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FOR DISCUSSION ONLY

ALABAMA ARBITRATION ACT

Alabama State Bar Committee on Alternative Dispute Resolution
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The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the Alabama State Bar Board of Bar Commissioners. They do not necessarily reflect the views of the Bar and its Members. Proposed statutory language may not be used to ascertain the intended meaning of any promulgated final statutory proposal.

Reporter's Notes are designed to aid in a comparison of this draft Act to the Revised Uniform Arbitration Act and, in most instances, are not intended to be, or appropriate as, formal comments on the provisions of the Act. The Comments to the Revised Uniform Arbitration Act provide useful commentary on the provisions of that Act and may, in some instances, be appropriate to include as a formal comment accompanying the Alabama legislation where the Alabama Arbitration Act adopts the language of the Revised Uniform Arbitration Act.

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PREFATORY NOTE

This Act, to be known as the Alabama Arbitration Act, is intended to govern the process of arbitration in this state. The Act is not intended to change this state's law as to actions for specific performance to enforce agreements to arbitrate (see Section 8-1-41 of the Code of Alabama 1975, as amended, and Section 84 of Article IV of the Alabama Constitution of 1901, as amended) or to supercede the provisions of the Federal Arbitration Act (Sections 1-14 of Title 9 of the U.S Code) where that Act preempts state law. It is intended to replace existing procedural statutory law in this state with respect to arbitration with a modern statute addressing current issues in arbitration in order to make the process more effective, clear and efficient and relieve the courts of this state from an increasing burden of having to address these issues on a case by case basis as they arise.

SECTION 1. DEFINITIONS. In this Act:

- (1) The term "arbitration organization" means an association, agency, board, commission or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.
- (2) The term "arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.
- (3) The term "court" means any court of this State having personal and subject matter jurisdiction over the matter in controversy.
- (4) The term "enforceable agreement to arbitrate" means an agreement, or a contractual term, to submit to arbitration one or more existing or subsequent controversies between or among the parties to the agreement or contract that is valid and enforceable under the laws of this state or the United States of America.
- (5) The term "knowledge" means actual knowledge.

(6) The term "motion", depending on the context as used in this Act, means a complaint, petition, motion or application filed in a court of this state in accordance with the Alabama Rules of Civil Procedure.

(7) The term "neutral" with respect to a person means that the person has no affiliation or substantial relationship with any party or with an attorney representing any party in the arbitration, has no personal or proprietary interest in the controversy or the outcome of the arbitration proceeding and is not controlled by any party.

(8) The term "party," depending on the context as used in this Act, means:

(A) a person who is covered by an agreement to arbitrate;

(B) a person by or against whom an arbitration proceeding is brought;
or

(C) a person by or against whom a civil action in a court involving an agreement to arbitrate is brought.

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

(10) The terms "written" or "in writing" or "record" mean any information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

REPORTER'S NOTE

Words defined in subsections 4, 6, 7, and 8 and "written" and "writing" defined in subsection 11 are not defined in the Revised Uniform Arbitration Act ("RUAA") which instead defines and uses the term "record". "Substantial relationship" in the definition of neutral should include, at a minimum, the type of relationship that must be disclosed by a judge but also should include certain business relationships that may be governed by judicial ethics.

SECTION 2. NOTICE.

(a) Except as otherwise provided in this Act, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course of the contents of the notice, whether or not the other person acquires knowledge of the notice, and by taking such additional action for the giving of notice as is (i) required by the agreement to arbitrate or (ii) otherwise provided in this Act.

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

(c) Except as otherwise provided in this Act, a person receives notice when its contents come to the person's attention, or the notice is given as provided in subsection (a) and delivered at the location held out by the person as a place of delivery of such communications pursuant to the agreement containing the agreement to arbitrate, or, if no such location is specified, at the person's place of residence or place of business.

(d) After initiation of arbitration, either party may give notice to the other party of its place for receiving notice and a party will receive notice when it is delivered to the place so specified.

