2006 Revised Handbook: Arbitrating Family Law Cases Under the North Carolina Family Law Arbitration Act as Amended in 2005

Volume I: Commentary

Prepared for and Published by the North Carolina Bar Association

George K. Walker

Professor of Law, Wake Forest University School of Law;
Reporter, North Carolina Bar Association
Family Law Section Drafting
Committee

May 20, 2006

[This page left blank intentionally]

PREFACE

The North Carolina Family Law Arbitration Act (FLAA, or the Act)[1] permits all issues incident to a marriage or breakup of a marriage, except the divorce itself, to be submitted to binding arbitration, if a husband and wife agree to it, with special protection for custody and support.[2] The Act and suggested forms and rules published in this 2006 Revised Handbook, which replaces a 1999 Handbook,[3] may be used in connection with a premarital agreement, an agreement during the marriage, or an agreement after spouses separate.

Volume I follows the format of the 1999 Handbook, publishing the text of the Act as of 2005 and Comments on each section of the Act and suggested model forms and rules with Comments on each form and rule. Volume II publishes the text of the North Carolina Uniform Arbitration Act (NCUAA), superseded by the North Carolina Revised Uniform Arbitration Act (NCRUAA) in 2003;[4] the text of the FLAA before the 2005 amendments; and documents contributed by North Carolina practitioners. Volume III reprints this 2006 Revised Handbook's 1999 predecessor.

A North Carolina Bar Association (NCBA) Dispute Resolution and Family Law Sections Joint Committee drafted the Act for submission to the 1999 General Assembly.[5] The Joint

---

[1] N.C. Gen. Stat. §§ 50-41 - 50-62 (2005).

[2] North Carolina is among about 10 states with family law arbitration legislation. *See generally* George K. Walker, *Arbitrating Family Law Cases by Agreement,* 18 J. Am. Acad. Matrimonial Law. 429, 434-35 (2003). North Carolina and Michigan, Mich. Comp. Laws Serv. 600.5070-600.5082 (LexisNexis 2005 Supp.), thus far are the only states with comprehensive special statutes for family law cases.

[3] *See generally* George K. Walker, Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act (Dec. 16, 1999) (Handbook), replaced by and reprinted in Volume III of this 2006 Revised Handbook. The 1999 Handbook forms and rules may govern older agreements to arbitrate under the Act. *See* Parts I.B.24, I.B.25.

[4] N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2005), replacing *id.* §§ 1-567.1 - 1-567.20 (2001). The NCUAA is no longer in the General Statutes; Volume III of this 2006 Revised Handbook reprints it.

[5] Lynn P. Burleson et al., The North Carolina Family Law Arbitration Act: Proposed Legislation, Forms and Rules (Jan. 25, 1999) was submitted to the 1999 North Carolina General Assembly. Joint Committee members were: Lynn P. Burleson, former North Carolina District Court Judge, former chair, North Carolina Bar Association Family Law Section and chair of the Joint Committee; Suzanne Reynolds, Professor of Law, Wake Forest University School of Law; Pamela H. Simon, former chair, North Carolina Bar Association Family Law Section; Robin J. Stinson, former chair, North Carolina Bar Association Family Law Section; the author, Professor of Law, Wake Forest University School of Law, reporter for the Joint Committee. The Bar

Committee also prepared model forms and rules and these, like the draft Act, were approved by the NCBA Board of Governors. The forms and rules were available for examination in the 1999 General Assembly during its consideration and enactment of the Act.[6] The 2003 General Assembly amended the Act in one respect.[7]

The 2003 General Assembly enacted the NCRUAA to replace the NCUAA, a primary source for the FLAA.[8] Thereafter a NCBA Family Law Section Drafting Committee recommended, and the NCBA sponsored, amendments to the FLAA to conform it to the NCRUAA.[9] The 2005 General Assembly enacted FLAA amendments,[10] although sometimes in different sections or phrased differently from the NCBA proposals.

In 2005 the American Academy of Matrimonial Lawyers adopted a Model Family Law Arbitration Act, based on the RUAA and the FLAA, with suggested forms and rules similar to

---

Association and the Joint Committee express thanks to Representative Joe Hackney and the J-I Committee, Senator Brad Miller, and the General Assembly bill drafting service, for their interest in and work for passage of the Family Law Arbitration Act in the 1999 General Assembly.

[6] Enacted originally as N.C. Gen. Stat. §§ 50-41 - 50-62 (1999).

[7] 2003 N.C. Sess. Laws ch. 2003-62; N.C. Gen. Stat. § 50-53 (2003), now *id.* § 50-53(a) (2005).

[8] N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2005), replacing *id.* §§ 1-567.1 - 1-567.20 (2001). The NCBA, through its International Law & Practice Section, sponsored the NCRUAA and an amendment to the North Carolina International Commercial Arbitration and Conciliation Act (ICACA), N.C. Gen. Stat. §§ 1-567.30 - 1-567.87 (2005). *See generally* 1 & 2 North Carolina Bar Association International Law & Practice Section Revised Uniform Arbitration Act Legislative Focus Group, Proposal for Enacting the Uniform Arbitration Act 2000 (Revised Uniform Arbitration Act or RUAA) to Replace North Carolina's Uniform Arbitration Act; Recommended Conforming Amendment for the North Carolina International Commercial Arbitration and Conciliation Act (ICACA) (2002), a commentary on the proposals, which in some cases the General Assembly modified. The ICACA was also a FLAA source. The NCUAA no longer appears in the General Statutes. Volume III of this 2006 Revised Handbook reprints the NCUAA; it may be governing legislation for older agreements to arbitrate. *See* 2003 N.C. Sess. Laws ch. 2003-345, § 4; N.C. Gen. Stat. § 1-569.3(b) (2005). Annotated cases for the former Act appear under similar NCRUAA provisions in the 2005 General Statutes. Cases decided under the NCUAA may be persuasive authority for FLAA cases. *See also* Part I.B.25.

[9] North Carolina Bar Association Family Law Section Drafting Committee, Amendments for the Family Law Arbitration Act and Associated Forms and Rules (2004) (2004 Proposed Amendments).

[10] 2005 N.C. Sess. Laws ch. 2005-187.

those in the 1999 Handbook.[11] This 2006 Revised Handbook refers to the AAML Model Act publication; in a few cases the AAML publication suggested language for a revised form or rule for practice under the FLAA.

In 2004-05 the NCBA Family Law Section Drafting Committee proposed, and the Family Law Section recommended, revised forms and rules for arbitrations under the Act.[12] The NCBA Board of Governors adopted these in late 2005. This 2006 Revised Handbook publishes those revised forms and rules[13] in Volume I, along with the 2005 Act's text and Comments on each section of the Act, as well as forms and rules approved in 2004 in connection with recommendations for the 2005 FLAA amendments.[14]

With some exceptions and additions, the 1999 Handbook's suggested forms and rules were the same as those submitted to the General Assembly. In some cases changes were necessary because the Legislature enacted the statutes in slightly different format from that proposed by the Bar Association; in other instances the Joint Committee developed other forms and rules based on practice experience.

Volume I of this 2006 Revised Handbook publishes revised forms and rules thought necessary in light of the 2005 amendments to the Act, case law developments, and experience under the Act. Volume II publishes documents, forms and rules contributed by North Carolina family law practitioners. Volume III reprints the NCUAA, removed from the General Statutes

---

[11] *See generally* 2004 American Academy of Matrimonial Lawyers Arbitration Committee, Model Family Law Arbitration Act (Mar. 12, 2005) (AAML Model Act), available on the AAML website. Lynn P. Burleson chaired the AAML Committee; Nancy E. Gordon, a 2004-05 NCBA Family Law Section Arbitration Committee member, was an AAML Committee member. The author of this 2006 Revised Handbook was reporter for the AAML project.

[12] *See generally* North Carolina Bar Association Family Law Section Drafting Committee, Recommended Amendments for Forms and Rules to be Used with the North Carolina Family Law Arbitration Act as Amended in 2005 (Oct. 18, 2005 rev.) (2005 Recommended Amendments).

[13] 2004 Proposed Amendments, note 9, pp. 57-63. This 2006 Revised Handbook is available on the NCBA website; its Volume III reprints the 1999 Handbook.

[14] The Bar Association Family Law Section did not approve all 2005 Drafting Committee suggestions, *e.g.,* for amending Basic R. 38 to allow court review of errors of law as the standard rule. The Bar Association Board of Governors accepted the amended suggestions. *Compare* 2005 Recommended Amendments, note 12, pp. 31-46, the version the Section and the Board of Governors approved, *with* North Carolina Bar Association Family Law Section Drafting Committee, Recommended Amendments for Forms and Rules to be Used with the North Carolina Family Law Arbitration Act as Amended in 2005, at 31-46 (Sept. 5, 2005), the earlier draft that included some proposed amendments that were rejected; *see also* Parts. I.B.17, I.B.23 and II.C.1, Comment to Basic R. 38 of this Revised Handbook.

since its replacement by the NCRUAA; the FLAA in force through 2005 before the 2005 amendments; and the 1999 Handbook.

Like North Carolina Bar Foundation continuing legal education publications, the 2006 Revised Handbook and its 1999 predecessor are intended to provide current and accurate information and are designed to assist in maintaining professional competence. The NCBA does not render any legal, accounting or professional services.

And as with all forms and rules, *drafters of agreements to arbitrate and other documents related to family law arbitration must consider the facts and circumstances of the client and the particular case and must determine which of the suggested form(s) or rule(s) fit(s) the needs of the client(s) and the case.* Readers with suggestions for amendments for the Act, the forms or rules, or this 2006 Revised Handbook, may communicate them to the NCBA Family Law Section chair.

The first initiative for the Act came from the 1982 *Crutchley* case,[15] which, when later cases are taken into account,[16] said that arbitration by agreement cannot result in a binding award for child custody and child support. Current law seems to allow arbitration of other family law issues, *e.g.,* equitable distribution, despite some language (dictum) in *Crutchley.* Family law cases in District Court, the proper court for divorces, may be mediated.[17] Other alternative dispute resolution (ADR) methods, *e.g.,* negotiated settlement, collaborative law[18] and parenting coordinators,[19] may be employed. However, if parties wanted to arbitrate by agreement, *Crutchley* limited issues that can be arbitrated. Family law cases are not subject to court-ordered

---

[15] Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

[16] *E.g.,* Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

[17] *See* N.C. Gen. Stat. §§ 7A-38.4A, 7A-494 - 7A-495, 50-31 (2005); David B. Hamilton, *Mediation --- Common Mistakes and Problems*; Barbara R. Morgenstern, *Point-Counterpoint --- Top Ten Complaints About Lawyers and Mediators in the Mediation Process*, chs. 7, 8 in North Carolina Bar Foundation, Perils and Pitfalls in ADR: A Family Law Perspective (2005) (hereinafter Perils and Pitfalls); *The Family Financial Settlement Program in North Carolina's Courts*; *The Custody and Visitation Mediation Program in North Carolina's Courts*, chs. 11, 12 in Jacqueline R. Claire, Alternative Dispute Resolution in North Carolina (2003).

[18] N.C. Gen. Stat. §§ 50-70 - 50-79 (2005); *see also* Nancy L. Grace, *Collaborative Law Agreements*, ch. 6 in Perils and Pitfalls, note 17.

[19] N.C. Gen. Stat. §§ 50-90 - 50-100 (2005); *see also* Basic R. 15(i) - 15(k), Part II.C.1; Katherine S. Holliday, *Parenting Coordinators --- Authority, Uses and Abuses*, ch. 9 in Perils and Pitfalls, note 17.

arbitration.[20] (The chief difference between arbitration under the Act and court-ordered arbitration is that in the latter, cases are only sent to arbitration by court order after suit has been filed. There is opportunity for trial de novo if a litigant is dissatisfied with an award. Under the Act, there is no right to trial de novo. The Supreme Court's rules for court-ordered arbitration specifically exclude family law cases. The primary purpose of court-ordered arbitration in districts that have the procedure is resolution of small money damage claims up to $15,000.)[21]

Another initiative for the Act came from a realization among family law counsel that in some districts the litigation volume, primarily the priority docket of criminal cases, necessarily has delayed consideration of family law issues in divorces. This has been particularly true if issues are complicated and require considerable court time to hear. Under the Act, parties may choose a family law specialist, or any other lawyer in whom there is mutual confidence, as an arbitrator. (As in all agreements to arbitrate, an arbitrator candidate must agree to serve.[22]) This may be particularly useful if there are complex legal issues in the case. Some parties may prefer the privacy[23] and convenience arbitration affords; *e.g.*, if the arbitrator and the parties agree, arbitration can be done during evenings or on a weekend when courts are not usually in session.

North Carolina is among about 10 States with legislation permitting agreements to arbitrate family law cases.[24] The FLAA is unique in providing comprehensive legislative guidance for parties and integrating protections for spouses and children in one set of statutes.

Custody and support issues, together with other issues, *e.g.*, equitable distribution and perhaps business issues incident to a postnuptial contract, whose agreement to arbitrate includes them, may be submitted to arbitration under the Act. (The Act bars a prenuptial agreement clause for arbitrating custody and support.[25]) The arbitrator must make a reasoned award, *i.e.*, findings of fact and conclusions of law in the award (unless the parties agree otherwise),[26] similar to civil litigation practice.[27] Parties can file this award with the court, like any arbitral award, for

---

[20] N.C. Gen. Stat. § 7A-37.1 (2005); N.C. Ct.-Ord. Arb. R. 1(a)(1)(iv).

[21] For analysis of court-ordered, sometimes called court-annexed, arbitration, *see Court-Ordered Arbitration in North Carolina's Courts*, ch. 13 in Claire, note 17.

[22] *Cf.* N.C. Gen. Stat. § 50-45(c) (2005).

[23] *See* Basic R. 11; N.C. Gen. Stat. § 50-57(b) (2005).

[24] *See* note 2 and accompanying text. Fla. Stat. Ann. § 44.104(14) (West 2003) forbids voluntary binding arbitration of child custody, visitation or child support disputes.

[25] N.C. Gen. Stat. § 50-42(a) (2005).

[26] *Id.* 50-51(b) (2005).

[27] *Cf.* N.C. R. Civ. P. 52.

confirmation as a judgment, and it will be treated like any other order or judgment for enforcement purposes.[28] On the other hand, if parties comply with the award, there is no need to file for confirmation unless there is a statute of limitations issue.[29] The Act, following the State's version of the Uniform Arbitration Act, this State's version of the Revised Uniform Arbitration Act and the North Carolina International Commercial Arbitration and Conciliation Act[30] in many other respects, provides for the court's vacating an award for child custody and support where the court determines the award is not in the best interest of the child. The burden of proof at a hearing on this issue is on the party seeking to vacate the award.[31] A special provision allows modification of an otherwise final award for postseparation support, alimony, child support or child custody when North Carolina law allows a judge to do so.[32] If an award has not been confirmed as a judgment, the parties can agree to arbitrate the modification. If the award has been confirmed as a judgment, the court would make the modification unless the parties jointly move the court for arbitration of the modification, and the court approves. Otherwise the Act follows the Uniform Act for modification of awards.[33] Custody and support cannot be subjects of a premarital agreement to arbitrate,[34] and a court may review arbitrator findings of fact for or modify interim measures for child support or child custody.[35] Emergency protections for spouses or children cannot be modified by the agreement to arbitrate.[36]

Following draft amendments for a Revised Uniform Arbitration Act under study by the Commissioners on Uniform State Laws, the Act allows judicial review of errors of law if the parties agree to this.[37] Other major differences between the Uniform Act and the Family Law

---

[28] N.C. Gen. Stat. §§ 50-53, 50-57 (2005).

[29] For further analysis of the statute of limitations, *see* the Comment to N.C. Gen. Stat. § 50-53 (2005) in this Volume.

[30] *Id.* §§ 1-567.1 - 1-567.20 (2001), the NCUAA, no longer in force except for older agreements to arbitrate, reprinted in this 2006 Revised Handbook, Volume III, and replaced by N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2005), the NCRUAA, now in force; *id.* §§ 1-567.30 - 1-567.87 (2005), the ICACA, still in force.

[31] N.C. Gen. Stat. § 50-54(a)(6) (2005).

[32] *Id.* § 50-56 (2005).

[33] *Id.* § 50-55 (2005).

[34] *Id.* § 50-42(a) (2005).

[35] *Id.* § 50-44(e) (2005).

[36] *Id.* § 50-44(g) (2005).

[37] *Id.* §§ 50-54(a)(8), 50-60(b) (2005); *see also* Basic R. 38.

Arbitration Act include a default provision for a single arbitrator to hear a case,[38] protection of assets pending arbitration,[39] better access to discovery procedures,[40] consolidation[41] and costs.[42]

The Act preserves rights children and spouses now have under State and federal law for emergency protection.[43] Although parties may contract to opt out of many requirements of the Act by special agreement, *e.g.,* for the number of arbitrators or pre-award assets protection, they cannot opt out of these protections.[44] The Act does not deprive parties of any dispute resolution options they have if they do not agree to arbitrate. Parties may litigate a case or may participate in, *e.g.,* collaborative law or mediation.[45] If they agree to arbitrate under the Act, that will affect their option to, *e.g.,* litigate.

