297 it is one.[295] Given the significant costs associated with having three arbitrators and the desire to avoid any possible conflict with the FAA,[296] the choice of one arbitrator as a default rule is salutary.

Second, Section 1297 and the Model Law vary in how interim measures are used. The Model Law merely states that, notwithstanding an arbitration agreement, a party may request and a court may grant an interim measure.[297] On the other hand, Section 1297 provides a mechanism for a court to enforce interim measures awarded by the arbitral tribunal,[298] and requires such court enforcement subject to public policy considerations.[299]

Third, Section 1297 and the Model Law differ in regards to arbitrator immunity. Unlike the Model Law, Section 1297.119 provides an arbitrator with "the immunity of a judicial officer from civil liability."[300] This affords international arbitrators more protection than domestic arbitrators, who enjoyed immunity under the now repealed section 1280.1 of the California Code of Civil Procedure. As noted above, Section 14 of the RUAA includes a provision for arbitrator immunity, which was based on Section 1280.1.

Fourth, the Model Law and Section 1297 have different provisions for arbitrator disclosure. Under the Model Law, arbitrators must disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[301] Section 1297.121 requires that "all persons whose names have been submitted for consideration shall...make a disclosure to the parties of any information which might cause their impartiality to be questioned."[302] It then

292. RUAA, *supra* note 3, Prefatory Note.
293. Golbert & Kolkey, *supra* note 287, at 47.
294. UNICTRAL MODEL LAW art. 10(2).
295. CAL. CIV. PROC. CODE § 1297.101.
296. 9 U.S.C. § 5 ("[U]nless otherwise provided in the agreement the arbitration shall be by a single arbitrator.").
297. Model Law, art. 9 ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.").
298. CAL. CODE CIV. PROC. §§ 1297.92-1297.93.
299. *Id.* at § 1297.94.
300. CAL. CODE CIV. PROC. § 1297.119.
301. Model Law, art. 12(1).
302. Title 9.3 § 1297.121.

enumerates categories of information that require disclosure that might question the arbitrator's impartiality.[303] These disclosures are mandatory and cannot be waived by contract.[304] The enumerated criteria heighten the disclosure standard as compared to the international or domestic norm.[305] As discussed above, California's utilization of strict mandatory criteria for arbitrator disclosure is highly unusual and undermines California as a friendly venue for international arbitration.

Recommendation: Section 1297 should be retained with two modifications. First, assuming Section 14 of the RUAA on arbitrator immunity is adopted as recommended above, Section 1297.119 should be repealed to avoid any misinterpretation that might result in differential treatment between arbitrators in the domestic and international contexts. If Section 14 of the RUAA is not adopted as part of California law, Section 1297.119 should be retained without modification.

Second, assuming Section 12 of the RUAA on arbitrator disclosures is adopted as recommended above, then Section 1297.121-1297.125 should be repealed. Otherwise, separate disclosure requirements will be mandated for international and domestic arbitrations, creating confusion for arbitrators. If Section 12 of the RUAA is not adopted, the change to the original Model Law reflected in Section 1297.121, which is out of step with most other disclosure requirements, should be repealed in favor of the original open-ended language of Section 12(1) of the UNCITRAL Model Law.

X. TITLE 9.3 — REAL ESTATE CONTRACT ARBITRATION

Section 1298 (Title 9.3)[306] was added to the California Arbitration Statute in 1989 to regulate arbitration clauses contained in real estate contracts.[307] Section

303. *Id.* at § 1291.121(a)-(f).

304. *Id.* at § 1291.122.

305. *Compare* INTERNATIONAL BAR ASSOCIATION, DRAFT REPORT OF THE WORKING GROUP ON GUIDELINES REGARDING THE STANDARD OF BIAS AND DISCLOSURE IN INTERNATIONAL COMMERCIAL ARBITRATION, § 6 (October 7, 2002); section 12 of the RUAA (requiring disclosure if an arbitrator has a "financial or personal interest in the outcome of the arbitration proceeding") *with* Section 1297.121(d) (requiring disclosure if the arbitrator or his family has "financial interest in the subject matter in controversy.").

306. Section 1298 should have been codified as Title 9.4, but officially is a second Title 9.3.

307. CAL. CIV. CODE § 1298; Villa Milano Homeowners Ass'n v. Il Davorge, 102 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 2000) ("The obvious intent of these requirements is to call to the buyer's attention the fact that he or she is being requested to agree to binding arbitration and to make certain that he or she does so voluntarily, if at all.").