REPORTER'S NOTE

The RUAA allows the parties to provide otherwise. The Alabama Arbitration Act ("ALAA") lets parties require more for notice but not less. Under this Section in the RUAA and Section 15, a party may lose the right to be heard or to object to lack of actual notice if notice was constructively given but never actually came to the attention of the party, as in delivery to a branch office or a fax to an operations department. The same is true under the ALAA except that for constructive notice, it must be delivered to the location specified in the agreement if a location is specified. Subsection (d) appears only in the ALAA and is designed to allow the parties to change or specify the location for delivery of notice after initiation of the proceeding.

SECTION 3. WHEN ACT APPLIES.

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

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

(c) On or after [a delayed date (four years following the effective date of the Act)], this Act governs an agreement to arbitrate whenever made.

REPORTER'S NOTE

ALAA adds the concept of any amendment to an agreement to arbitrate after the effective date bringing it under the statute.

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

(a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this Act in the agreement to arbitrate or in any other valid agreement to the extent permitted by law. To the extent the agreement to arbitrate does not otherwise provide, this Act governs the arbitration proceeding between the parties.

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

(1) waive or agree to vary the effect of the requirements of Section 2; Section 5(a); Section 6(a) or (b); Section 8(a); Section 11; Section 12; Section (17)(a) or (b); Section 26; or Section 28.

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

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

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

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or Section 3(a) or (c), 7, 14, 18, 20(d) or (e), 21(b) 22, 23 except subsection (a)(8) which may be waived, 24, 25(a) or (b), 29, 30, 31, or 32.

REPORTER'S NOTE

The ALAA makes Sections 2, 8(b) and (c), 11 and 12 nonwaivable before the controversy arises and 21(b) nonwaivable at any time and the RUAA does not, but see subsection (b)(3) with reference to Section 12. Paragraph (a) in the RUAA specifies that the parties to the arbitration proceeding may vary or waive the terms of the act without requiring that such action be in an agreement except as otherwise required by law. Subsection (b)(3) is identical to the RUAA provision but is probably redundant here since ALAA Subsection (b), unlike the RUAA, provides that none of Section 12 may be waived. Subsection (b)(3) is included in this draft to provide an option if it should be decided to allow waiver of some parts of Section 12.

SECTION 5. APPLICATION FOR JUDICIAL RELIEF.

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

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

SECTION 6. VALIDITY OF AGREEMENT TO ARBITRATE.

(a) An agreement or a contractual term to submit any controversy to arbitration that is otherwise enforceable under applicable law may be deemed unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

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

(c) Unless the parties otherwise agree:

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

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

REPORTER'S NOTE

The RUAA affirmatively states that agreements to arbitrate are enforceable. The ALAA does not address this issue but instead only addresses under what circumstances an agreement to arbitrate otherwise enforceable under applicable law (AL statutory and case law or the Fed. Arb. Act) will not be enforced (grounds for the revocation of any contract) and who will decide enforceability. The RUAA does not qualify the provisions of (c)(1) and (2) with "unless the parties otherwise agree" but the provisions are waivable.

SECTION 7. MOTION TO COMPEL OR STAY ARBITRATION.

(a) Subject to subsection 7(b), on motion of a person to compel arbitration showing a controversy subject to an enforceable agreement to arbitrate and alleging the refusal to arbitrate of another person who is obligated to arbitrate under such agreement, a court shall order such persons to arbitrate if the refusing party does not appear or does not oppose the motion.

(b) If a person opposes a motion made under subsection (a), the court shall proceed promptly to hear and decide the issue. Unless the court finds the controversy is not subject to an enforceable agreement to arbitrate, it shall order the persons to arbitrate. If the court finds that there is no enforceable agreement to arbitrate, it may not order the parties to arbitrate.

(c) On a motion of a person for a stay of an arbitration proceeding, alleging that a controversy is not subject to an enforceable agreement to arbitrate, a court shall proceed promptly to hear and decide the issue. If the court finds that the controversy is not subject to an enforceable agreement to arbitrate, it shall stay the arbitration.