The 2005 FLAA amendments add rules on waiver or nonwaiver of provisions in the Act, preserving all rules in the former Act, *e.g.,* right to counsel[46] and nonwaivability of rights under State and federal law for emergency protection.[47] The FLAA provisions are not the same as those in the NCRUAA and afford less opportunity to waive by contract terms of the FLAA. For example, parties to a NCRUAA-governed agreement to arbitrate, perhaps dealing with a commercial contract, may waive right to appeal as they can in litigation involving commercial issues. They cannot in a FLAA-governed agreement.[48] The reason for this difference is that it guarantees an appellate route for review of, *e.g.,* child custody or support issues. To deny by contract a right of appellate review in a FLAA-governed case, as parties have in divorce cases in the courts, invites invalidating an award on statutory and perhaps public policy grounds.[49]

---

[38] N.C. Gen. Stat. § 50-45(a) (2005); *see also id.* § 1-567.40 (2005).

[39] *Id.* § 50-44 (2005); *see also id.* §§ 1-567.39, 1-567.47 (2005).

[40] *Id.* § 50-49 (2005); *see also id.* §§ 1-567.8(a) - 1-567.8(c), 1-567.57(a) (2005).

[41] *Id.* § 50-50.1 (2005), replacing *id.* § 50-50 (2003), adapted from the NCRUAA, *id.* § 1-569.10 (2005); *see also id.* § 1-567.57(b) (2005), a source for former § 50-50.

[42] *Id.* § 50-51 (2005); *see also id.* § 1-567.61 (2005).

[43] *Id.* §§ 50-44(c)(7) - 50-44(c)(8) (2005).

[44] *Id.* § 50-44(g) (2005), preserved by *id.* § 50-42.1(a) (2005).

[45] *See* notes 17-18 and accompanying text.

[46] N.C. Gen. Stat. § 50-48 (2005), preserved by *id.* § 50-42.1(a) (2005).

[47] *Id.* § 50-42.1(a), 50-44(c)(7) - 50-44(c)(8) (2005).

[48] *Compare id.* § 1-569.4 (2005) *with id.* § 50-42.1 (2005).

[49] *See* notes 15-16 and accompanying text.

The 2005 amendments also add arbitrator disclosure requirements;[50] new arbitrability standards;[51] new consolidation rules;[52] reasons to allow arbitrators to change an award;[53] definition of "person;"[54] applying federal and State law governing legal effect, validity or enforceability of electronic records or electronic signatures;[55] standards for redacting or sealing awards;[56] requirements that agreements involved in arbitration must be in writing;[57] and revised rules of construction.[58] All but the last three have NCRUAA counterparts.

Comments follow every section of the Act to explain it and to cite sources.

Besides legislation, the 1999 Joint Committee and the 2004-05 Drafting Committee prepared forms and rules that have been approved by the NCBA Board of Governors after Section consideration and adoption. These forms and rules are designed to be used by practitioners in North Carolina family law cases where parties agree to arbitrate family law matters under the Act. The forms and rules will be subject to further amendment after experience under the Act by the NCBA Family Law Section with final approval by the Board of Governors. This procedure reflects prior practice of other NCBA Sections or committees, *e.g.*, the Dispute Resolution Section's drafting and promotion of legislation and practice rules for court-annexed arbitration and mediated settlement conferences and the Appellate Rules Committee's proposals of amendments for the State appellate rules.

The Forms and Rules were borrowed from standard forms and rules of longstanding

---

[50] N.C. Gen. Stat. § 50-45.1 (2005); *compare id.* § 1-569.12 (2005). Form C, governing arbitrator ethics, must be read in the context of this legislation if the agreement to arbitrate incorporates Form C.

[51] N.C. Gen. Stat. § 50-43(b) (2005); *compare id.* § 1-569.6 (2005).

[52] *Id.* § 50-50.1 (2005), superseding *id.* § 50-50 (2003); *compare id.* § 1-569.10 (2005); *see also* Basic R. 5A, 5B, which are new, Parts. I.B.13 and I.C.1, Comments for Basic R. 5A and 5B.

[53] N.C. Gen. Stat. § 50-52(a) (2005); *compare id.* § 1-569.20 (2005).

[54] *Id.* § 50-59(b) (2005); *compare id.* § 1-569.1(5) (2005).

[55] *Id.* § 50-62(b) (2005); *compare id.* § 1-569.30 (2005).

[56] *Id.* § 50-57(b) (2005).

[57] *Id.* §§ 50.42.1(a), 50-42.2(a), 50-45 - 50-47, 50-51, 50-53, 50-56, 50-58, 50-61 (2005). *Id.* § 50-42 (2005) has always required the agreement to arbitrate to be in writing. *See also id.* § 50-62(b) (2005), validating electronic correspondence and signatures.

[58] *Id.* § 50-62(a) (2005).

dispute resolution institutions, *e.g.,* the American Arbitration Association (AAA). As with the Act, a Comment follows every form or rule to explain it and to cite sources.

The Forms and Rules are not mandatory. As with any form or rule, parties and their counsel must judge which, if any, are appropriate in a given situation. Some clauses and rules are necessary for arbitration, however. For that reason, the Forms are divided into Basic Forms, the substance of which any agreement to arbitrate should include, and Optional Forms, which are variations from the standard Basic Forms. For example, if parties want to use three arbitrators, they would include Form BB. The Act declares that one arbitrator is the norm;[59] Basic Rule 2 echoes this. However, the Act allows parties to deviate from this, and parties who want more than one arbitrator to hear the case (*e.g.,* three) have that option.[60]

The same principle applies for the Rules, which can be incorporated by reference through Forms B.1 - B.6. As options among those forms indicate, parties have two sets of rules to consider for possible incorporation by reference: Basic Rules, usually appropriate and sufficient for most family law cases; Optional Rules, more appropriate in special situations, *e.g.,* where several languages are involved.[61] Parties interested in varying the terms of an agreement to arbitrate, after reviewing the Act for deviations allowed or denied by the Act, can read through the Basic Forms, Optional Forms, Basic Rules and Optional Rules to choose what they want and need. Parties are free to add more terms through Form E. This might happen if marriage partners are a professional couple as well as being married and must arbitrate in accordance with their professional association's rules as well as what they might want incident to breakup of the marriage.

Unlike the Act, which is positive law, the Forms and Rules can be amended or supplemented through experience by the NCBA Family Law Section, which can propose amendments and additional rules. This 2006 Revised Handbook publishes amendments to the 1999 Forms and Rules, including new standards, *e.g.,* Basic Rules 5A and 5B, dealing with consolidation. While Form AA allows parties to "freeze" the rules under which they operate, a procedure more appropriate if parties agree to arbitrate after divorce proceedings begin, parties otherwise are bound by the rules they choose in the format in force when the notice for arbitration is given. This might occur if parties sign a premarital agreement and arbitration begins years, perhaps decades, later. Parties can modify this by subsequent agreement in either case. For example, a "freeze" clause using Form AA may be modified later to take advantage of later developments, *e.g.,* a new rule like Basic Rules 5A and 5B. A premarital agreement can be modified to retain rules in force when the agreement was signed.

---

[59] *Id.* § 50-45(a) (2005).

[60] More than a single arbitrator might be appropriate in large complex cases. *See, e.g.*, A. Doyle Early, Kevin Miller & Honorable Clarence E. Horton, Jr., *Arbitrating the Complex Case by Panel,* ch. 4 in Perils and Pitfalls, note 17.

[61] *See* Optional R. 102-03 (interpreters; language for the arbitration).

The Act allows arbitration of all family law issues except the divorce[62] while affording protections for changing child custody and child support awards,[63] thereby superseding *Crutchley*. The Act otherwise follows the former NCUAA and current arbitration law now in force in the State. Participation in arbitration under the Act is voluntary; it is consistent with freedom of contract principles. The Act offers many opportunities for parties to vary arbitration procedure for their case, with few exceptions, *e.g.*, protections for emergency support under State or federal law.[64]

The Forms and Rules, developed from standard forms and rules commonly used in commercial and other cases where parties agree on arbitration to settle differences, are subject to the parties' decision to use them as published, omit them except for clauses that must be used to create an agreement to arbitrate, change them to suit their case, or add to them to suit their case.

The Act, with the Forms and Rules, offers an excellent ADR option to litigation if parties wish to use it, but only if they agree to do so. The Act is consistent with other ADR legislation; if parties want to negotiate a settlement or mediate instead of arbitrating these issues, they may do so. The Act does not change the substantive law of the State with respect to family law issues; it only offers another way resolve disputes arising under that law.

---

[62] N.C. Gen. Stat. § 50-42(a) (2005), which also forbids a prenuptial (but not a postnuptial) agreement to arbitrate child custody or child support.

[63] *Id.* §§ 50-54(a)(6), 50-55 - 50-56 (2005).

[64] *Id.* § 50-44(g) (2005).

TABLE OF CONTENTS

[This page left blank intentionally]

I. THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT

A. Introduction

The purpose of the North Carolina Family Law Arbitration Act (the Act, or the FLAA) is to permit all issues incident to breakup of a marriage, except the divorce decree itself, and certain issues during a marriage, to be submitted to binding arbitration, if a husband and wife agree to it, with special protection for child custody and child support and a bar on negotiating a prenuptial agreement for divorce, child custody or child support.[65]

Suggested forms and rules, submitted in Parts II.B and II.C, are designed to be used by practitioners in North Carolina family law cases where the parties have agreed to arbitrate family law matters under the Act. The forms and rules, approved by the North Carolina Bar Association (NCBA) Board of Governors in 1999 and amended in 2005, are subject to amendment through experience under the Act by the Bar Association Family Law Section with final approval by the NCBA Board of Governors. Suggestions for amendments for the Act, the forms and rules, or this Handbook may be communicated to the Bar Association Family Law Section chair.

The *Crutchley* case,[66] as interpreted by *Cyclone Roofing*,[67] held child custody or child support issues not subject to binding arbitration. Other issues related to a marriage breakup, *e.g.*, equitable distribution,[68] are subject to binding arbitration by the parties' agreement before, during or after litigation. The North Carolina Uniform Arbitration Act (NCUAA),[69] now no longer in force and superseded since 2003 by the North Carolina Revised Uniform Arbitration Act (NCRUAA),[70] would have applied to these issues. Cases in District Court, the proper court for

---

[65] N.C. Gen. Stat. §§ 50-41(a), 50-42(a) (2005).

[66] Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

[67] Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

[68] *See* N.C. Gen. Stat. §§ 50-20 - 50-21 (2005).

[69] *Id.* §§ 1-567.1 - 5-567.20 (2001).

[70] *Id.* §§ 1-569.1 - 1-569.31 (2005); *compare* Unif. Arbitration Act (2000) §§ 1-33, 7(1) U.L.A 1, 10-93 (2005), the latter hereinafter cited as RUAA and its Comments as RUAA Comments.

divorces,[71] may be mediated.[72] Some districts provide for child custody mediation today.[73] Other alternative dispute resolution (ADR) methods, besides negotiated settlement, include collaborative law and parental coordination.[74] Family law cases are not subject to court-ordered arbitration.[75]

The result has been that although family law issues may be mediated, some but not all family law issues could be subject to arbitration by agreement. The purpose of the Act is to allow parties to arbitrate all family law issues arising out of a marriage breakup while protecting children's interests by allowing review, under terms of the Act, of those aspects of an arbitral award dealing with child support and child custody.[76] Child custody and child support cannot be the subject of a premarital agreement to arbitrate.[77] The Act also protects other aspects of a marriage dissolution currently not subject to arbitration by agreement.[78]

The FLAA was originally adapted from the NCUAA, in force in this State until the NCRUAA superseded it.[79] Amendments and ideas discussed by the Commissioners on Uniform State Laws for what became the Revised Uniform Arbitration Act (RUAA)[80] were also made part

---

[71] N.C. Gen. Stat. §§ 7A-240, 7A-244 (2005).

[72] *Id.* § 7A-38.4A (2005).

[73] *Id.* §§ 7A-494 - 7A-495, 50-13.1 (2005).

[74] *Id.* §§ 50-70 - 50-79, 50-90 - 50-100 (2005); *see also* Grace, note 18; Hamilton, note 17; Holliday, note 19; Morgenstern & Bloom, note 17; for analyses of collaborative law, mediation and parenting coordination. Lorion M. Vitale, *ADR and the Client Interview: Broaching the ADR Subject with Clients*, *id.* ch. 1 offers an overview of ADR methods and ethics considerations.

[75] N.C. Ct.-Ord. Arb. R. 1(a)(1)(iv).

[76] *See* N.C. Gen. Stat. § 50-54(a)(6) and its Comment.

[77] N.C. Gen. Stat. § 50-42(a) (2005).

[78] *See, e.g.,* special rules for interim measures and interim relief when North Carolina or federal law give emergency protection measures for spouses or children, in *id.* § 50-44 (2005).

[79] *See* notes 69-70 and accompanying text.

[80] The 1998-99 FLAA drafters consulted an earlier draft, Commissioners on Uniform State Laws, The Revised Uniform Arbitration Act (Tent. Draft No. 2, Mar. 20, 1998) for ideas.

of the Act, notably provisions allowing review and of issues of law if parties agree to such.[81] The statute also adapted provisions of the North Carolina International Commercial Arbitration and Conciliation Act (ICACA).[82] The NCUAA formerly in force in North Carolina was deficient in some respects, *e.g.,* no provision for pre-award protection of assets. Innovations from the ICACA were incorporated in the FLAA as enacted in 1999. In 2003 the General Assembly enacted the NCRUAA, in most but not all respects identical to the RUAA.[83] In 2005 the General Assembly incorporated many, but not all, features of the NCRUAA into the FLAA while retaining the statutory format of the 1999 FLAA, which had been based on the now-superseded NCUAA.[84]

The FLAA also includes specific reference to North Carolina family law legislation, *e.g.,* special provisions for subsistence for spouses and children in pre-award asset protection cases. The FLAA takes nothing away from parties that they would have in divorce and related litigation, except resolving all issues but the divorce in the courts. Resolution of these issues in the courts can be taken away only if parties sign a valid agreement to arbitrate. If parties agree to arbitrate, the procedure follows the path of the NCUAA with provisions taken from the NCRUAA and the ICACA, special provisions for family law incorporated from the General Statutes, plus ideas from the Draft Revised Uniform Act, now enacted among other jurisdictions in different format as the Revised Uniform Arbitration Act.

As the amended FLAA requires,[85] the first step after a thorough reading and understanding of the Act and case law construing it[86] incident to preparing an agreement to

---

[81] N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005), a feature dropped from the final RUAA version.

[82] N.C. Gen. Stat. §§ 1-567.30 - 1-567.87 (ICACA).

[83] *Compare id.* §§ 1-569.1 - 1-569.31 (2005) *with* RUAA §§ 1-31, note 70.

[84] *Compare* N.C. Gen. Stat. §§ 50-41 - 50-62 (2005) *with* N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2005) *and id.* §§ 1-567.1 - 1-567.20 (2001), superseded by the NCRUAA except for some older agreements to arbitrate.

[85] N.C. Gen. Stat. § 50-62(a) (2005).

[86] *E.g.*, Semon v. Semon, 161 N.C. App. 137, 587 S.E.2d 460 (2003), is the first reported case under the Act; Poole v. Cogdell, 164 N.C. App. 411, 595 S.E.2d 816, 2004 WL 1098733 (2004, unpublished op.).

arbitrate and action under it, is researching State case law under the old NCUAA,[87] the ICACA,[88] the NCRUAA[89] and North Carolina family law legislation and cases.[90] The next step is studying other jurisdictions' legislation adopting the UAA,[91] the RUAA[92] or the equivalent of the ICACA[93] and cases construing these statutes. These decisions are, of course, not binding on North Carolina courts, but they may be persuasive. A third step is reviewing cases under the Federal Arbitration Act[94] where there is similar language in the federal statutes; these cases may be persuasive but are probably not as useful as cases under the UAA or the RUAA.

Another research source may be the AAML Model Family Law Arbitration Act, adopted in 2005 and based in part on the FLAA, which follows the RUAA format and not the UAA format like the FLAA.[95] Several jurisdictions have the Model Act under study; if it is enacted

---

[87] Some of this caselaw appears in annotations under comparable NCRUAA provisions.

[88] The ICACA is similar to international commercial arbitration and conciliation statutes in other States. Analysis in George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C.J. Int'l L. & Com. Reg. 419 (1992), is dated by later enactment of conciliation legislation in this State and by the time (over 10 years) since the article was published. Other States may have enacted similar legislation or may have amended their statutes since then. The ICACA was based in part on the UNCITRAL Model Law, now in force in other countries. The article may be a useful starting point, however.

[89] Thus far no cases have construed the NCRUAA, although that gap is bound to be filled in the future. NCRUAA annotations to the superseded NCUAA must be used with caution where the statutory language differs. If the language or statutory intent is the same, NCUAA cases may be persuasive.

[90] N.C. Gen. Stat. § 50-62(a) (2005), citing N.C. Gen. Stat. chs. 50, 50A, 50B, 51, 52, 52B, 52C.

[91] 7(1) U.L.A. 95 (2005) publishes the UAA, notes most variations from the UAA as enacted around the country, and annotates cases decided under the UAA.