1298 regulates the size and font of real estate arbitration agreements, and it assumes that agreements will be binding.[308] However, the courts have not assumed that arbitration agreements that comply with Section 1298 are valid. First, unlike Section 1295(e) involving arbitration of medical malpractice claims, Section 1298 contains no language to the effect that compliance with the statutory requirements will render the contract "not a contract of adhesion, nor unconscionable nor otherwise improper."[309] In at least one case, the court has found real estate arbitration agreements to be unconscionable when they are contained in a declaration of covenants, codes and restrictions, as opposed to being part of the sale contract.[310] Second, section 1298.7 incorporates a statutory non-arbitrability provision for actions involving bodily injury, wrongful death, or litigation for any construction or design defect.[311] This is subject to preemption by the FAA in the event the contract involves interstate commerce.[312]

Recommendation: Section 1298 through 1298.8 should be repealed. Unlike other provisions of the California Arbitration Act, these provisions do not promote arbitration and actually appear hostile to arbitration. They impose additional statutory obligations as to language and form with no countervailing assurances that compliance therewith will render the clause enforceable. In the absence of these provisions, such contracts, like other contracts, will continue to enjoy common law protection against adhesion and contract that are unconscionable or otherwise improper. Moreover, it establishes a category of claims pertaining to real estate claims that are not capable of settlement by arbitration. This will promote parallel proceedings, with certain causes of action subject to arbitration while others subject to litigation. And given the inconsistency of Section 1298.7 with federal law, it also invites litigation on a case-by-case basis as to whether California law is preempted because the contract involves interstate commerce. Finally, the policies that animate Section 1298 through 1298.8 appear inconsistent with the policies that support Section 1295. One would

308. CAL. CODE CIV. PROC. § 1298.

309. *Compare* CAL. CODE CIV. PROC. § 1295(e) *with* CAL. CODE CIV. PROC. § 1298.

310. *Villa Milano*, 102 Cal. Rptr. 2d at 8 ("by placing the arbitration provision in the [covenants, codes and restrictions], which contain no notice provision and are not signed by the buyer, the developer avoids informing the buyer that he or she is waiving the right to a jury trial. We can hardly condone this mechanism for circumventing the protections of a statute.).

311. *See* § 1298.7 ("In the event an arbitration provision is included in a contract or agreement covered by this title, it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable."); *Villa Milano*, 102 Cal. Rptr. 2d at 8 (Section 1298.7 "'shall not preclude or limit any right of action to which Section 337.1 or 337.15 is applicable.' Code of Civil Procedure sections 337.1 and 337.15 pertain to litigation to recover damages for construction and design defects.").

312. Basura v. US Home Corp., 120 Cal. Rptr. 2d 328, 334 (Cal. Ct. App. 2002) ("These uncontroverted facts in the record compel the conclusion that the instant agreements between Home and plaintiffs involved interstate commerce. Therefore, the agreements are governed by the FAA.").

expect that, as with the medical profession, the escalating cost of insurance premiums are significant in the real estate industry as well, and that promoting arbitration is one means to address that concern.

XI. TITLE 9.5 — FIREFIGHTER AND LAW ENFORCEMENT ARBITRATION

Section 1299 was adopted to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife.[313] In an effort to meet its goal, Section 1299 provides specific procedures on how to settle employment agreements involving firefighters and police officers. It contains provisions regarding the submission of a dispute to arbitration,[314] the nature of arbitration proceedings,[315] the validity and enforcement of arbitration decisions,[316] and the modification of an arbitral award.[317]

In April 2003, the California Supreme Court declared Section 1299 unconstitutional.[318] Article XI of the State Constitution provides that "a county's 'governing body shall provide for the ... compensation ... of employees'" and "forbids the Legislature to 'delegate to a private person or body power to ... perform municipal functions."[319] The Court concluded that Section 1299 "violates both constitutional provisions. It deprives the county of its authority to provide for the compensation of its employees."[320]

Recommendation: Section 1299 in its current version is unconstitutional and not enforceable. It should be repealed.

313. CAL. CODE CIV. PROC. § 1299
314. *Id.* at § 1299.4.
315. *Id.* at § 1299.5.
316. *Id.* at § 1299.6.
317. *Id.* at § 1299.7.
318. Riverside v. Superior Court, 132 Cal. Rptr. 2d 713 (2003).
319. *Id.* at 717.
320. *Id.*