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

(e) If a proceeding involving a claim alleged to be referable to arbitration under an enforceable agreement to arbitrate is pending in court, a motion under this section must be made in that court.

Otherwise a motion under this section may be made in any court as provided in Section 27.

(f) If the court orders any parties to a judicial proceeding to arbitrate, the court on just terms shall stay the judicial proceeding that involves the claim subject to arbitration pending the outcome of the arbitration. Upon a motion filed with the court by a party to a judicial proceeding to order arbitration under this section, the court on just terms shall stay any judicial proceeding pending its decision on the motion. If a claim subject to the arbitration is severable, the court may limit a stay under this section to that claim.

REPORTER'S NOTE

The RUAA provides for summary determination of whether there is an agreement to arbitrate and an order requiring arbitration if the agreement exists. It does not specifically address in this section the court's obligation to determine whether the claim at issue is subject to the agreement. The ALAA provides for an expedited hearing if an application to compel arbitration is contested.

The ALAA and RUAA require the court to find an "enforceable agreement to arbitrate", not just "an agreement to arbitrate"; thus, requiring a determination of enforceability under State and Federal law. The ALAA provides for a judicial stay of arbitration proceedings if there is no enforceable agreement to arbitrate. The RUAA has no provisions for staying an arbitration. There are also significant structure and language differences between the ALAA and RUAA in this section.

SECTION 8. PROVISIONAL REMEDIES.

(a) Upon motion of a person subject to an agreement to arbitrate or a party to an arbitration proceeding, made before an arbitrator is appointed and is authorized and able to act, the court for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

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

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

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

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

REPORTER'S NOTE

ALAA allows the court to order a remedy after an arbitrator is appointed if the motion was made before the arbitrator was appointed. RUAA says the order must come before the arbitrator is appointed.

SECTION 9. INITIATION OF ARBITRATION.

(a) A person initiates an arbitration proceeding by giving written notice of the commencement of the arbitration proceeding to the other parties to the agreement to arbitrate in the manner provided in such agreement or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action; provided that any such notice must at a minimum meet the requirements of Section 2(a). Unless the parties to the agreement to arbitrate otherwise agree, the notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 15(c) not later than such person's first appearance at the hearing as a party, any objection as to lack of or insufficiency of notice under this section is waived.

REPORTER'S NOTE

RUAA requires that notice include the nature of the controversy and the remedy sought. ALAA allows the parties to agree otherwise. RUAA requires that an objection as to lack of notice be made at the commencement of the hearing. ALAA recognizes that if there is a notice problem, the person may not know about the hearing until after it commences and so requires an objection as to inadequate notice at the time of the person's first appearance. Sentence structure is different from the RUAA.

SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

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

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

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

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

(4) consolidation of the separate arbitration proceedings would not substantially prejudice the rights of, or result in undue delay or hardship to, a party to an arbitration proceeding.

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

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

REPORTER'S NOTE

Differences in this Section between the RUAA and ALAA reflect the committee's philosophy that consolidation should happen only under very narrow circumstances. The RUAA allows any party to the agreement to arbitrate to move for consolidation whether or not that entity is a party to a pending arbitration proceeding. The ALAA, unlike the RUAA, specifically requires that the proceedings to be consolidated must be "pending", i.e. must have already been initiated separately before a motion for consolidation is filed. The ALAA, unlike the RUAA, also requires, in subsection 1, that if arbitration proceedings are proposed to be consolidated where all the proceedings do not involve all the parties, the party moving for consolidation must be a party to the proceeding and also to the arbitration agreement or proceeding with a third party. The RUAA allows consolidation if any party to the agreement or the proceeding is a party to a separate agreement with a third party involving a common issue and arising from the same transaction regardless of who is the moving party.

The RUAA provides for consolidation unless the prejudice from a failure to consolidate is outweighed by undue prejudice to a party opposing consolidation. Under the ALAA, consolidation is allowed only if it does not substantially prejudice a party or result in undue delay or hardship.