[92] 7(1) U.L.A. 1 (2005) publishes the RUAA, notes most variations from the RUAA as enacted around the country, and annotates cases decided under the RUAA.

[93] *See* notes 88-89.

[94] 9 U.S.C. §§ 1-307 (2000).

[95] *See also* note 11 and accompanying text. The AAML Model Act drafters initially took a two-track approach, preparing draft legislation following the UAA and the RUAA formats. The AAML eventually decided on a single-track, RUAA-based statute with forms and rules like those in this and the 1999 Handbook. *Introduction: Reasons for the Legislation*, in AAML

around the country, cases decided under it will be persuasive authority for this State if the adopted statutory language is the same, or similar to, the FLAA.

Because the FLAA contemplates premarital agreements as allowed under, *e.g.,* General Statutes Chapter 52B, there is a possibility that the United States, or Federal, Arbitration Act (FAA) could apply, if interstate or foreign commerce or maritime transactions are involved in the agreement to arbitrate.[96] *Allied-Bruce Terminix* held Congress intended that interstate commerce under the FAA extend to the limits of the Commerce Clause;[97] this means that the FAA will govern many business agreements to arbitrate. While most premarital agreements under Chapter 52B and other State legislation deal with incidents of marriage, *e.g.,* wills, depending on how "property" is defined, the result may be that a premarital agreement to arbitrate will involve business interests involving interstate commerce. The same might be true for postmarital agreements to arbitrate. Although primary emphasis is on the UAA and the RUAA in the analysis that follows, possible application of the FAA has been noted in some instances. The FAA, except those provisions implementing international agreements,[98] does not confer subject matter jurisdiction on the federal courts. The FAA must be enforced by the State courts[99] and by the federal courts when the federal courts have independent subject-matter jurisdiction. The result is that the FAA could be invoked in family law-related matters, particularly if business *transactions* in interstate commerce are comprehended within a prenuptial or postnuptial agreement to arbitrate. The possibility of applying treaty-based legislation, part of the FAA, is beyond the scope of this analysis.[100] There is always a possibility of applying the Federal Arbitration Act to transactions covered by the FLAA, but there is nothing in the FLAA that conflicts with federal law. If a conflict develops, perhaps in application, State law must give way. Given the number of divorces not involving transactions in interstate commerce, the chances of conflict are small. Even more slight is the chance that the FLAA will conflict with U.S. treaties and implementing legislation, *e.g.,* the Federal Arbitration Act, since these deal with international commercial transactions. The FLAA takes into account other federal law and

---

Model Act, note 11, p. 16 n.1. Some jurisdictions may choose to enact a UAA-based family law arbitration statute like the FLAA. If so, those States' decisions may be particularly helpful. The two-track AAML documents may be on file with the AAML and are in the Wake Forest University School of Law collection.

[96] *See id.* §§ 1-2, 201, 301 (2000).

[97] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

[98] *E.g.,* 9 U.S.C. §§ 203, 302 (2000).

[99] *See, e.g.,* Doctor's Associates v. Cassarotto, 517 U.S. 681 (1996).

[100] *See generally* Walker, *Trends,* note 88, for a partly-dated study of these issues, which could arise in an international business context.

treaties to which the United States is a party, *e.g.,* those dealing with child abduction.[101]

A **Comment** follows each section to explain its purpose, origin, and in some cases its relationship with family law legislation. The Comments also refer to the January 25, 1999 Proposed Legislation, published by the Bar Association as a guide to the 1999 General Assembly and members of the bar as the FLAA went through the legislative process. The January 25, 1999 version of Proposed Legislation superseded earlier drafts, some of which may be in circulation. The Comments also occasionally refer to other NCBA proposals for legislation, *e.g.,* for the NCRUAA or the 2005 FLAA amendments. The enacted version of the Act is different in some instances from the draft act submitted in Proposed Legislation and the draft act submitted in 2004 Proposed Amendments; Comments note these differences. The Comments also refer to AAML Model Act provisions.[102]

B. The North Carolina Family Law Arbitration Act

1. § 50-41. Purpose; short title.

(a) It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody and child support. Pursuant to this policy, the purpose of this Article is to provide for arbitration as an efficient and speedy means of resolving these disputes, consistent with Chapters 50, 50A, 50B, 51, 52, 52B, and 52C of the General Statutes and similar legislation, to provide default rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for proceedings ancillary to this arbitration.

(b) This Article may be cited as the North Carolina Family Law Arbitration Act.

Comment

This section parallels the former NCUAA and the ICACA, N.C. Gen. Stat. §§ 1-567.1 (2001), 1-567.30 (2005). A strong North Carolina policy supported upholding arbitral awards under the former NCUAA; *see, e.g., Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984). The FAA has no similar statement, but cases like *Doctors' Associates,* note 99, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625 (1985) recite the same strong policy for FAA arbitration. Courts and arbitrators should conduct proceedings under this Act, mindful of policies stated in this Act and provisions of the General Statutes governing family law, *e.g.,* Chapters 50-52C. *Cf. Semon v. Semon*, 161 N.C. App. 137, 142, 587 S.E.2d 460, 464 (2003). *See also* N.C. Gen. Stat. § 50-62(a) (2005); *id.* §§ 1-569.31 (suggested short title; NCRUAA has no policy statement like *id.* § 50-41(a) (2005);

---

[101] *See* N.C. Gen. Stat. § 50-44 (2005).

[102] AAML Model Act, note 11.

AAML Model Act §§ 101(a), 134 and their Commentaries. Section 50-41 follows Proposed Legislation § 1 and was unchanged by the 2005 amendments. N.C. Gen. Stat. § 50-42.1(a) (2005) allows waiving or varying the effect of *id.* § 50-41 (2005) to the extent provided by law; *See also* Part I.B.3.

2. § 50-42. Arbitration agreements made valid, irrevocable and enforceable.

(a) During, or after marriage, parties may agree in writing to submit to arbitration any controversy, except for the divorce itself, arising out of the marital relationship. Before marriage, parties may agree in writing to submit to arbitration any controversy, except for child support, child custody, or the divorce itself, arising out of the marital relationship. This agreement is valid, enforceable, and irrevocable except with both parties' consent, without regard to the justiciable character of the controversy and without regard to whether litigation is pending as to the controversy.

(b) This Article does not apply to an agreement to arbitrate in which a provision stipulates that this Article does not apply or to any arbitration or award under an agreement in which a provision stipulates that this Article does not apply.

Comment

N.C. Gen. Stat. § 50-42 (2005) tracks *id.* §§ 1-567.2(a) - 1-567.2(b)(1) (2001) of the former NCUAA, limiting its scope to agreements related to marriage and following *id.* § 50-20(d)'s phraseology ("Before, during or after . . . "). *See also* 9 U.S.C. § 2 (2000); N.C. Gen. Stat. §§ 1-567.37, 1-569.6(a) (2005). Section 50-42's intent is to validate agreements to arbitrate, whether signed as part of a premarital agreement pursuant to, *e.g.,* N.C. Gen. Stat. Ch. 52B; after marriage but before separation; after difficulty in a marriage arises; after a complaint for absolute divorce or other causes related to dissolving a marriage has been filed; or even after an judgment for absolute divorce has been entered. There is nothing in § 50-42 forbidding agreements to arbitrate in connection with a divorce case consent order. Parties or their counsel could sign a consent order reciting an agreement to arbitrate under the Act. This order would be just as binding as a single-paragraph letter agreement to arbitrate signed by the parties or their counsel. If a party later refuses to arbitrate, a court can compel arbitration against that party upon an application under N.C. Gen. Stat. § 50-43 (2005). *Id.* § 50-45 (2005) is authority for that court to appoint the arbitrator(s) and declare the rules for the arbitration, perhaps the arbitrator and the rules for which a party applying for arbitration under *id.* § 40-43 (2005) nominates. Parties following consent order practice could recite the entire agreement to arbitrate in the consent order; they could incorporate it by reference. All § 50-42 requires is a signed agreement to arbitrate to trigger the arbitration process. Litigants, counsel and parties considering arbitration must consider § 50-42's importance. If parties sign an agreement to arbitrate, they can sign another agreement to end the proceedings and settle, use another ADR procedure, or litigate. If parties subject to an agreement to arbitrate go to full-blown litigation without filing a motion to compel, a court could find an implied waiver of arbitration. *See* the N.C. Gen. Stat. § 50-42.1 Comment.

N.C. Gen. Stat. 50-42 (2005) is consistent with *id.* § 50-50.1 (2005) (consolidation of arbitrations), because the other agreement(s) would be governed by the NCRUAA if North Carolina-based; arbitrations under an agreement governed by this Act could be consolidated with agreements under the NCRUAA. *See also* Part I.B.10. N.C. Gen. Stat. § 1-569.6(a) (2005), following RUAA § 6(a), retains the heart of former N.C. Gen. Stat. § 1-567.2(a) (2001) and read with N.C. Gen. Stat. §§ 50-52(b) and 1-569.30 (2005), broadens the number of agreements to include electronic (*e.g.,* e-mail) agreements. The FLAA thus now provides for E-mail and similar correspondence; parties may consent to these forms of communication by special provision in the agreement to arbitrate. *See, e.g.,* Part I.C.1, Basic R. 9, 15(f), 26(b), 30, as amended in this 2006 Revised Handbook. The 2005 legislation did not amend *id.* 50-42 (2005); its terms may be waived after a controversy arises; *see* N.C. Gen. Stat. § 50-42.1(b)(1) (2005) and Part I.B.3.

See also Fred M. Morelock, *Arbitration for the Average Jill and Joe and Post-Hearing Matters*, Perils and Pitfalls, note 17, ch. 3; Amy Simpson, *Beware of the Contract, id.* ch. 2; RUAA §§ 6, 30 Comments, note 70, pp. 23, 91.

3. § 50-42.1. Nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section or in this Article, a party to an agreement to arbitrate or an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law. Any waiver or agreement must be in writing.

(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 G.S. 50-42, 50-49(a), (b), or (c), 50-58, or 50-59.

(2) Agree to unreasonably restrict the right to notice of the initiation of an arbitration proceeding under G.S. 50-42.2(a) or (b).

(3) Agree to unreasonably restrict the right to disclosure of any facts by an neutral arbitrator under G.S. 50-45.1.

(c) Except as otherwise provided in this Article, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 50-43, 50-45(f), 50-52 through 50-57, or 50-60 through 50-62.

(d) Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate.

Comment

Section 50-42.1, promoted as §§ 50-41(c) - 50-41(f) in the 2004 Proposed Amendments, note 9, is similar to AAML Model Act § 104, which follows RUAA § 4 with important differences, *e.g.,* declaring that the right to appeal is nonwaivable. Section 50-42.1 is also similar to N.C. Gen. Stat. § 1-569.4 (2005), but the opportunity for waiver under *id.* 50-42.1 (2005) is more limited than under § 1-569.4.

From the beginning the FLAA has had statutes dealing with waivers; these continue in effect after the 2005 amendments:

N.C. Gen. Stat. 50-44(g) (2005), allowing parties to limit interim measures from arbitrators or interim relief from a court, except that 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50B-3, Chapter 52C of the General Statutes, federal law, or treaties to which the United States is a party, whose purpose is to provide immediate, emergency relief or protection, cannot be waived;

N.C. Gen. Stat. § 50-47(1) (2005), appearance by a party at a hearing waives claims of deficiency of notice;

N.C. Gen. Stat. § 50-48 (2005), waiver of representation by counsel before a proceeding is ineffective.

A 2003 amendment to N.C. Gen. Stat. § 50-53 (2005) in effect allows parties to waive submission of all or part of an award for confirmation. A 2005 amendment, N.C. § 50-44(j) (2005), tracking *id.* § 1-569.8(c) (2005), says a party seeking interim measures or interim relief under *id.* § 50-44 (2005) does not waive the right to arbitrate by seeking such relief. This scotches an argument, *e.g.,* when a party, having noticed an opponent for arbitration under N.C. Gen. Stat. § 50-42.2 (2005), added in 2005, then seeks interim relief from a court and is confronted with an argument that filing in court waives the right to arbitrate.

The 2005 amendments preserve these rules in N.C. Gen. Stat. § 50-42.1(a) (2005) ("Except as provided . . . in this Article [*i.e.*, the FLAA]") and others in the Act, adding that all waivers or agreements must be in writing.

Following but not copying verbatim the NCRUAA, N.C. Gen. Stat. §§ 1-569.4(a), 1-569.4(b) and 1-569.4(c) (2005), the 2005 FLAA amendments also allow written waivers or agreements to waive provisions of the Act, *id.* § 50-42.1(a) (2005), with two sets of exceptions to waivers listed in *id.* §§ 50-42.1(b) and 50-42.1(c) (2005).

Under N.C. Gen. Stat. § 50-42.1(b) (2005), "before a controversy arises that is subject to an agreement to arbitrate," a party to that agreement to arbitrate may not:

> Waive or agree to vary the effect of the requirements of *id.* § 50-42 (2005) (validity, irrevocability, and enforceability of agreements to arbitrate), *id.* § 50-49(a) (2005) (authority of arbitrators to issue subpoenas, etc.), *id.* § 50-49(b) (2005) (authority of arbitrators to permit depositions), *id.* § 50-49(c) (2005) (applicability of provisions of law compelling a person under subpoena to testify), *id.* § 50-58 (2005) (method of applying to a court), or *id.* 50-59 (2005) (definitions), *id.* § 50-42.1(b)(2) (2005);
>
> Agree to unreasonably restrict the right to notice of initiation of an arbitration under *id.* §§ 50-42.2(a) or 50-42.2(b) (2005), *id.* § 50-42.1(b)(2) (2005);
>
> Agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator under *id.* § 50-45.1 (2005), § 50-42.1(b)(3) (2005).

After a controversy arises, parties may agree to waive these requirements. The Act does not define "before a controversy arises." In postnuptial agreement situations, where the divorce proceeding begins before or simultaneous with signing the agreement, the controversy and

opportunity for N.C. Gen. Stat. § 50-42.1(b) (2005) waiver(s) would come at the same time. In situations of prenuptial agreements and postnuptial agreements signed before marital rancor, a controversy giving rise to opportunity for *id.* § 50-42.1(b) waivers would come only when a dispute arises. In post-divorce custody or support agreement situations, the controversy would arise only when there is a dispute related to these matters. If the agreement to arbitrate is incident to a dispute over custody and/or support, the controversy would arise coincident with signing the agreement. On the other hand, if parties sign an agreement to arbitrate as part of an amicable settlement, the controversy might arise much later to trigger § 50-42.1(b) waiver opportunities. Although this limited waiver opportunity, taken from NCRUAA § 1-569.4(b) and therefore available for long-term commercial contracts, is available for similar prenuptial or postnuptial agreements or post-divorce agreements, prudent practice is to avoid the § 50-42.1(b) waiver opportunity in most cases, particularly because of the undefined term, "controversy." One effect of § 50-42.1(b) is that if parties sign an agreement to arbitrate under N.C. Gen. Stat. § 50-42 (2005), they cannot waive its irrevocable status until after a controversy arises. Parties who have signed an agreement and who wish to rescind the agreement could do so if the rescinding agreement recites that a controversy within the meaning of N.C. Gen. Stat. § 50-42.1(b) (2005) has arisen, perhaps describing the controversy. Section 50-42.1(b) further underscores the need for parties to understand the importance of signing an agreement to arbitrate under § 50-42.

Under N.C. Gen. Stat. § 50-42.1(c) (2005), parties may not waive or vary the effect of these provisions:

> *Id.* § 50-42.1 (2005), which recites waiver rules;
> *Id.* § 50-43 (2005), proceedings to compel or stay arbitration;
> *Id.* § 50-45(f) (2005), immunity of arbitrators;
> *Id.* § 50-52 (2005), change of arbitral award by arbitrators;
> *Id.* § 50-53 (2005), confirmation of an award by a court;
> *Id.* § 50-54 (2005), vacating an award;
> *Id.* § 50-55 (2005), modifying or correcting an award;
> *Id.* § 50-56 (2005), modifying of an award for alimony, postseparation support, child support, or child custody, based on substantial change of circumstances;
> *Id.* § 50-57 (2005), orders or judgments on an award;
> *Id.* § 50-60 (2005), issues for appeal;
> *Id.* § 50-61 (2005), nonretroactivity of the FLAA, unless parties agree in writing otherwise;
> *Id.* § 50-62 (2005), construction rules.

The § 50.42.1(c) nonwaiver list is considerably longer than the comparable NCRUAA provision, N.C. Gen. Stat. § 1-569.4(c) (2005) and its RUAA § 4(c) counterpart. The reason is that issues like child custody and child support are always open if there has been substantial change of circumstances, including appellate review.[103] Otherwise, as in the NCRUAA, N.C. Gen. Stat. §

---

[103] To allow waiver might invite a public policy or statutory attack on this aspect of the Act. *See* Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982) and notes 66-67 and

1-569.4(c) (2005), parties could contract out of the appeal under *id.* § 1-569.28 (2005) as they can in civil litigation. They cannot under the FLAA.

N.C. Gen. Stat. 50-42.1(d) (2005), copied from *id.* § 1-569.4(c) and RUAA § 4(c), declares that a waiver contrary to *id.* § 50-42.1 (2005) is not effective but does not void an agreement to arbitrate.

A final issue on waivers is the issue of waiver by conduct, or implied waiver. This situation may arise if, after parties sign an agreement to arbitrate, a party files suit and defendant fails to file objections and a motion to compel arbitration under N.C. Gen. Stat. § 50-43 (2005). Case law under the former NCUAA, upon which the FLAA is based in part, recites a strong policy for arbitration and a general policy against waivers. Filing a suit for divorce incident to arbitration will not be enough to trigger a waiver claim, particularly since N.C. Gen. Stat. § 50-41 (2005) specifically declares that all issues except the divorce can be subject to arbitration. *Compare, e.g.,* Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986) *and* Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 229-33, 321 S.E.2d 872, 876-79 (1984) (no waiver of arbitration) *with* Douglas v. Vicker, 150 N.C. App. 705, 707-08, 564 S.E.2d 622, 623-24 (2002) (waiver found because of detriment to party). A party to an agreement to arbitrate faced with an opponent's filing for general adjudication of family law issues besides seeking divorce should file a § 50-43 motion to compel arbitration promptly, unless that party has changed his or her mind about the desirability of arbitration over litigation. *See also* N.C. Gen. Stat. § 50-42.1(b) (2005) and the discussion on waiver after a controversy has arisen.

See also Recommended Amendments, note 12, discussing 2005 amendments that require matters to be in writing; 2004 Proposed Amendments, note 9, pp. 29-34; Handbook, note 3, pp. 11-14, 17-18, discussing older FLAA waiver rules; AAML Model Act, note 11, pp. 56-57; RUAA § 4 Comment, note 70, p. 17.

4. § 50-42.2. Notice.

(a) A person initiates an arbitration proceeding by giving written notice to the other parties to the agreement to arbitrate in the manner in which the parties have agreed or, in the absence of agreement, by certified or registered mail, return receipt requested, or by service as authorized for the commencement of a civil action under the North Carolina Rules of Civil Procedure.

(b) Unless a person objects to the lack or insufficiency of notice not later than the beginning of the hearing, the person's appearance at the hearing waives the objection.

(c) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course of business, regardless of whether the person acquires knowledge of the notice.

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

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

---

accompanying text.

Comment

Following the NCRUAA, N.C. Gen. Stat. § 1-569.2 (2005), *id.* § 50-42.2 (2005) establishes statutory notice standards, subject to § 50-42.1(b)(1) waiver rules for §§ 50-42.2(a) - 50-42.2(b) before a controversy arises that is subject to an agreement to arbitrate. *See* Part I.B.3. Previously arbitration rules chosen by the parties in an agreement might govern notice; if parties failed to choose notice rules, the arbitrator can establish fair rules. N.C. Gen. Stat. § 50-45(e) (2005).

Section 50-42.2(a) provides that a person begins an arbitration proceeding by giving written notice to other parties to the agreement to arbitrate in the manner the parties have agreed, or if there is no agreement, by certified or registered mail, return receipt requested, or by service under the North Carolina Rules of Civil Procedure. Section 50-59(b) broadly defines "person;" *see* Part I.B.12. Part I.B.2 notes a possibility of other than traditional hard copy written notice through e-mail.

Section 50-42.2(b) says that unless a person objects to lack or insufficiency of notice not later than the beginning of the arbitration hearing, that person's appearance at the hearing waives any objection.

Section 50-42.2(c) says that unless otherwise provided in the Act, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course of business, regardless of whether that person acquires knowledge of the notice. This parallels language in cases like Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950), requiring service reasonably calculated to notify of civil litigation.

Section 50-42.2(d) declares that notice has been given if the person has knowledge of, or has received, the notice.

Section 50-42.2(e) says that a person is given actual notice when it comes to that person's attention or notice is delivered at the person's place of residence, place of business, or at another location held out by that person as a place of delivery of communications.

N.C. Gen. Stat. § 50-42.1(b)(1) says that before a controversy arises, parties may not agree to unreasonably restrict the right to notice of the initiation of an arbitration proceeding under *id.* §§ 50-42.2(a) or 50-42.2(b) (2005). N.C. Gen. Stat. § 50-42.1(a) (2005) allows waiving or varying the effect of *id.* § 50-42.2(c) - 50-42.2(e) (2005) to the extent provided by law. *See also* Part I.B.3.

Section 50-59(b) defines "person;" *see* Part I.B.22.

See also 2004 Proposed Amendments, note 9, pp. 34-35; Handbook, note 3, p. 10, discussing § 50-42 as enacted before the 2005 additions; AAML Model Act, note 11, pp. 54-55; RUAA § 2 Comment, note 70, p. 13.

5. § 50-43. Proceedings to compel or stay arbitration.

(a) On a party's application showing an agreement under G.S. 50-42 and an opposing party's refusal to arbitrate, the court shall order the parties to proceed with the arbitration. If an opposing party denies existence of an agreement to arbitrate, the court shall proceed summarily to determine whether a valid agreement exists and shall order arbitration if it finds for the moving party; otherwise, the application shall be denied.

(b) Upon the application of a party, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. This issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the court shall order a stay if it finds for the moving party. If the court finds for the opposing party, the court shall order the parties to go to arbitration. 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. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue unless the court orders otherwise.

(c) If an issue referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a court of competent jurisdiction, the application shall be made in that court. Otherwise, the application may be made in any court of competent jurisdiction.

(d) The court shall order a stay in any action or proceeding involving an issue subject to arbitration if an order or an application for arbitration has been made under this section. If the issue is severable, the stay may be with respect to that specific issue only. When the application is made in an action or proceeding, the order compelling arbitration shall include a stay of the court action or proceeding.

(e) An order for arbitration shall not be refused and a stay of arbitration shall not be granted on the ground that the claim in issue lacks merit or because grounds for the claim sought to be arbitrated have not been shown.

Comment

N.C. Gen. Stat. § 50-43 (2005) tracks former *id.* § 1-567.3 (2001) of the old NCUAA, except for new legislation ("An arbitrator . . . orders.") in *id.* § 50-43(b). Who decides arbitrability issues, *e.g.,* whether a matter is subject to arbitration, has divided courts. Section 50-43(b) now follows the NCRUAA, §§ 1-569.6(c) - 1-569.6(d) (2005), directing the arbitrator to decide whether a condition precedent to arbitration has been fulfilled and whether a contract with a valid agreement to arbitrate is enforceable. (Under prior § 50-43[b] language a court decides on existence of an agreement to arbitrate.) The amendment also says that if there is a challenge to existence of an agreement, arbitration may go forward unless the court otherwise orders.

In other respects § 50-43 is the same as originally enacted. N.C. Gen. Stat. § 50-42.1(c) forbids waiving or varying the effect of *id.* § 50-43's provisions. *See* Part I.B.3. *See also* 9 U.S.C. §§ 3-4 (2000); N.C. Gen. Stat. §§ 1-567.38, 1-569.7 (2005); 2004 Proposed Amendments, note 9, pp. 35-36; AAML Model Act, note 11, pp. 58-60; Handbook, note 3, p. 11, discussing § 50-43 before the 2005 amendments; RUAA § 6 Comment, note 70, p. 23.

6. § 50-44. Interim relief and interim measures.

(a) In the case of an arbitration where arbitrators have not yet been appointed, or where

the arbitrators are unavailable, a party may seek interim relief directly from a court as provided in subsection (c) of this section. Enforcement shall be granted as provided by the law applicable to the type of interim relief sought.

(b) In all other cases a party shall seek interim measures as described in subsection (d) of this section from the arbitrators. A party has no right to seek interim relief from a court, except that a party to an arbitration governed by this Article may request from the court enforcement of the arbitrators' order granting interim measures and review or modification of any interim measures governing child support or child custody.

(c) In connection with an agreement to arbitrate or a pending arbitration, the court may grant, under subsection (a) of this section any of the following:

(1) An order of attachment or garnishment;

(2) A temporary restraining order or preliminary injunction;

(3) An order for claim and delivery;

(4) Appointment of a receiver;

(5) Delivery of money or other property into court;

(6) Notice of lis pendens;

(7) Any relief permitted by G.S. 7B-502, 7B-1902, 50-13.5(d), 50-16.2A, 50-20(h), 50-20(i), or 50-20(i1); or Chapter 50A, Chapter 50B, or Chapter 52C of the General Statutes;

(8) Any relief permitted by federal law or treaties to which the United States is a party; or

(9) Any other order necessary to ensure preservation or availability of assets or documents, the destruction or absence of which would likely prejudice the conduct or effectiveness of the arbitration.

(d) The arbitrators may, at a party's request, order any party to take such interim measures of protection as the arbitrators consider necessary in respect of the subject matter of the dispute, including interim measures analogous to interim relief specified in subsection (c) of this section. The arbitrators may require any party to provide appropriate security, including security for costs as provided in G.S. 50-51, in connection with interim measures.

(e) In considering a request for interim relief or enforcement of interim measures, any finding of fact of the arbitrators in the proceeding shall be binding on the court, including any finding regarding the probable validity of the claim that is the subject of the interim relief sought

or granted, except that the court may review any findings of fact or modify any interim measures governing child support or child custody.

(f) Where the arbitrators have not ruled on an objection to their jurisdiction, the findings of the arbitrators shall not be binding on the court until the court has made an independent finding as to the arbitrators' jurisdiction. If the court rules that the arbitrators did not have jurisdiction, the application for interim relief shall be denied.

(g) Availability of interim relief or interim measures under this section may be limited by the parties' prior written agreement, except for relief pursuant to G.S. 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50B-3, Chapter 52C of the General Statutes; federal law; or treaties to which the United States is party, whose purpose is to provide immediate, emergency relief or protection.

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

(i) A party seeking interim measures, or any other proceeding before the arbitrators, shall proceed in accordance with the agreement to arbitrate. If the agreement to arbitrate does not provide for a method of seeking interim measures, or for other proceedings before the arbitrators, the party shall request interim measures or a hearing by notifying the arbitrators and all other parties of the request. The arbitrators shall notify the parties of the date, time, and place of the hearing.

(j) A party does not waive the right to arbitrate by proceeding under this section.

Comment

The 2005 legislation amended N.C. Gen. Stat. 50-44 (2005) in one respect. New § 50-44(j) makes it clear that a party seeking interim relief or interim measures does not waive a right to arbitration if that party, e.g., files for interim relief or interim measures with a court. *See also* Part I.B.3, discussing waivers related to other aspects of the Act.

There is no equivalent for N.C. Gen. Stat. § 50-44 (2005) in the FAA or the former North Carolina Uniform Act. A weakness of proceedings under the FAA, except those under 9 U.S.C. § 8 (2000), and all proceedings under the Uniform Act, unless cured by special legislation or the parties' agreement, is that most courts have held that the equivalent of prejudgment attachment, etc., to preserve assets pending reduction of a claim to judgment in a civil action, is not available in arbitration. N.C. Gen. Stat. §§ 50-44(a) - 50-44(i) were adapted from the ICACA, *id.* §§ 1-567.39 and 1-567.47 (2005). New § 50-44(j) tracks N.C. Gen. Stat. § 1-569.8(c). The NCRUAA, N.C. Gen. Stat. § 1-569.8 (2005), adopts RUAA § 8, which has language similar to the FLAA.

Sections 50-44(c)(6) - 50-44(c)(8) were adapted from *id.* §§ 7B-502, 7B-1902, 50-

13.5(d), 50-20(h), 50B-3, Chapter 52C and similar State legislation and refer to federal legislation or treaties to which the United States is a party; that are designed to afford temporary emergency protection or support to spouses or children. The latter two provisions are designed to include federal statutes and treaties concerned, *e.g.,* with international child abduction, not a frequent problem, but one which has been an issue in North Carolina. These provisions would also include protections that future federal legislation or treaties to which the United States is a party accord family members. A treaty is not effective for the United States until the United States exchanges ratifications, which has, *e.g.,* happened for Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, in force for the United States since July 1, 1988. *See* United States Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2005, at 439 (2005), published annually. If a treaty requires implementing action, usually legislation, *e.g.*, 42 U.S.C. §§ 11601-11 (2000, 2002 Repl.) for the Convention, the legislation governs. Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).

If arbitrators have not been appointed, a party otherwise subject to an arbitration agreement may apply to a court for interim relief as in a civil action. If arbitrators have been appointed, a party's first recourse is to ask the arbitrator(s) for interim measures, which can be coextensive with interim relief a court can order, unless the arbitrators are unavailable, *e.g.,* on vacation. If an opponent to interim measures ordered by the arbitrators refuses to comply, the other party may apply to the court for enforcement.

N.C. Gen. Stat. §§ 50-44(g), 50-44(h) (2005) keep the law as it is for children's temporary custody and support under *id.* §§ 7B-502, 7B-1902, 50-13.5(d), 50-20(h), 50B-3, Chapter 52C and similar State legislation; federal legislation; or treaties to which the United States is party; designed to afford temporary emergency relief or protection. A party cannot use an agreement to arbitrate to supersede these rights by contract. Whether a general contract, *e.g.,* a premarital agreement without an agreement to arbitrate, can override these protections is not the concern of this Act. The Act seeks to make clear that parties cannot sign an agreement to arbitrate and thereby override federal legislation and treaties to which the United States is party. Treaties and federal statutes are part of the supreme law of the land, U.S. Const. art. VI.

N.C. Gen. Stat. § 50-42.1(a) (2005) ("Except as otherwise provided . . . in this Article") makes it clear that *id.* §§ 50-44(g) and 50-44(h) (2005)'s nonwaivability continues to apply after the 2005 amendments. In other respects *id.* § 50-41.1(a) allows waiving or varying the effect of *id.* 50-44 (2005) to the extent provided by law.

See also Part I.B.3; Handbook, note 3, pp. 12-14, discussing § 50-44 as originally enacted; AAML Model Act, note 11, pp. 60-62; RUAA § 8, Comment, note 70, p. 31.

7. § 50-45. Appointment of arbitrators; rules for conducting the arbitration.

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

(b) If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. The agreement may provide for appointing one or more arbitrators.

Upon the application of a party, the court shall appoint arbitrators in any of the following situations:

(1) The method agreed upon by the parties in the arbitration fails or for any reason cannot be followed.

(2) An arbitrator who has already been appointed fails or is unable to act, and a successor has not been chosen by the parties.

(3) The parties cannot agree on an arbitrator.

(c) Arbitrators appointed by the court have all the powers of those arbitrators specifically named in the agreement. In appointing arbitrators, a court shall consult with prospective arbitrators as to their availability and shall refer to each of the following:

(1) The positions and desires of the parties.

(2) The issues in dispute.

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

(4) The availability of prospective arbitrators.

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

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

(f) Arbitrators and established arbitration institutions, whether chosen by the parties or designated by the court, have the same immunity as judges from civil liability for their conduct in the arbitration.

(g) "Arbitration institution" means any neutral, independent organization, association,

agency, board or commission that initiates, sponsors or administers arbitration proceedings, including involvement in appointment of arbitrators.

(h) The court may award costs under G.S. 50-51(f) in connection with applications and other proceedings under this section.

Comment

The 2005 FLAA Amendments added requirements in N.C. Gen. Stat. §§ 50-45(a), 50-45(d) and 50-45(e) (2005) that agreements to submit to other than a single arbitrator, for an arbitration institution to conduct the arbitration, and on rules for the arbitration, must be in writing. N.C. Gen. Stat. § 50-45(h) (2005) was rewritten to provide for "costs under G.S. 50-51(f)" instead of "costs, as provided in G.S. 50-51(f)," a distinction without a difference.

N.C. Gen. Stat. § 50-45(a) (2005) is the default provision for a single arbitrator. Parties may agree on more than one arbitrator. The FLAA generally refers to arbitrators in the plural but should be interpreted to apply to a single arbitrator unless the parties' agreement otherwise provides. N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) (2005) track the former NCUAA, *id.* § 1-567.4 (2001). *Id.* § 50-45(c) (2005) requires a court to hear the position of the parties and their counsel, even though they may not be able to agree on arbitrators, and to consider appointing arbitrators who have expertise in family law issues, if those persons agree to serve. (In some cases, *e.g.,* a family law arbitration where there are substantial business law issues, a lawyer with family law expertise may not be appropriate.)

N.C. Gen. Stat. § 50-45(d) (2005) tracks *id.* §§ 1-567.41(e) (2005). *See also* 9 U.S.C. § 5 (2000). Allowing a court to choose an arbitration institution if parties fail to appoint or agree on arbitrators permits institutions specializing in, or otherwise qualified to deal with, marital disputes an opportunity to name arbitrators who are neutral and qualified to hear the case. Although parties may choose any arbitration institution to supervise the proceedings, the court is limited in designation to an institution the court considers qualified to conduct family law arbitrations. Some arbitration institutions, *e.g.,* the American Arbitration Association (AAA), decline to accept family law arbitration; if parties mistakenly agree to arbitrate before an institution like AAA, they will receive a refusal and be required to select another institution or to choose arbitrators. The NCRUAA, N.C. Gen. Stat. § 1-569.1(1) (2005), defines "arbitration organization"; *id.* § 50-45(g) (2005) has a similar definition for "arbitration institution."