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

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

(b) An arbitrator appointed pursuant to this section shall be neutral with respect to the parties and controversy if serving as the sole arbitrator of the controversy or as the chair of a panel of arbitrators.

(c) An individual who is not neutral as defined in this Act may not serve as an arbitrator required by the agreement to arbitrate to be

neutral or as an arbitrator where the agreement to arbitrate does not specify the use of a non-neutral arbitrator.

REPORTER'S NOTE

The ALAA, unlike the RUAA, requires that the appointment be "consistent to the extent practicable with the agreement to arbitrate", i.e., if the agreement called for an industry expert, the court would have to appoint an industry expert, and requires that the appointed arbitrator be neutral if the sole arbitrator or the chair of a panel.

Subsection (b) is not in the RUAA.

Subsection (c) adopts the concept from the RUAA that any arbitrator (not just a court appointed arbitrator) must be neutral if the agreement so specifies but expands the requirement to apply to arbitration under any agreement not specifically allowing the arbitrator to be a non-neutral. It refers back to the definition of "neutral" found in the ALAA and not in the RUAA and omits the RUAA definition of neutral found in RUAA Section 11 (b).

SECTION 12. DISCLOSURE BY ARBITRATOR.

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

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

(2) an existing or past relationship, including but not limited to a relationship as an arbitrator in another proceeding, with any of the parties to the agreement to arbitrate, the parties to the arbitration proceeding and their counsel or representatives, a witness, or another arbitrator.

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

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

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

(e) Failure of an arbitrator appointed as a neutral to make a significant disclosure required under this section creates a rebuttable

presumption of evident partiality prejudicing the rights of a party to the arbitration proceeding under Section 23(a)(2).

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

(g) Unless the parties otherwise agree, if a party to an arbitration proceeding objects to an arbitrator prior to the hearing, or prior to the award if information required to be disclosed by the arbitrator is discovered after the commencement of the hearing, on the basis of partiality on the part of the arbitrator, the arbitrator shall withdraw as arbitrator unless the arbitrator determines that the alleged partiality will not prejudice the rights of any party and that withdrawal will prejudice the rights of, or would result in undue delay or hardship to, a party. Failure to withdraw absent such a determination creates a rebuttable presumption of evident partiality under Section 23(a)(2).

REPORTER'S NOTE

The RUAA requires disclosure to all parties to the agreement and of relationships with counsel or representatives for all parties to the agreement. The ALAA requires disclosure only to parties to the proceeding and of relationships with counsel or representatives of such parties.

The ALAA, but not the RUAA, requires withdrawal by an arbitrator upon objections after disclosure, (subsection g). The ALAA, unlike the RUAA, provides that the presumption of partiality in subsection (e) is rebuttable and creates the presumption where "significant" facts are not disclosed. The RUAA provides for a presumption when the omission is of "known, direct and material interests" or "known, existing and substantial relationships". Whether that partiality will "prejudice" the rights of a party to allow for vacating an award is an issue here and in Section 23 where the final RUAA provides for vacating an award for evident partiality by a neutral arbitrator whether or not prejudice resulted.

SECTION 13. ACTION BY MAJORITY. Unless the parties to an agreement to arbitrate or to the arbitration proceeding otherwise agree, if there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 15(c).

REPORTER'S NOTE

The first clause is not included in the RUAA but the section is waivable.

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

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

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

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

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

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

(2) to a hearing on a motion to vacate an award under Section 23(a)(1) or (2) if the movant establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune in accordance with Subsection (a) or that the arbitrator or the representative of an arbitration organization is incompetent to testify or produce records, the court shall award to the arbitrator, arbitration organization or representative reasonable attorney's fees, costs, and other reasonable expenses of resisting such compulsion including reasonable attorney's fees, costs, and expenses on appeal.