There is no equivalent to N.C. Gen. Stat. § 50-45(e) (2005) in the Uniform Act, the RUAA or other legislation. Section 50-45(e) covers a situation where parties sign a bare-bones agreement to arbitrate, perhaps in a premarital agreement, and then cannot agree on rules of procedure. It codifies results in the cases, *e.g.,* Keebler Co. v. Truck Drivers Local 170, 247 F.3d 8, 11 (1st Cir. 2001) (arbitrators may choose procedural rules if parties cannot agree on them, as long as the rules are fundamentally fair). Under § 50-45(e) initially the arbitrators, and the court if the arbitrators cannot decide on rules, may direct use of certain rules, usually standard rules developed by institutions like the North Carolina Bar Association Family Law Section or the American Academy of Matrimonial Lawyers, whose rules in AAML Model Act, note 11, pp. 111-35, are similar to those this Revised Handbook recommends. The arbitrators or the court can develop these in consultation with parties or counsel after an application to the arbitrators or

the court, or the arbitrators or the court could direct use of certain rules, incorporating them by reference in an order or drafting them in the order, if disagreement among parties and counsel remains after the application and hearing. Usually the arbitrators will be able to decide on rules, but the court as ultimate stop-gap assures that an arbitration will move forward in a timely, efficient way. Usually § 50-45(e) will come into play when parties agree on more than one arbitrator, the agreement does not provide for rules for the arbitration, and the arbitrators cannot agree on rules to be used. This might happen if parties agree on an even number of arbitrators without designating a "tie-breaker" arbitrator, i.e., the arbitrator whose decision governs if there is a tie on a decision. It could also be invoked in a single arbitrator case, where the agreement is silent on rules to be used, and the arbitrator cannot decide on rules that to be used.

There is no equivalent to N.C. Gen. Stat. § 50-45(f) (2005) in the Uniform Act; it tracks *id.* § 7A-37.1(e) (2005) and N.C. Ct.-Ord. Arb. R. 5(f), declaring immunity for arbitrators in court-ordered arbitration. The NCRUAA, N.C. Gen. Stat. §§ 1-569.14(a) - 1-569.14(b) (2005) provides for arbitrator and arbitration institution immunity; *see also id.* §§ 1-567.87 (2005) (conciliator immunity). *Id.* § 50-42.1(c) (2005) bars parties from agreeing to waive or vary the effect of *id.* § 50-45(f) (2005). N.C. Gen. Stat. § 50-42.1(a) (2005) allows waiving or varying the effect of *id.* §§ 50-45(a) - 50-45(e) and 50-45(g) - 50-45(h) (2005) to the extent provided by law.

N.C. Gen. Stat. § 50-45(h) (2005) provides for costs in the court's discretion, *e.g.,* if a party fails to comply with terms of an arbitration agreement to appoint an arbitrator, and a court must appoint one pursuant to *id.* §§ 50-45(b) - 50-45(c) (2005). In other circumstances, *e.g.,* when an arbitrator dies and a court appoints a successor, usually no costs should be assessed. *Id.* § 50-45(h) is thus a financial incentive for parties to comply with an arbitration agreement.

See also Parts I.B.3, I.B.14; Early et al., note 60; Morelock, Part II.B.2 Comment; Handbook, note 3, pp. 14-16; AAML Model Act, note 11, pp. 56-58; RUAA § 1, Comment, note 70, p. 10.

8. 50-45.1. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and 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.

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

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

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section 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 grounds for vacating an award made by the arbitrator under G.S. 50-54(a)(2).

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court may vacate an award pursuant to G.S. 50-54(a)(2).

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 50-54(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration institution 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 those grounds pursuant to G.S. 50-54(a)(2).

Comment

N.C. Gen. Stat. § 50-45.1 (2005), tracking the NCRUAA, *id.* § 1-569.12 (2005), establishes standards for disclosure of possible arbitrator conflicts of interest. As *id.* §§ 50-45.1(b) - 50-45.1(f) make clear, an arbitrator's failure to disclose a financial or personal interest in the proceeding's outcome or an existing or past relationship with any party to the agreement to arbitrate or to the arbitration proceeding, parties' counsel or representatives, a witness to the proceeding, or to other arbitrators to the proceeding, can be grounds for vacating an award under *id.* § 50-54(a)(2) (2005). Section 50-54(a)(2) allows a court to vacate an award, upon a party's application, because "There was evident partiality by an arbitrator appointed as a neutral, [because of] corruption of an arbitrator, or [because of] misconduct prejudicing the rights of a party[.]"

Sections 50-45.1(c) - 50-45.1(f) do not mandate vacatur ("may"). However, if a court believes (1) nondisclosure as § 50-45.1 requires shows "evident partiality by an arbitrator appointed as a neutral," (2) an arbitrator has been corrupted through nondisclosure, or (3) arbitrator misconduct has "prejudic[ed] the rights of a party[,]" the court must vacate an award. If the court vacates an award, a new hearing must be granted, except in child custody or child support cases. In the latter case the court may proceed to hear and determine these issues. *Id.* § 50-54(b). If a court vacates an award but does not direct a rehearing, that is a ground for appeal after an award has been confirmed as a judgment. *Id.* §§ 50-53, 50-57, 50-60(a)(5) (2005). On the other hand, if a court denies vacatur and confirms an award, that decision is also appealable. *Id.* §§ 50-53, 50-54(d), 50-57, 50-60(a)(3) (2005). *See also* Parts I.B.16, I.B.17, I.B.20 and I.B.23.

Section 50-45.1 arbitrator disclosure standards displace conflicting arbitrator ethics standards that parties may incorporate by reference in the agreement to arbitrate. *See, e.g.*, North Carolina Canons of Ethics for Arbitrators, Oct. 1, 1999, Canon VIII, 350 N.C. 877, 887 (1999). Arbitrator ethics rules violations have never been considered grounds for vacatur. *See, e.g.*, Delta Mine Holding Co. v. AFC Coal. Prop., Inc., 280 F.3d 815, 820 (8th Cir. 2001); ANR Coal Co. v. Cogentrix, Inc., 173 F.3d 493, 495-500 (4th Cir. 1999); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679-82 (7th Cir. 1983); Lee Korland, Comment, *Proposing a New Test for*

Evident Partiality Under the Federal Arbitration Act, 53 Case W.L. Rev. 815, 832-34 (2003). However, ethics can be an important factor in assessing a particular arbitration's result. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective,* in Symposium, *Ethics in a World of Mandatory Arbitration*, 18 Ga. St. L. Rev. 907, 909-10 (2002). Parties preparing an agreement to arbitrate should consider incorporating arbitrator ethics standards. *See* Basic Form C and its Comment in Part II.B.1.c.

Although the statutory burden is on arbitrators to disclose, the initial burden is on the parties who nominate persons to serve as arbitrators. The burden may also fall on a court that must appoint an arbitrator under N.C. Gen. Stat. § 50-45 (2005) where parties cannot agree on an arbitrator. In either case good practice would call for diligent inquiry of persons under consideration, including inquiry about counsel or other party representatives in a case, or witnesses reasonably expected to be called. Arbitrators should be reminded, before the proceeding begins, of their § 50-45.1(b) continuing duty to disclose.

N.C. Gen. Stat. § 50-42.1(b)(3) (2005) forbids parties to "unreasonably restrict the right to disclosure of any facts by a neutral arbitrator under G.S. 50-45.1" before a controversy arises that is subject to an agreement to arbitrate. The practical impact of this rule is that a prenuptial agreement signed before marital trouble cannot "unreasonably restrict" disclosure. On the other hand, once "a controversy arises," *e.g.*, a divorce proceeding, parties may, under *id.* § 50-42.1(a) (2005), waive or vary the effect of *id.* § 50-45.1's disclosure rules to the extent provided by law, thus eliminating this aspect of a potential vacatur ground under *id.* § 50-54(a)(2) (2005). However, parties cannot waive rights under § 50-54 itself. *Id.* 50-42.1(c). Thus, *e.g.*, once there has been a divorce filing, parties may agree to arbitrate under the Act and may allow a relative of a party to serve as an arbitrator by waiving any § 50-45.1 conflicts in writing. On the other hand, an otherwise "independent" arbitrator discovered to be "on the take" from a party would continue to be subject to § 50-54(a)(2)'s "corruption" principle. The § 50-54 corruption ground cannot be waived.

Section 50-45(g) defines "arbitration institution." Section 50-59(b) defines "person."

See also Parts I.B.3, I.B.22; 2004 Proposed Amendments, note 9, pp. 38-41, which proposed a different location for N.C. Gen. Stat. § 50-45.1 (2005); Lynn P. Burleson, *Ethical Standards for Arbitrators and Appellate Review,* Perils and Pitfalls, note 17, ch. 5; AAML Model Act, note 11, pp. 66-67; RUAA § 12 Comment, note 70, p. 43.

9. § 50-46. Majority action by arbitrators.

The arbitrators' powers shall be exercised by a majority unless otherwise provided by the parties' written agreement or this Article.

Comment

The 2005 amendments require that an agreement to modify this rule be in writing. N.C. Gen. Stat. § 50-42.1(a) (2005) allows waiving or varying the effect of *id.* § 50-46 (2005) to the extent provided by law. Section 50-46 tracks the former NCUAA, N.C. Gen. Stat. § 1-567.5 (2001), substituting "shall" for "may." The NCRUAA, N.C. Gen. Stat. § 1-569.13 (2005), is similar.

See also Part I.B.3; 2004 Proposed Amendments, note 9, p. 41; Early et al., note 60; Handbook, note 3, p. 16; AAML Model Act, note 11, pp. 67-68; RUAA § 13 Comment, note 70, p. 48.

10. § 50-47. Hearing.

Unless otherwise provided by the parties' written agreement:

(1) The arbitrators shall appoint a time and place for the hearing and notify the parties or their counsel by personal service or by registered or certified mail, return receipt requested, not less than five days before the hearing. Appearance of a party at the hearing waives any claim of deficiency of notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause shown, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the written agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. Upon application of a party, the court may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(3) All the arbitrators shall conduct the hearing, but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon request of any party or at the election of any arbitrator, the arbitrators shall cause to be made a record of testimony and evidence introduced at the hearing. The arbitrators shall decide how the cost of the record will be apportioned.

Comment

This tracks the former NCUAA, N.C. Gen. Stat. § 1-567.6 (2001); *see also id.* § 1-567.54 (2005). The 2005 amendments require written agreements in *id.* §§ 50-47, chapeau material, and 50-47(1). The NCRUAA, § 1-569.15(c) - 1-569.15(d) (2005) has the substance of *id.* §§ 50-47(1) - 50-47(2) (2005). Section 50-47, unlike § 1-569.15(b) (2005), does not provide for a "pretrial" hearing analogous to a N.C.R. Civ. P. 16 pretrial conference. There is nothing to bar parties from agreeing on such a hearing or an arbitrator from, in effect, conducting such a hearing. Basic R. 6, based on standard arbitration rules, provides for an administrative conference, *i.e.*, an initial hearing or preliminary meeting before the principal hearing(s) on the merits of the controversy. If the arbitrator adjourns the initial hearing after ruling on planning,

etc., as § 50-47(1) provides, the arbitrator has in effect conducted a pretrial hearing. N.C. Gen. Stat. § 50-44 (2005) interim relief measures contemplate a pretrial hearing, in most cases, for that purpose. N.C. Gen. Stat. § 50-42.1(a) (2005) allows waiving or varying the effect of *id.* § 50-47 (2005) to the extent provided by law.

See also Parts I.B.3, II.B.6; 2004 Proposed Amendments, note 9, pp. 41-42; Early et al., ; note 60; Handbook, note 3, p. 17; AAML Model Act, note 11, pp. 69-71; RUAA § 15 Comment, note 70, p. 54.

11. § 50-48. Representation by attorney.

A party has the right to be represented by counsel at any proceeding or hearing under this Article. A waiver of representation prior to a proceeding or hearing is ineffective.

Comment

This tracks the former NCUAA, N.C. Gen. Stat. § 1-567.7 (2005), except to substitute "counsel" for "an attorney" to make it clear that more than one lawyer can represent a party. The General Assembly did not amend *id.* § 50-48 in 2005. Parties may not agree to waive or vary the effect of *id.* § 50-48. N.C. Gen. Stat. § 50-42.1(a) (2005) ("Except as otherwise provided in . . . this Article"). The NCRUAA, *id.* § 1-569.16 (2005), has similar language.

See also id. §§ 1-567.48(b), 1-567.79 (2005); Part I.B.3; Handbook, note 3, pp. 17-18; AAML Model Act, note 11, pp. 71-72; RUAA § 16, Comment, note 70, p. 56.

12. § 50-49. Witnesses; subpoenas; depositions; court assistance.

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

(b) On the application of a party and for use as evidence, the arbitrators may permit depositions to be taken, in the manner and upon the terms the arbitrators designate.

(c) All provisions of law compelling a person under subpoena to testify apply.

(d) The arbitrators or a party with the approval of the arbitrators may request assistance from the court in obtaining discovery and taking evidence, in which event the Rules of Civil Procedure under Chapter 1A of the General Statutes and Chapters 50, 50A, 52B and 52C of the General Statutes apply. The court may execute the request within its competence and according to its rules on discovery and taking evidence and may impose sanctions for failure to comply with its orders.

(e) A subpoena may be issued as provided by G.S. 8-59, in which case the witness compensation provisions of G.S. 6-51, 6-53, and 7A-314 shall apply.

Comment

N.C. Gen. Stat. §§ 50-49(a) - 50-49(c) (2005) track the former NCUAA, *id.* §§ 1-567.8(a) - 1-567.8(c) (2001); *id.* §§ 50-49(d) - 50-49(e) (2005) track *id.* § 1-567.57(a) (2005) with references to the North Carolina Rules of Civil Procedure and Chapters 50, 50A and 52C added.

See also 9 U.S.C. § 7 (2000). The NCRUAA, N.C. Gen. Stat. § 1-569.17 (2005), has similar discovery principles. The 2005 General Assembly did not amend N.C. Gen. Stat. § 50-49 (2005).

Reference to general discovery and sanctions principles, stated in, *e.g.*, the Rules of Civil Procedure as well as special provisions related to family law, Chapters 50, 50A and 52B, is necessary because agreements to arbitrate may encompass interspousal business relations as well as family law issues. N.C. Gen. Stat. §§ 50-42, 50-50 (2005). Citation of provisions related specifically to family law litigation underscores the cumulative nature of discovery in these cases and that the Act does not preclude use of discovery procedures permitted by family law legislation. If emergency proceedings are instituted in court, those proceedings will be governed by statutes applicable to them, including discovery. *See id.* § 50-44 (2005) and its Comment. N.C. Gen. Stat. § 50-49(b) (2005) contemplates that arbitrators may order depositions ahead of the hearing for discovery or for use during the hearing for witnesses who cannot be subpoenaed or who cannot attend the hearing because of, *e.g.*, illness or infirmity.

Court assistance with discovery under N.C. Gen. Stat. § 50-49(d) can mean that recalcitrant parties risk N.C.R. Civ. P. 37 sanctions, including citation for contempt, from the court for failure to comply with discovery. The Comment to N.C. Gen. Stat. § 50-51 (2005) makes the point that arbitrators cannot cite a party for contempt for failure to comply with an award. Once an award has been confirmed as a judgment, however, a court may issue a contempt citation for failure to comply with the judgment.

N.C. Gen. Stat. § 50-42.1(b)(1) (2005) bars parties from waiving or varying the effect of the requirements of *id.* §§ 50-49(a) - 50-49(c) (2005), "before a controversy arises that is subject to an agreement to arbitrate." N.C. Gen. Stat. § 50-42.1(a) (2005) allows parties to agree to waive or vary the effect of *id.* §§ 50-49(d) - 50-49(e) (2005) to the extent provided by law.

See also Parts I.B.3, I.B.6, I.B.14; Handbook, note 3, pp. 18-19; AAML Model Act, note 11,pp. 72-74; RUAA § 17, Comment, note 70, p. 58.

13. § 50-50.1. Consolidation.

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

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same parties or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third party.

(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.

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

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

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

Comment

N.C. Gen. Stat. § 50-50.1 (2005) is a new provision for consolidating arbitrations; it follows the NCRUAA, *id.* § 1-569.10 (2005). N.C. Gen. Stat. § 50-42.1(a) (2005) allows parties to agree to waive or vary the effect of *id.* § 50-50.1 (2005) to the extent provided by law. Section 50-50.1 establishes criteria for consolidating arbitrations and allows a court to order consolidation of arbitration if the agreement is silent on the issue. If parties agree to consolidate, and one party later reneges and refuses to consolidate, a fortiori a court can order consolidation. Section 50-50.1(c) preserves contract autonomy on consolidation; parties may agree that an arbitration shall not be consolidated with other arbitration proceedings. New Basic R. 5A and 5B, if incorporated into an agreement to arbitrate, will bar consolidations. The Comments to these Rules offer alternative language if parties want consolidation.

Although multiple arbitration agreements in a family law context may be rare, this situation might arise, *e.g.,* in a circumstance of a business arrangement between two people in which there is an agreement to arbitrate dissolution of the business. These two people later sign an premarital agreement pursuant to, *e.g.,* N.C. Gen. Stat. Ch. 52B and marry. Still later there is a divorce proceeding and an agreement to arbitrate under the FLAA. Another possibility is that the subject of the couple's business arrangement, in which there is an agreement to arbitrate, and the subject of a third agreement to arbitrate fit the §§ 1-569.10 and 50-50.1 consolidation criteria. Unless the couple's business arrangement agreement to arbitrate and the FLAA-governed agreement have §§ 1-569.10(c) and 50-50.1(c) opt-out clauses like those in Basic R. 5A and 5B, there could be consolidation of both or all three arbitrations. If parties to the FLAA agreement elect Basic R. 1, the Basic Rules will trump all other arbitration rules.

See also Parts I.B.3 and II.C.1, Comments to Basic R. 5A, 5B; 2004 Proposed Amendments, note 9, pp. 53-54; AAML Model Act, note 11, pp. 62-63; RUAA § 10 Comment, note 70, p. 37.

Former § 50-50 (2003) allowed court-ordered consolidation only if parties had agreed to consolidation, and a party later refused to consolidate. The statute read:

> **§ 50-50. Consolidation**
>
> (a) If parties to two or more arbitration agreements agree, in their respective arbitration agreements or otherwise, to consolidate arbitrations arising out of those agreements, they may agree upon common arbitrators to hear all arbitrations, and these arbitrations shall proceed as consolidated.
>
> (b) If parties to two or more arbitration agreements agree, in their respective arbitration agreements or otherwise, to consolidate arbitrations arising out of those agreements, the court, upon application by a party, may do any of the following:
>
> (1) Order the arbitrations consolidated on terms the court considers just and necessary;
>
> (2) If all parties cannot agree on arbitrators for the consolidated arbitration, appoint arbitrators as provided by G.S. 50-45; and
>
> (3) If all parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make other orders it considers necessary.

Former N.C. Gen. Stat. § 50-50(b) (2003) tracked *id.* § 1-567.57(b) (2005). Former § 50-50(a)

(2005) allowed parties to agree to consolidate without court intervention; § 50-50(b) court intervention procedure was included as a precaution if it was thought necessary to make consolidation a part of an official record, and to cover situations where a party objected to consolidation. There was no Uniform Act equivalent. *See also* Handbook, note 3, p. 19, for analysis of § 50-50.

14. § 50-51. Award; costs.

(a) The award shall be in writing, dated and signed by the arbitrators joining in the award, with a statement of the place where the arbitration was conducted and the place where the award was made. Where there is more than one arbitrator, the signatures of a majority of the arbitrators suffice, but the reason for any omitted signature shall be stated. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the parties' written agreement. Time of delivery shall be computed from the date of personal delivery or date of mailing.

(b) Unless the parties otherwise agree in writing, the award shall state the reasons upon which it is based.

(c) Unless the parties otherwise agree in writing, the arbitrators may award interest as provided by law.

(d) The arbitrators in their discretion may award specific performance to a party requesting an award of specific performance when that would be an appropriate remedy.

(e) Unless the parties otherwise agree in writing, the arbitrators may not award punitive damages. If arbitrators award punitive damages, they shall state the award in a record and shall specify facts justifying the award and the amount of the award attributable to punitive damages.

(f) Costs:

(1) Unless the parties otherwise agree in writing, awarding of costs of an arbitration shall be in the arbitrators' discretion.

(2) In making an award of costs, the arbitrators may include any or all of the following as costs:

a. Fees and expenses of the arbitrators, expert witnesses, and translators;

b. Fees and expenses of counsel, to the extent allowed by law unless the parties otherwise agree in writing, and of an institution supervising the arbitration, if any;

c. Any other expenses incurred in connection with the arbitration proceedings;

d. Sanctions awarded by the arbitrators or the court, including those provided by N.C.R. Civ. P. 11 and 37; and

e. Costs allowed by Chapters 6 and 7A of the General Statutes.

(3) In making an award of costs, the arbitrators shall specify each of the following:

a. The party entitled to costs;

b. The party who shall pay costs;

c. The amount of costs or method of determining that amount; and

d. The manner in which costs shall be paid.

(g) An award shall be made within the time fixed by the agreement. If no time is fixed by the agreement, the award shall be made within the time the court orders on a party's application. The parties may extend the time in writing either before or after the expiration of this time. A party waives objection that an award was not made within the time required unless that party notifies the arbitrators of his or her objection prior to delivery of the award to that party.

Comment

This tracks the former NCUAA, N.C. Gen. Stat. § 1-567.61 (2001), for the most part, with incorporation by reference of N.C.R. Civ. P. 11 and 37 and Chapters 6 and 7A, thereby tracking N.C. Gen. Stat. § 6-1 (2005), and specific provision for sanctions if imposed by the arbitrators or a court before the award is made. The 2005 amendments added a requirement that the award also recite the place where the arbitration was conducted, in addition to the place where the award was made. The two sites can be different; *e.g.*, the arbitration might be conducted in the offices of a spouse's counsel, or at a neutral site within North Carolina, and the arbitrator might complete and sign the award in his or her offices in another North Carolina community. The 2005 amendments require that agreements under §§ 50-51(a) - 50-51(c), 50-51(e), 50-51(f)(1) and 50-51(f)(2)(b) be in writing. Another § 50-51(f)(2)(b) amendment makes it clear that counsel fees and expenses may be added as costs, "to the extent allowed by law," unless the parties otherwise agree in writing. Unless parties agree on different rules, counsel fees and expenses as costs can be no different in an arbitration than in litigation. N.C. Gen. Stat. § 50-42.1(a) (2005) allows parties to agree to waive or vary the effect of *id.* § 50-51 (2005) to the extent provided by law.

Compare 9 U.S.C. § 9 (2000), the NCRUAA, N.C. Gen. Stat. § 1-569.21 (2005); the former NCUAA, *id.* §§ 1-567.9, 1-567.11 (2001). The last sentence in *id.* § 50-51(a) (2005) is in neither the NCRUAA or the NCUAA and establishes the date from which time will be computed

for purposes of, *e.g., id.* § 50-52 (2005).

Many commercial awards under the UAA or the RUAA are not "reasoned," *i.e.,* they do not go beyond stating a dollar amount and who owes it. They are like general verdicts. N.C. Gen. Stat. § 1-567.61(b) (2005) follows this pattern for international commercial arbitration awards. However, *id.* § 50-51(b) (2005) takes an opposite tack from *id.* § 1-567.61(b) for FLAA cases and requires a reasoned award unless the parties otherwise agree in writing, *i.e.,* they ask the arbitrator to render a "general verdict"-style award in the agreement to arbitrate. A reasoned award is almost necessary in child support and child custody cases, to show how the arbitrator arrived at the award. On the other hand, a low-assets divorce case might be resolved by a simple declaration of property division. Arbitrators should follow N.C.R.Civ. P. 52 principles of findings of fact and conclusions of law in drafting a reasoned award, since many awards under this Act may be subject to motions to vacate, modify or correct the award as provided in N.C. Gen. Stat. §§ 50-54 - 50-56 (2005).

Id. § 50-51(e) (2005) says punitive damages may not be awarded unless the parties otherwise agree in writing. If arbitrators award punitive damages, they must state the award in a record and must specify facts justifying the award and the amount of the award attributable to punitive damages. The NCRUAA, *id.* § 1-569.21(a) (2005) authorizes punitive damages if the parties agree that the arbitrators may award them, if the law would allow them in a civil action on the same claim, and if evidence at the hearing justifies the award under legal standards otherwise applicable to the claim.

No North Carolina case has considered the issue of contempt for failure to comply with an award under the FLAA. Elder v. Barnes, 219 N.C. 411, 14 S.E.2d 249, 251-52 (1941), decided under an older general arbitration act, held a court can issue an injunction after party-chosen arbitrators make an award. Failure to comply with an injunction invites contempt. Luther v. Luther, 234 N.C. 430-31, 67 S.E.2d 345, 346-47 (1951) held contempt for failure to comply with a consent order entered pursuant to spouses' agreement was available, although *Luther* disallowed a contempt under that case's facts. The conclusion is that if parties agree to arbitrate under the FLAA, which permits parties to agree to arbitrate, a contract allowing determination of property distribution, etc. as in *Luther*, *Elder* and *Luther* stand as strong precedent for a court's holding a party in contempt for failure to comply with a FLAA award when confirmed as a judgment under N.C. Gen. Stat. § 50-53 (2005). No case has allowed arbitrators to issue contempt citations. An award may order monetary relief, support and custody, etc. under the Act; it may direct a party to transfer title and the like. If a party refuses to comply with an award, the procedure is to have the award confirmed as a judgment and seek a contempt citation if a party refuses to comply with the award.

See also Part I.B.3; 2004 Proposed Amendments, note 9, pp. 44-46; Simpson, Part II.B.2 Comment; Handbook, note 3, pp. 19-21; AAML Model Act, note 11, pp. 79-81, useful in discussing the different approaches RUAA § 21 and the Model Act take; RUUA § 21 Comment, note 70, p. 69.

15. § 50-52. Change of award by arbitrators.

(a) On a party's application to the arbitrators or, if an application to the court is pending

under G.S. 50-53 through G.S. 50-56, on submission to the arbitrators by the court under the conditions ordered by the court, the arbitrators may modify or correct the for any of the following reasons:

(1) Upon grounds stated in G.S. 50-55(a)(1) and (a)(3).
(2) If the arbitrators have not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding.
(3) To clarify the award.

(b) The application shall be made within 20 days after delivery of the award to the opposing party. The application must include a statement that the opposing party must serve any objections to the application within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-51(a) through G.S. 50-51(f) and G.S. 50-53 through G.S. 50-56.

Comment

The 2005 amendments conformed N.C. Gen. Stat. § 50-52 (2005) to the NCRUAA, *id.* §§ 1-569.20(a) - 1-569.20(c); *compare* the NCUAA, *id.* § 1-567.10 (2001) and *id.* § 1-567.63 (2005). N.C. Gen. Stat. § 50-42.1(c) (2005) bars waiving or varying the effect of *id.* § 50-52 (2005) unless otherwise provided in the Act.

See also Part. I.B.3; 2004 Proposed Amendments, note 9, p. 46, which recommended a different format; Handbook, note 3, pp. 21-22; AAML Model Act, note 11, pp. 77-78; RUAA § 20 Comment, note 70, p. 67.

16. § 50-53. Confirmation of award.

(a) Unless the parties otherwise agree in writing that part or all of an award shall not be confirmed by the court, upon a party's application, the court shall confirm an award, except when within time limits imposed under G.S. 50-54 through G.S. 50-56 grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 50-54 through 50-56.

(b) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

Comment

The 2005 amendments to N.C. Gen. Stat. § 50-53 (2005) rewrote § 50-53 by subdividing the statute into subsections (a) and (b). An agreement that all or part of an award shall not be confirmed by the court, a 1999 amendment, must now be in writing. The words "except when" are a substitute for "unless." The statute's costs provision now appears in *id.* § 50-53(b) (2005). In other respects § 50-53 tracks the NCRUAA, *id.* § 1-569.22 (2005) and the former NCUAA, *id.* § 1-567.12 (2001); compare *id.* § 1-567.65 (2005), from which the costs provision was taken; 9 U.S.C. § 9 (2000). Cross-reference to N.C. Gen. Stat. § 50-51(f) was inserted for clarity. Costs may be awarded if an application lacks merit.

Since an agreement to arbitrate is a contract, the statutes of limitation for contracts apply to applications under N.C. Gen. Stat. § 50-53 (2005). N.C. Gen. Stat. §§ 1-47(2) (2005) (10

years, contracts under seal); 1-52(1) (2005) (3 years, contracts not under seal); *see also* Sprinkle v. Sprinkle, 159 N.C. 81, 82-84, 74 S.E. 739-40 (1912). However, 9 U.S.C. § 9 (2000) has a 1-year limitation for filing between the day the award is rendered and the application for confirmation. Treaty-based arbitral awards must be filed within 3 years. 9 U.S.C. §§ 207, 302 (2000). These limitations could come into play if an agreement to arbitrate triggers the Federal Arbitration Act. This could occur, *e.g.,* if a premarital agreement has a clause covering the spouses' business in interstate commerce as well as family law issues. Federal and not State law would govern the interstate commerce aspects, or those coming under the treaty legislation. This is an example of the override of federal law mentioned in the Introduction, Part I.A, and the Comment to N.C. Gen. Stat. § 50-41 (2005), Part I.B.1. Once confirmed as a judgment, the 10-year N.C. Gen. Stat. § 1-47(1) (2005) judgment enforcement limitation would apply if the agreement is under seal.

N.C. Gen. Stat. § 50-42.1(c) (2005) bars waiving or varying the effect of *id.* § 50-53 (2005) unless otherwise provided in the Act.

See also Parts I.B.3, I.B.14, the latter discussing contempt for failure to comply with an award confirmed as a judgment; 2004 Proposed Amendments, note 9, pp. 46-47; Handbook, note 3, p. 22, publishing § 50-53 as it was before the 1999 amendment; AAML Model Act, note 11,pp. 81-82; RUAA § 22 Comment, note 70, p. 72.

17. § 50-54. Vacating an award.

(a) Upon a party's application, the court shall vacate an award for any of the following reasons:

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

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing the rights of a party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to the provisions of G.S. 50-47;

(5) There was no arbitration agreement, the issue was not adversely determined in proceedings under G.S. 50-43, and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief awarded either could not or would not be granted by a court is not ground for vacating or refusing to confirm the award;

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

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

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

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant. If the application is predicated on corruption, fraud, or other undue means, it shall be made within 90 days after these grounds are known or should have been known.

(c) In vacating an award on grounds other than stated in subdivision (5) of subsection (a) of this section, the court may order a rehearing before arbitrators chosen as provided in the agreement, or in the absence of a provision regarding appointment of arbitrators, by the court in accordance with G.S. 50-45, except in the case of a vacated award for child support or child custody in which case the court may proceed to hear and determine all issues. The time within which the agreement requires an award to be made applies to the rehearing and commences from the date of the order.

(d) The court shall confirm the award and may award costs of the application and subsequent proceedings under G.S. 50-51(f) if an application to vacate is denied, no motion to modify or correct the award is pending, and the parties have not agreed in writing that the award shall not be confirmed under G.S. 50-53.

Comment

The 2005 amendments rewrote N.C. Gen. Stat. § 50-54(d) (2005). *Id.* § 50-54 (2005) tracks the former NCUAA, *id.* § 1-567.13 (2001), except *id.* § 50-54(a)(6) (2005), added for child support or child custody issues; vacating a punitive damages award, *id.* § 50-54(a)(7) (2005) if parties agree that the arbitrator may award punitive damages under *id.* § 50-51(e) (2005); and vacating an award for errors of law in N.C. Gen. Stat. § 50-54(a)(8) (2005) if parties agree to such. N.C. Gen. Stat. § 50-54(a)(6) follows Tex. Family Code § 153.0071 on the burden of proof. N.C. Gen. Stat. § 50-54(c) (2005) omits "new" before "arbitrators"; compare 9 U.S.C. §§ 10, 12-13 (2000) and the former NCUAA, N.C. Gen. Stat. § 1-567.13(c) (2001). The court may remit an issue, *e.g.,* of child support or child custody to the same arbitrators or new arbitrators. *Id.* 50-54(d) (2005) follows the costs provisions of *id.* § 1-567.65 (2005) with cross-reference to *id.* § 50-51(f) (2005) for clarity. Imposing costs of an application would normally occur if a court deems an application is without merit. *See also id.* § 1-567.64 (2005). *Id.* § 50-54 (2005) is substantially in line with the NCRUAA, *id.* § 1-569.23 (2005), aside from *id.* § 1-569.23(a)(6) (2005) (proper notice under *id.* § 1-569.9 [2005]), and *id.* § 1-569.23's omission of the equivalent of *id.* §§ 50-54(a)(6) - 50-54(a)(8) (2005).

The review of errors of law option enacted in this section appeared in early RUAA drafts; however, the NCRUAA, following the RUAA, does not provide for review of errors of law.

AAML Model Act §§ 123(a)(9) and 128(b) follow the North Carolina model, N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(c) (2005). Most decisions from other jurisdictions hold that unless legislation allows it, parties to an arbitration agreement cannot contract for court review. Part of the rationale has been that review can slow down results and increase expenses in arbitration, which is supposed to render a more efficient and less costly decision. The general policy of State and federal arbitration legislation has been to limit appeal grounds. *See, e.g.,* 9 U.S.C. § 16 (2000); N.C. Gen. Stat. §§ 1-569.28, 1-567.67, 50-60 (2005) and the former NCUAA, *id.* § 1-567.18 (2001); AAML Model Act § 128. Basic R. 38, Part II.C.1, follows this philosophy, declaring that there will be no judicial review of errors that N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) would otherwise allow. Basic R. 38's Comment offers optional language if parties want judicial review.

Although parties would usually include a provision for review in an agreement to arbitrate, it is possible to contract for such during the arbitration. However, at this point one party may take a more firm position on the issue; agreement may not be possible. The better practice is to contract for review as part of the agreement to arbitrate. If parties want to abandon this option later, *e.g.*, once arbitration begins, they can do so by separate written agreement.

If parties agree in writing on judicial review, the first step is a § 50-54(a)(8) motion to vacate. Thereafter, if the court denies the motion on this ground, the next step is confirmation of the award under N.C. Gen. Stat. § 50-53 (2005), followed by entry of judgment under *id.* § 50-57 (2005). The trial court, usually the District Court, at this point will have decided on the review of errors of law vacatur ground. The case is then ready for appeal on this ground under *id.* § 50-60(b) (2005). The appeal might include other appeal grounds *id.* § 50-60(a) (2005) lists.