REPORTER'S NOTE

In subsection (d), the ALAA provides that the arbitrator is incompetent to testify only if the arbitrator asserts the immunity. The RUAA simply makes the arbitrator incompetent but in subsection (d)(1) allows testimony if the arbitrator brings a claim against a party to the proceeding. Reimbursement of fees language in subsection (e) is somewhat different in the RUAA and the scope of immunity in subsection (a) is theoretically broader in the ALAA than in the RUAA.

SECTION 15. ARBITRATION PROCESS.

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

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue if all interested parties agree;

(c) Unless an arbitrator has made a final decision under subsection (b) on all issues, the arbitrator shall set a time and place for a hearing and give notice of the hearing not less than fifteen days before the hearing begins. Unless a party to the arbitration proceeding interposes timely objection at the hearing to lack or insufficiency of notice, that party's appearance at the hearing as a party waives the objection. Objection shall be deemed to be timely only if made at the commencement of the hearing, if the person had notice prior to commencement of the hearing, or at the person's first appearance at the hearing as a party, if the person did not have notice prior to the commencement of the hearing. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding and the hearing did not appear. A court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, to cross-examine witnesses appearing at the hearing, and, upon timely request, to have the hearing transcribed at the expense of the requesting party, with a transcript to be provided to the arbitrator if one is prepared.

(e) If an arbitrator ceases, or is unable, to act during the arbitration proceeding, the remaining arbitrator or arbitrators, if appointed to act as neutrals, may continue with the hearing and decide the controversy. If the arbitration proceeding cannot continue because none of the remaining arbitrators are neutral, then a sufficient number of replacement arbitrators must be appointed in accordance with Section 11 to continue the hearing and to decide the controversy.

REPORTER'S NOTE

Subsection (a), from the RUAA, specifically provides for the arbitrator's authority with respect to evidence. Earlier drafts of the ALAA do not mention evidence. The previous ALAA draft read: "(a) The arbitrator may manage all aspects of an arbitration proceeding. The arbitrator may hold conferences with the parties to the arbitration proceeding before the hearing to act upon any matters that may aid in the fair and expeditious disposition of the arbitration proceeding."

Both the ALAA and the RUAA allow the parties to waive or vary the terms of this Section.

In subsection (b)(2), the RUAA allows summary disposition upon the request of one party. The committee felt that it should only be available when the parties agreed to that procedure.

Language in subsection (c) not in the RUAA requires that a party have notice of the hearing as well as the proceeding before letting an arbitrator proceed to a decision in the absence of a party. The RUAA requires only five days notice of a hearing and sets out procedures to be followed if a hearing is ordered. The ALAA requires that a hearing be held. The ALAA provision regarding timely objection to lack of notice and waiver of the objection is substantively different from the RUAA.

In subsection (e), the RUAA prohibits a decision by the remaining arbitrators if one is unable to act and requires appointment of a new arbitrator. The ALAA approach in subsection (e) is to let the decision proceed if the remaining arbitrators are neutral.

In subsection (d), the ALAA adds a provision entitling any party to have a transcript made of the hearing.

SECTION 16. REPRESENTATION BY LAWYER. A party to an arbitration proceeding may be represented by a lawyer or any other person at any arbitration hearing under this Act.

REPORTER'S NOTE

The RUAA does not give a party the right to be represented by anyone other than an attorney. The committee weighed the pros and cons of allowing a nonlawyer to represent a party and concluded that it was appropriate despite the possibility of poor or self-serving representation in some circumstances.

SECTION 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

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

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

(c) Unless the parties otherwise agree, an arbitrator may permit such discovery as the arbitrator decides is appropriate in the

circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

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

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

(f) All laws compelling a person under subpoena to testify, including provisions for contesting subpoenas, and all fees for attending a hearing or trial, a deposition, or a discovery proceeding as a witness apply to equivalent proceedings in an arbitration proceeding as if the controversy were the subject of a civil action in this State; provided that parties to the arbitration proceedings must submit any request to quash a subpoena to the arbitrator and persons who are not parties to the arbitration proceeding may submit a request to the arbitrator to quash a subpoena or may file a motion to quash in a court of competent jurisdiction.