N.C. Gen. Stat. §§ 50-51(e) (2005) establishes requirements for arbitrators' awarding punitive damages if parties agree on such an award; it is the predicate for a motion to vacate under *id.* § 50-54(a)(8) (2005).

An arbitrator's failure to disclose as N.C. Gen. Stat. § 50-45.1 (2005) requires may be grounds for vacatur under *id.* § 50-54(a)(2) (2005), *i.e.*, evident partiality of a neutral arbitrator, corruption by an arbitrator, or arbitrator misconduct prejudicing a party's rights. Although under § 50-42.1(b)(3) (2005) parties may not unreasonably restrict disclosure rights under § 50-45.1 before a controversy arises but may waive them after the controversy arises, § 50-42.1(c) bars waiver or varying the effect of § 50-54 at any time. The result is that § 50-54(a)(2) vacatur grounds remain in effect for the duration of the arbitration proceeding. *E.g.*, although parties might waive a disqualifying family relationship for an arbitrator after a controversy arises under §§ 50-42.1(b)(3) and 50-45.1, if that arbitrator would be later found to have been "on the take" during the arbitration, that would be a nonwaivable vacatur ground under §§ 50-42.1(c) and 50-54(a)(2).

N.C. Gen. Stat. § 50-42.1(c) provides that except as the FLAA otherwise provides, a party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of N.C. Gen. Stat. § 50-54 (2005).

See also Parts I.B.3, I.B.8, I.B.14, I.B.16, I.B.23; 2004 Proposed Amendments, note 9, pp. 47-49; Burleson, Part II.B.8 Comment; Early et al., note 60; Morelock, Part II.B.2 Comment; Handbook, note 3, pp. 22-24, 27-28, 50; AAML Model Act, note 11, pp. 82-85, 93-94, 131; RUAA § 23 Comment, note 70, p. 74.

18. § 50-55. Modification or correction of award.

(a) Upon application made within 90 days after delivery of a copy of an award to an applicant, the court shall modify or correct the award where at least one of the following occurs:

(1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to in the award;
(2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as so modified or corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

(d) The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

Comment

This tracks the former NCUAA, N.C. Gen. Stat. § 1-567.14 (2001), with modifications added to parallel what is now the NCRUAA, *id.* § 1-569.24 (2005), except for that Act's amendments related to "record" as defined in *id.* § 1-569.1(6) (2005). Compare 9 U.S.C. §§ 10-13 (2000); N.C. Gen. Stat. § 1-567.64 (2005). Since *id.* § 50-55 contemplates modifications or corrections that are clerical errors or situations where arbitrators have gone beyond their authority under the agreement, there is no necessity for remitting the matter to arbitrators again. If there is a motion for modification pursuant to *id.* §§ 50-55 and 50-56 (2005), a court should make § 50-55 modifications or corrections and may remit the alimony, child support or child custody issues to arbitrators if the parties agree to such and move the court, and the court approves. A court may retain jurisdiction of these issues and decide them along with § 50-55 issues and must do so if the parties cannot agree to do so or do not move for submission of § 50-56 issues to arbitration. *Id.* § 50-55(d) (2005) allows a court to award costs if it deems an application to modify or correct is without merit. *See also id.* § 1-567.65 (2005). Cross-reference to *id.* § 50-51(f) was added for clarity. The General Assembly did not amend § 50-55 in 2005.

Section 50-55(a)'s 90-day deadline differs from N.C.R. Civ. P. 60(a) (clerical errors in judgments).

N.C. Gen. Stat. § 50-42.1(c) provides that except as the FLAA otherwise provides, a party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of N.C. Gen. Stat. § 50-55 (2005).

See also Parts I.B.3, I.B.14; I.B.19; 2004 Proposed Amendments, note 9, pp. 49-50; Morelock, Part II.B.2 Comment; Handbook, note 3, pp. 24-25; AAML Model Act, note 11, pp. 85-86.

19. § 50-56. Modification of award for alimony, postseparation support, child support, or child custody based on substantial change of circumstances.

(a) A court or arbitrators may modify an award for postseparation support, alimony, child support, or child custody as provided in G.S. 50-13.7 and 50-16.9 as provided in subsections (b) through (f) of this section.

(b) Unless the parties have agreed in writing that an award for postsepartion support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony under G.S. 50-16.2A, 50-16.3A, 50-16.4 or 50-16.7 may be modified if a court order for alimony or postseparation support could be modified under G.S. 50-16.9.

(c) An award by arbitrators for child support or child custody may be modified if a court order for child support or child custody could be modified under G.S. 50-13.7.

(d) If an award for modifiable postseparation support or alimony, or an award for child support or child custody, has not been confirmed under G.S. 50-53, upon the parties' written agreement these matters may be submitted to arbitrators chosen by the parties under G.S. 50-45. G.S. 50-52 through 50-56 shall apply to this modified award.

(e) If an award for modifiable postseparation support or alimony, or an award for child custody or child custody has been confirmed pursuant to G.S. 50-53, upon the parties' agreement in writing and joint motion, the court may remit these matters to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through 50-56 shall apply to this modified award.

(f) Except as otherwise provided in this section, the provisions of G.S. 50-55 apply to modifications or corrections of awards for postseparation support, alimony, child support, or child custody.

Comment

The 2005 General Assembly added requirements in N.C. Gen. Stat. §§ 50-56(b), 50-56(d) and 50-56(e) (2005), that these agreements be in writing. The 2005 legislation also changed "in accordance with procedures stated" to "as provided" in *id.* § 50-56(a) (2005); "pursuant to" to "under" in *id.* §§ 50-56(b) and 50-56(c) (2005); and "as provided in G.S. 50-45, in which case" to "under G.S. 50-45" in *id.* § 50-45(d) (2005). No change in meaning is meant for the latter amendments.

There is no equivalent for N.C. Gen. Stat. § 50-56 (2005) in the UAA, the RUAA, the NCRUAA or the former NCUAA. Section 50-56 allows arbitrators or a court to modify an

award for postseparation support, alimony, child support or child custody under conditions stated in N.C. Gen. Stat. §§ 50-13.7, 50-16.9 (2005), by which a court may modify an award for alimony, postseparation support, child support or child custody after a case has been filed and has been litigated or settled. Section 50-56 supersedes Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982). *Crutchley* held that final arbitral awards under the former NCUAA, although subject to modification or vacatur for other reasons, violated the statutory requirement that awards for custody and support must always be open for modification.

In the situation of young children, *e.g.*, there may be a succession of modifications throughout the time for custody and support. In each case a decision on modifying postseparation support, alimony, child support or child custody can be made by the court or by arbitrators (perhaps the same arbitrators, since they would have the file and be familiar with the case), in the court's discretion if the parties agree and file an appropriate motion under *id.* § 50-56(e). If parties have not filed for confirmation of an initial arbitral award for postseparation support, alimony, child support or child custody under *id.* § 50-53 (2005) (admittedly a rare case), *id.* § 50-56(d) (2005) permits them to agree to arbitrate substantial change of circumstances without getting the initial award confirmed under *id.* § 50-53 (2005) and moving the court for arbitration. The second, modified award could be confirmed under § 50-53 (2005) or not, with either party having the option to seek confirmation. *Id.* § 50-56(f) (2005) incorporates *id.* § 50-55 (2005) by reference unless modified by *id.* § 50-56 (2005). Thus, *e.g.*, costs provisions of *id.* § 50-55(f) (2005) also apply to *id.* § 50-56 (2005) proceedings.

N.C. Gen. Stat. § 50-42.1(c) provides that except as the FLAA otherwise provides, a party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of N.C. Gen. Stat. § 50-56 (2005).

See also Parts I.B.3, I.B.18; 2004 Proposed Amendments, note 9, pp. 50-51; Burleson, Part II.B.8 Comment; Morelock, Part II.B.2 Comment; Handbook, note 3, pp. 25-26; AAML Model Act, note 11, pp. 86-88.

20. § 50-57. Orders or judgments on award.

(a) Upon granting of an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment. The court may award costs, as provided in G.S. 50-51(f), of the application and of proceedings subsequent to the application and disbursements.

(b) Notwithstanding G.S. 7A-109, 7A-276.1, or 132-1 or similar law, the court, in its discretion, may order that any arbitration award or order or any judgment or court order entered as a court order or judgment under this Article, or any part of the arbitration award or order or judgment or court order, be sealed, to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order resealing of the opened arbitration awards or orders or judgments or court orders. The court, in its discretion, may order that any arbitration award or order or any part of the arbitration award or order or judgement or court order, be redacted, the redactions to be opened only upon order of the court upon good cause shown. Upon good cause shown, the court may order redaction of the previously redacted arbitration awards or orders or judgments or court orders opened under the court's order.

Comment

N.C. Gen. Stat. § 50-57(a) (2005) tracks the former NCUAA, *id.* § 1-567.15 (2001), omitting reference to decrees and is similar to the NCRUAA, *id.* § 1-569.25 (2005). Compare 9 U.S.C. § 9 (2000) and N.C. Gen. Stat. § 1-567.65 (2005). Cross-reference to N.C. Gen. Stat. § 50-51(f) was added for clarity. Costs may be awarded if an application lacks merit.

The 2005 General Assembly added "(a)" before the former § 50-57, otherwise making no changes, and enacted § 50-57(b) (2005). There is no known counterpart in general arbitration legislation; AAML Model Act, note 11, pp. 88-91, includes the equivalent in its proposals.

A primary feature of arbitration is privacy of the proceedings; Basic R. 11, if adopted in an agreement to arbitrate, preserves this as a matter of contract. Section 50-57(b) continues privacy as a matter of legislative policy once an award or other material related to an arbitration is eligible for inclusion in a court order or judgment. Today courts have discretionary authority to order part or all of a court record sealed or to order redaction of part of a court record. They have discretionary authority to open previously sealed or redacted material. The statute restates that authority in the context of an arbitral award or other document resulting from family law arbitration. In some cases courts must seal or redact material, *e.g.,* under the U.S. E-Government Act of 2002. There has been longstanding discretionary authority to issue protective orders in, *e.g.*, trade secrets cases under N.C.R. Civ. P. 26(c).

Section 50-57(b) is designed to protect, *e.g.*, innocent children from revelation of facts and circumstances in what would otherwise be the public record of a judgment on an arbitral award. It will also protect business secrets necessarily the subject of a reasoned award, the norm under N.C. Gen. Stat. § 50-51(b) (2005). The amendment makes it clear that this is an exception to *id.* §§ 7A-109, 7A-276.1, 132-1 (2005) or similar law. The phrase "or similar law" is a catchall for future legislation, other provisions elsewhere in the General Statutes, or perhaps a common-law principle. (State statutes cannot supersede federal law, *e.g.*,Virmani v. Novant Health Inc., 259 F.3d 284, 293 [4th Cir. 2001]), constitutional provisions, *e.g.*, the N.C. Constitution's art. I, § 18 "open courts" provision, or cases interpreting them.) A court may order sealing of part of an order or judgment. "Good cause" is a standard phrase; *see* N.C.R. Civ. P. 26(c). Section 50-57(b)'s last sentence allows resealing if a court deems this action appropriate.

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

N.C. Gen. Stat. § 50-42.1(c) provides that except as the FLAA otherwise provides, a party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of N.C. Gen. Stat. § 50-57 (2005).

See also Parts I.B.3, I.B.14, II.C.1, Comment to Basic R. 11; 2004 Proposed Amendments, note 9, pp. 51-53; Handbook, note 3, p. 16; AAML Model Act, note 11, pp. 88-91; RUAA § 25 Comment, note 70, p. 85.

21. § 50-58. Applications to the court.

Except as otherwise provided, an application to a court under this Article shall be by motion and shall be heard in the manner and upon notice provided by law or rule of court for making and hearing motions in civil actions. Unless the parties otherwise agree in writing, notice of an initial application for an order shall be served in the manner provided by law for service of summons in civil actions.

Comment

The 2005 amendments added a requirement that agreements under N.C. Gen. Stat. § 50-58 be in writing. Section 50-58 otherwise tracks the NCRUAA, *id.* § 1-569.5 (2005) and the former NCUAA, *id.* § 1-567.16 (2001); compare 9 U.S.C. §§ 6, 12 (2000).

N.C. Gen. Stat. § 50.42.1(b)(1) (2005) says that before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not waive or agree to vary the effect of the requirements of *id.* § 50-58 (2005).

See also Part I.B.3; 2004 Proposed Amendments, note 9, p. 53; Handbook, note 3, pp. 26-27; AAML Model Act, note 11, pp. 57-58; RUAA § 5 Comment, note 70, p. 21.

22. § 50-59. Court; jurisdiction; other definitions.

(a) The term "court" means a court of competent jurisdiction of this State. Making an agreement in this State described in G.S. 50-42, or any agreement providing for arbitration in this State or under its laws confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement.

(b) 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.

Comment

The 2005 amendments added "(a)" to the first paragraph of N.C. Gen. Stat. § 50-59 (2005) and added *id.* § 50-59(b) (2005). The NCRUAA, *id.* § 1-569.1(3) and 1-569.1(5) (2005) has similar definitions for "court" and "person." The balance of *id.* § 50-59(a) appears in the NCRUAA, *id.* § 1-569.26 (2005). Section 50-59(a) tracks the former NCUAA, *id.* § 1-567.17 (2001); *compare id.* § 1-567.66 (2005). *Id.* § 50-45(g) (2005) defines "arbitration institution;" *compare id.* 1-569.1(1), defining "arbitration organization."

N.C. Gen. Stat. § 50-42.1(b)(1) (2005) says that before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not waive or agree to vary the effect of *id.* § 50-59 (2005).

See also Parts I.B.3, I.B.7; 2004 Proposed Amendments, note 9, pp. 53-54; Handbook, note 3, p. 27; AAML Model Act, note 11, pp. 52-54, 91-92; RUAA § 1 Comment, note 70, p. 10.

23. § 50-60. Appeals.

(a) An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:

(1) An order denying an application to compel arbitration made under G.S. 50-43;
(2) An order granting an application to stay arbitration made under G.S. 50-43(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 entered pursuant to provisions of this Article.

(b) Unless the parties contract in an arbitration agreement for judicial review of errors of law as provided in G.S. 50-54(a), a party may not appeal on the basis that the arbitrator failed to apply correctly the law under Chapters 50, 50A, 52B or 52C of the General Statutes.

(c) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Comment

The 2005 General Assembly did not amend N.C. Gen. Stat. § 50-60 (2005). The 1999 edition (Handbook, note 3, pp. 27-28) of this Revised Handbook omitted publication of *id.* § 50-60(c) (2005), a typographical error. This was corrected for Vol. III of this Revised Handbook.

The statute tracks the former NCUAA, *id.* § 1-567.18 (2001) except for a rewritten first sentence in *id.* § 50-60(a) (2005), adding the clarifying "any of the following," deleting material in *id.* § 1-567.18(b) (2005); and adding *id.* § 50-60(b). Compare 9 U.S.C. § 16 (2000); the NCRUAA, N.C. Gen. Stat. § 1-569.28 (2005); *id.* § 1-567.67 (2005).

Section 50-60(b) can only be invoked if parties agree to review of errors of law as N.C. Gen. Stat. § 50-54(a)(8) (2005) provides and a motion to vacate is filed with the trial court, usually the District Court. There is no comparable provision in the NCRUAA, *id.* § 1-569.28 (2005). *See also* Comment to *id.* § 50-54, Part I.B.17.

N.C. Gen. Stat. § 50-42.1(c) (2005) provides that except as otherwise provided in the Act, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, *id.* § 50-60 (2005).

See also Part I.B.3; Burleson, Part II.B.8 Comment; Early et al., note 60; Morelock, Part II.B.2 Comment; AAML Model Act, note 11, pp. 93-94, discussing the Model Act, which follows N.C. Gen. Stat. § 50-60 (2005)'s format.

24. § 50-61. Article not retroactive.

This Article applies to agreements made on or after October 1, 1999, unless parties by separate written agreement after that date state that this Article shall apply to agreements dated before October 1, 1999.

Comment

This tracks the former NCUAA, N.C. Gen. Stat. § 1-567.19 (2001), except the last clause; compare 9 U.S.C. § 14 (2000), the NCRUAA, N.C. Gen. Stat. § 1-569.3 (2005); *id.* § 1-567.31(g) (2005). The 2005 General Assembly added a requirement of a written agreement.

N.C. Gen. Stat. § 50-42.1(c) (2005) provides that except as otherwise provided in the Act, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, *id.* § 50-61 (2005).

See also Part I.B.3; 2004 Proposed Amendments, note 9, pp. 55-56; Handbook, note 3, p. 28; AAML Model Act, note 11, pp. 55-56; RUAA § 3 Comment, note 70, p. 14.

25. § 50-62. Construction; uniformity of interpretation.

(a) Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the Revised Uniform Arbitration Act in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52 and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters 50, 50A, 50B, 51, 52, 52B and 52C of the General Statutes.

(b) The provisions of this Article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, or of contracts performed with the use of these records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing these electronic records or electronic signatures.