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

REPORTER'S NOTE

The RUAA allows testimony by deposition of virtually any witness. The ALAA allows testimony by deposition by any witness who could so testify under the Alabama Rules of Civil Procedure.

The ALAA, in subsection (f), provides the option for third parties to apply to a court to quash a subpoena issued by an arbitrator and other language in this subsection is different in the ALAA and the RUAA.

SECTION 18. JUDICIAL ENFORCEMENT OF PREAWARD RULING BY ARBITRATOR.

If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing

party may make a motion to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under Section 23 or 24.

SECTION 19. AWARD.

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

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

(c) An award must be accompanied by a reasoned decision if such a reasoned decision is requested by any party to the arbitration proceeding no later than such party's first appearance at the hearing.

REPORTER'S NOTE

RUAA allows an award to be signed "or otherwise authenticated" and this provision for electronic signature, not in the ALAA, requires the inclusion of Section 30, included in the ALAA in brackets. Subsection (c) requiring a reasoned decision if timely requested by a party is not in the RUAA. Among other things, it facilitates review of an award for possible vacating of the award on two grounds included in the ALAA but not found in the RUAA—manifest disregard of the law and, if the parties so provide by contract, errors of law in the award.

SECTION 20. CHANGE OF AWARD BY ARBITRATOR.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) upon a ground stated in Section 24(a)(1) or (3);

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

(3) to clarify the award.

(b) A motion under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to a motion under subsection (a) within 10 days after receipt of the notice.

(d) If a motion to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Section 24(a)(1) or (3);

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

(3) to clarify the award.

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

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

(a) Unless the parties otherwise agree:

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

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

(3) As to all remedies other than those authorized by subsections (a)(1) and (2), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

(4) Subject to Section 21 (b), an arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(5) If an arbitrator awards punitive damages or other exemplary relief under subsection (a)(1), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

(b) If the controversy is within the jurisdiction of the District Court of this state, the party filing an action or motion to compel arbitration, moving to stay judicial resolution of the controversy or opposing a motion to stay arbitration of the controversy shall pay the arbitrator's fees and expenses and the fees and expenses of the arbitration organization, if any; provided that this subsection shall not relieve any party from any obligation to pay a portion of such fees pursuant to the agreement to arbitrate up to an amount equal to the local district court filing fees minus any such filing fees actually paid by such party with respect to the controversy.

REPORTER'S NOTE

The RUAA does not say "unless the parties otherwise agree" in subsection (a) but these provisions are waivable in the RUAA and the ALAA.

Subsection (b) appears only in the ALAA.

SECTION 22. CONFIRMATION OF AWARD. After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

SECTION 23. VACATING AN AWARD.

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

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

(2) there was:

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

(B) corruption by an arbitrator; or

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

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

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

(5) the controversy was not subject to an enforceable agreement to arbitrate, unless the person participated in the arbitration proceeding as a party without raising the objection under Section 15(c) not later than the commencement of the arbitration hearing or at that person's first appearance at the arbitration hearing as a party if such person did not receive notice of the arbitration proceeding prior to the commencement of the hearing;

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

(7) the award was made in manifest disregard of the law; or

(8) the parties contracted in the agreement to arbitrate for judicial review of errors of law in the arbitration award and the Court finds that the arbitrator has committed an error of law in the award substantially prejudicing the rights of a party.

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

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

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

REPORTER'S NOTE

Subsection (a)(2) is the new RUAA provision. It is substantially the same as in earlier drafts of the RUAA and the ALAA except that new punctuation makes it clear that the phrase "prejudicing the rights of a party to the arbitration proceeding" only modifies "misconduct by an arbitrator", i.e., it now seems to more clearly provide that the award must be vacated if there was evident partiality by a neutral arbitrator or corruption by any arbitrator whether or not there was any resulting prejudice. It appears that the award may have to be vacated even if it is against the party with whom the arbitrator had an undisclosed relationship (who was not prejudiced) and that this ground could be raised by that party to overturn the award.

In subsection (a)(5) the RUAA provides that objection on the ground of no agreement must be raised at the commencement of the hearing. The ALAA provides that objection must be at the first appearance of a party at the hearing if notice was not received prior to the hearing.

Subsection (a)(6) is new from the RUAA. It is not clear whether a party loses the ground for vacating an award in subsection (a)(6) by not timely objecting to the lack of notice as provided in Section 9. By way of contrast, subsection (a)(5) addresses the waiver issue in the context of vacating an award on the grounds of no enforceable agreement to arbitrate. To clarify the issue, subsection (a)(6) could provide either (1) that it will be waived absent timely objection or (2) that the ground exists despite failure to raise it at the hearing if the lack of notice did in fact substantially prejudice a party.

Subsections (7) and (8) are not included in the RUAA. Notes to the RUAA discuss these grounds and conclude that they should not be

included. The committee concluded otherwise after extended discussion. Subsection (8) is sometimes referred to as the Opt-In provision and is discussed as such in the RUAA notes but note that the provision the committee decided to include is narrower than some proposed opt-in provisions in that it does not provide for review of findings of fact.

SECTION 24. MODIFICATION OR CORRECTION OF AWARD.

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

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

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

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

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

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

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

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

(b) A court may allow reasonable costs of the motion filed under Section 22, 23 or 24 and subsequent judicial proceedings.

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

SECTION 26. JURISDICTION.

(a) A court may enforce an enforceable agreement to arbitrate.

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

SECTION 27. VENUE. Except as provided in Section 7(e), a motion pursuant to Section 5 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion must be made in the court of any county in which an adverse party to the movant resides or has a place of business or, if no adverse party to the movant has a residence or place of business in this State, in the court of any county in this State. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs.

REPORTER'S NOTE

Additional language added to the RUAA language for clarity.

SECTION 28. APPEALS.

(a) An appeal may be taken from:

- (1) an order granting or denying a motion to compel arbitration;
- (2) an order granting or denying a motion to stay arbitration;
- (3) an order confirming or denying confirmation of an award;
- (4) an order modifying or correcting an award;
- (5) an order vacating an award without directing a rehearing;
- (6) a final judgment entered pursuant to this Act; or
- (7) an order granting a motion for provisional remedies.

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

REPORTER'S NOTE

In subsections (a) (1) and (2), the RUAA provides for appeal of only orders denying a motion to compel and granting a motion to stay arbitration, arguably reflecting a bias toward arbitration since parties would have to arbitrate before appealing a decision on arbitrability. The ALAA provides in these subsections for appeal of orders granting or denying motions to compel or stay arbitration.

The RUAA does not contain subsection (a)(7) providing for appeal of an order granting provisional remedies.

SECTION 29. SEVERABILITY. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act

which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

REPORTER'S NOTE

This section is not in the RUAA. Section 29 of the RUAA is "Uniformity of Application and Construction" which is not included in the ALAA.

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

The provisions of this Act governing the legal effect, validity, or enforceability of electronic records or signatures, and of contracts formed or performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No 106-299, 114 Stat. 464 (2000), and supersede, modify, and limit the Electronic Signatures in Global and National Commerce Act.

REPORTER'S NOTE

This section is in the RUAA and may be unnecessary in the ALAA but see the definition of "written" and the Reporter's Note to Section 19.

SECTION 31. EFFECTIVE DATE.

(a) This Act takes effect on [effective date];

SECTION 32. REPEAL. The following statutes shall have no force or effect with respect to any agreement to arbitrate governed by this Act on or after [the Effective Date of the Act]: Sections 6-6-1 through 6-6-16, Code of Alabama 1975, as amended.

SECTION 33. SAVINGS CLAUSE. Except as provided in Section 3(b) or (c), this Act does not affect an action or proceeding commenced or right accrued before this Act takes effect.