Comment

The 2005 amendments inserted "(a)" at the beginning of N.C. Gen. Stat. § 50-62 (2005), changed reference to the NCUAA as being formerly in force in North Carolina, and incorporated the NCRUAA by reference in addition to other State statutes. Section 50-60(b) is identical with the NCRUAA, *id.* § 1-569.30 (2005) and differs from RUAA § 30 in providing for other federal and State legislation governing electronic records or electronic signatures, thereby anticipating future statutes.

Section 50-62(a) tracks the format of the former NCUAA, N.C. Gen. Stat. § 1-567.20 (2001) in providing for parallel construction, but specifically incorporating this State's version of the RUAA, the UAA and the ICACA. Chapters 50, 50A, 50B, 51, 52, 52B and 52C have also been incorporated to encourage uniformity of interpretation between litigation, arbitration and other methods of settlement of disputes under these statutes. Section 50-60(a) is the researcher's key to the doors opening citation of State legislation and cases under the NCUAA, the NCRUAA and the ICACA in addition to North Carolina family law legislation and cases. Since the former NCUAA, N.C. Gen. Stat. § 1-567.20 (2001) and the NCRUAA, *id.* § 1-569.29 (2005) recite a policy for uniform interpretation of the UAA and the RUAA among all enacting jurisdictions, *id.* § 50-60(a) (2005) also is a key to the doors opening citation of other jurisdiction's legislation and cases as persuasive authority. The ICACA is based on Texas and other jurisdictions' legislation; *see* Walker, *Trends*, note 88. Those jurisdictions' decisions might be considered for persuasive

authority.

N.C. Gen. Stat. § 50-42.1(c) (2005) provides that except as otherwise provided in the Act, a party to an agreement to arbitrate or an arbitration proceeding may not waive, or the parties shall not vary the effect of, *id.* § 50-62 (2005).

See also Part I.B.3; RUAA § 30 Comment, note 70, p. 91.

C. The Family Law Arbitration Act: Summary

The Family Law Arbitration Act is based on this State's version of the Uniform Arbitration Act, the Revised Uniform Arbitration Act, the North Carolina International Commercial Arbitration and Conciliation Act. The principal differences from older arbitration legislation include: specific provision for one arbitrator,[104] provision for pre-award assets protection,[105] additional provisions for discovery,[106] and consolidation.[107] North Carolina family law legislation has been taken into account to protect postseparation support, alimony, custody and support rights pursuant to applications to vacate, modify or correct awards.[108] Rights under federal and State law for emergency protection of spouses and children are assured[109]; the Act does not derogate from these.

The 2005 amendments to the Act conform the FLAA to the North Carolina Revised Uniform Act in many instances. Because the family law bar wanted to keep the Family Law Act's NCUAA-oriented format, the amendments appear in different places than in the NCRUAA. Comments in Part I for each section of the Act cite to comparable NCRUAA provisions. The principal changes wrought by the amendments are: statutory requirements that agreements be in writing,[110] the best practice, because what is said over a handshake may be forgotten or misinterpreted through time; complex standards governing waivers or modifications of

---

[104] N.C. Gen. Stat. § 50-45(a) (2005).

[105] *Id.* § 50-44 (2005).

[106] *Id.* § 50-49 (2005).

[107] *Id.* § 50-50.1 (2005), *replacing id.* § 50-50 (2003).

[108] *Id.* § 50-54 - 50-56 (2005).

[109] *Id.* §§ 50-44(c)(7) - 50-44(c)(8), 50-44(g) (2005).

[110] *Id.* §§ 50-42.1, 50-45 - 50-47, 50-51, 50-53 - 50-56, 50-58, 50-61 (2005).

agreements;[111] notice requirements;[112] revised arbitrability standards;[113] required arbitrator disclosure of possible conflicts of interest;[114] revised consolidation procedures;[115] revised procedures for changing awards;[116] new provisions for sealing or redacting awards, orders, judgments or court orders;[117] provisions for electronic records and signatures.[118]

Unlike court-ordered arbitration,[119] the procedure is entirely voluntary. Parties may agree to arbitrate as part of a premarital agreement,[120] as part of an agreement during the marriage but before separation, after divorce proceedings begin, and after an absolute divorce has been granted. The agreement can be in the form of a District Court consent order. The Act offers many options for tailoring family law arbitration to suit the needs of a particular case, although they cannot cut off postseparation support, alimony, custody and support rights except as allowed

---

[111] *Id.* §§ 50-42.1, 50-44(j) (2005).

[112] *Id.* § 50-42.2 (2005).

[113] *Id.* § 50-43(b) (2005).

[114] *Id.* § 50-45.1 (2005).

[115] *Id.* § 50-50.1 (2005), *replacing id.* § 50-50 (2003).

[116] *Id.* § 50-52 (2005).

[117] *Id.* § 50-57(b) (2005).

[118] *Id.* § 50-62(b) (2005).

[119] The chief difference between arbitration under the Act and court-ordered arbitration is that in the latter, cases are only sent to arbitration by court order after suit has been filed. There is opportunity for trial de novo if a litigant is dissatisfied with an award. Under the Act, there is no right to trial de novo. The Supreme Court's rules for court-ordered arbitration specifically exclude family law cases. The primary purpose of court-ordered arbitration in districts that have the procedure is resolution of small money damage claims up to $15,000. (The chief difference between arbitration under the Act and court-ordered arbitration is that in the latter, cases are only sent to arbitration by court order after suit has been filed. There is opportunity for trial de novo if a litigant is dissatisfied with an award. Under the Act, there is no right to trial de novo. The Supreme Court's rules for court-ordered arbitration specifically exclude family law cases. The primary purpose of court-ordered arbitration in districts that have the procedure is resolution of small money damage claims up to $15,000.) *See generally Court-Ordered Arbitration in North Carolina's Courts*, note 21 .

[120] Parties cannot include provisions for arbitration of child support or child custody in a premarital agreement to arbitrate, however. N.C. Gen. Stat. § 50-42(a) (2005).

by federal and North Carolina law.[121] The Act, in common with other arbitration legislation, requires a signed agreement to arbitrate.[122] This agreement should recite certain terms, also largely within the parties' choice, and should incorporate or recite rules of arbitration procedure. These are the subject of Part II.

---

[121] *Id.* § 50-56 (2005).

[122] *Id.* § 50-42 (2005).

II. FORMS AND RULES

A. Introduction

Legislation such as the Family Law Arbitration Act discussed in Part I.B cannot cover all aspects of arbitration. To fill in details of how, where and when arbitration will be held and conducted, who will participate, what will be covered in the proceeding, and the decision-making standards or parameters, parties may agree on their own rules. Today most arbitration is conducted by incorporating a set of predrafted rules by reference into an arbitration agreement, sometimes with designation of an arbitration institution, *e.g.,*the American Arbitration Association (AAA). In this case the arbitration agreement will include certain basic decisions, *e.g.,* number of arbitrators, scope of the arbitration agreement, etc., leaving other matters to the rules. If parties cannot or do not agree on rules for the arbitration, the Act provides that the arbitrators shall select rules for the arbitration after hearing all parties and referring to model rules, perhaps rules published in Part II.C. If the arbitrators cannot decide on rules for the arbitration, upon application by a party the court may order rules for conducting the arbitration, referring to model rules, again perhaps rules published in Part II.C.[123]

Except insofar as a Form or Rule might contravene law,[124] the Forms and Rules govern as part of the procedure of an arbitration, read in connection with law governing the arbitration. Parties are free to use these Forms and Rules as published, to agree to use them as modified by the arbitration agreement, to copy them in whole or in part in an arbitration agreement, or to decline to use them at all. Use of these Forms and Rules is a matter of freedom of contract. As with all model forms and rules, *drafters of agreements to arbitrate and other documents related to family law arbitration must consider the facts and circumstances of the client and the particular case and must determine that the suggested form(s) or rule(s) fit(s) the needs of the client(s) and the case.* However, parties agreeing to arbitrate family law issues under the FLAA procedure will leave many issues open for possible disagreement, and possible reference to the arbitrators or a court for resolution if they cannot agree,[125] if they do not provide for matters covered by these rules in a family law arbitration case. The result may be loss of time and money that would otherwise be saved by resorting to arbitration instead of conventional litigation.

Because of the number of North Carolina family law issues subject to arbitration under

---

[123] N.C. Gen. Stat. § 50-45(e) (2005); *see also* Part I.B.7.

[124] *E.g.,* no form or rule may derogate from rights under federal or State law for immediate, emergency relief for children or spouses. N.C. Gen. Stat. § 50-44(g) (2005); *see also* Part I.B.6.

[125] *Cf.* N.C. Gen. Stat. § 50-45(e) (2005); *see also* Part I.B.7.

the Act if the parties elect this form of alternative dispute resolution (ADR) for low-assets cases, the drafters decided to minimize the number of choices that must be made to use the forms and rules. For example, the Act provides that parties may agree on one or more arbitrators.[126] Basic Rule 2, echoing the Act,[127] declares a default principle: unless the parties agree otherwise, one arbitrator shall hear the case. Forms B.1- B.6 incorporate the Rules by reference. Stating the number of arbitrators in a form that would become part of the arbitration agreement was another option. The drafters chose to keep the number of forms to a minimum, so that the arbitration agreement will be as brief as possible, thereby keeping files as slim as possible. However, this means that counsel for parties, and parties if they are not represented by counsel, must read and be familiar with the Forms, the Rules and any additions or deletions from the Forms and Rules in addition to the Act and the arbitration agreement.

Part II follows the format of Part I. Part II.B introduces the Forms, some or all of which should be considered for inclusion in an arbitration agreement. Part II.B.1 states basic Forms, which are lettered, e.g., A. Part II.B.2 states Optional Forms, which are lettered, e.g., AA. In each case a Comment follows the Form. Part II.C states the Rules in two subparts: II.C.1, Basic Rules suggested for any family law case; II.C.2, Optional Rules to cover less than ordinary situations, e.g., a marriage between persons who are multilingual and where designating the language of the arbitration proceedings might be thought advisable. Basic Rules in Part II.C.1 begin with 1; Optional Rules in Part II.C.2 begin with 101. Comments follow each Rule. Drafters of agreements to arbitrate family law issues can incorporate Rules or Optional Rules by number, thereby minimizing agreement's length. The Forms should be incorporated in the arbitration agreement.

The Forms, Basic Rules and Optional Rules were derived from these sources: AAA, Arbitration Rules for the Interpretation of Separation Agreements, in CCH, Doyle's Dispute Resolution Practice North America ¶ 15-100, at 23,302 (1990) (AAA Separation Agreement Rules); AAA, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes (July 1, (2003) (AAA R.), with updates a visit to the AAA website suggested; AAA, Drafting Dispute Resolution Clauses: A Practical Guide (1997) (AAA Guide); AAA, International Dispute Resolution Procedures (Including Mediation and Arbitration Procedures) (July 1, 2003) (AAA Int. R.), with updates a visit to the AAA website suggested; AAML Matrimonial Arbitration Rules --- Financial Issues (AAML R.), reprinted in American Academy of Matrimonial Lawyers, Marital Arbitration Handbook; AAML Model Act, note 11, pp. 100-35, available on the AAML website; National Association of Securities Dealers, Code of Arbitration Procedure (Nov. 17, 2003), which publishes the National Association of Securities Dealers Rules (NASD R.), with updates a visit to the NASD website suggested; P-A-C, Form Arbitration Agreement (1998) (P-A-C Agreement); P-A-C, Rules of Practice and

---

[126] N.C. Gen. Stat. § 50-45 (2005); *see also* Part I.B.7.

[127] N.C. Gen. Stat. § 50-45(a) (2005); *see also* Part I.B.7.

Procedure (1998) (P-A-C R.).[128] Although these forms and rules deal with matters usually outside the scope of family law disputes, their themes are similar to all arbitration rules. Comments to the Forms and Rules cite these sources.

B. North Carolina Forms for Arbitrating Family Law Disputes

The single-lettered Forms that follow in Part II.B.1 should be considered for inclusion as part of an arbitration agreement under the Act. The double-lettered Forms in Part II.B.2 should be examined for possible use, particularly if variants from the Rules appear useful.

1. Basic Forms

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

A. Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach of this contract, shall be settled by arbitration under the North Carolina Family Law Arbitration Act, and judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction, unless parties to the arbitration agree in writing pursuant to N.C. Gen. Stat. § 50-53 as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

A. Arbitration. We, the undersigned parties, hereby agree to submit to arbitration under the North Carolina Family Law Arbitration Act the following controversy: [here describe briefly the controversy]. We agree that the controversy shall be submitted to one arbitrator. We agree that we will faithfully observe this Arbitration Agreement and the rules incorporated by reference or stated in this Arbitration Agreement, that we will abide by and perform any award the arbitrator renders, and that a judgment of a court having jurisdiction may be entered on the award, unless parties to the arbitration agree in writing pursuant to N.C. Gen. Stat. § 50-53 as to some or all issues submitted to arbitration that some or all parts of the award shall not be confirmed by any court having jurisdiction.

Comment

Both versions of Form A now incorporate the FLAA by reference. These Forms as

---

[128] Current AAA or NASD rules may be researched from the AAA or NASD websites, perhaps using a search engine like Google. The AAML Model Act is available on the AAML website; the AAML Arbitration Committee used the 1999 Handbook forms and rules as the benchmark for its research and amended them in certain respects. The AAA Separation Agreement Rules are the latest version; AAA does not accept these kinds of cases today. The P-A-C rules are in Private Adjudication Center, Inc, form Arbitration Agreement (1998); *id.*, Rules of Practice and Procedure (1998) (P-A-C R.) Duke University School of Law's Private Adjudication Center (P-A-C) has shut down, but P-A-C procedures continue to offer useful suggestions.

published in the 1999 Handbook did not incorporate the Act by reference.

The first Form A follows the AAA suggested form for contracts, Standard Arbitration Clause, omitting reference to rules to be followed. The second Form A follows the AAA suggested form for an existing dispute, Standard Arbitration Clause, *e.g.,* where parties have filed for divorce. *See also* Basic R. 1-2; AAA Separation Agreement Rules, at 23,301. *See* Forms B.1-B.6 for choices among rules. Parties should pay close attention to describing the controversy to be inserted in the second Form A, *e.g.,* does the family law proceeding include only alimony, or is child support and custody also an issue? Failing to describe accurately the controversy or matters to be arbitrated can lead to arbitrability litigation. If the clause is very broad, e.g., including all matters related to a divorce, issues that parties want to resolve outside arbitration may be forced into arbitration. If it is too narrow, e.g., covering only matters or controversies related to stocks but not bonds a couple own, there will be no arbitration on the issue of bonds. Moreover, agreeing to arbitrate "stocks a couple own" leaves open the question of stocks each spouse owns individually. Parties can amend the agreement to arbitrate to cover gaps, but this can be a contentious issue. It is better to "get it right" from the beginning; counsel should question clients carefully on this issue. The worst situation is an agreement to arbitrate without any clause describing matters or the controversy to be arbitrated.

The second Form A provides for a single arbitrator; it is consistent with R. 2, a default provision for contracts that include an arbitration agreement, and which provides for a single arbitrator. If parties desire more than one arbitrator, they should change the second Form A. Multiple arbitrators may be a useful option in large, complex cases involving, *e.g.,* a family business in addition to a divorce under a premarital agreement, but having three or five arbitrators triples or quintuples arbitrator compensation. If parties want an even number of arbitrators, they should consider agreeing on the arbitrator who will be the "tie-breaker," i.e., the arbitrator who will break tie votes. *See also* Optional Form BB.

N.C. Gen. Stat. § 50-53(a) (2005), as amended in 2003 and 2005, allows parties to agree not to present an award for confirmation to a court. The amendment allows parties to contract, *e.g.,* for a nonmodifiable property settlement or nonmodifiable alimony, that would not be subject to confirmation. A contract, as distinguished from a judgment, can be confidential. Forms A, as amended, permit the flexibility the amendment allows for confirming some or all of an award. For example, "business" aspects of a divorce might be confirmed in certain respects to allow judgment enforcement, while a marriage property settlement or alimony award could remain confidential. *See also* N.C. Gen. Stat. § 50-57(b) (2005), which allows a court to exercise discretion to seal or redact all or part of an arbitral award; Basic R. 11, requiring parties to maintain the privacy of hearings.

In other respects Forms A are the same as those published in the Handbook, note 3, p. 32; *see also* AAML Model Act, note 11, pp. 103-04.

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

B.1. Rules for Arbitration. The North Carolina Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply to this Arbitration Agreement. The North Carolina Optional Rules for Arbitrating Family Law Disputes shall not apply to this Arbitration Agreement.

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

B.3. Rules for Arbitration. The North Carolina Basic Rules for Arbitrating Family Law Disputes (Basic Rules) and the North Carolina Optional Rules for Arbitrating Family Law Disputes (Optional Rules) shall apply to this Arbitration Agreement.

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

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

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

Comment

Forms B.1 - B.6 are the six options from which parties must choose, depending on whether they want the Basic Rules (Part II.C.1), just some of them, the Basic Rules and the Optional Rules, the Basic Rules and some of the Optional Rules, some of the Basic Rules and all of the Optional Rules, or some of the Basic Rules and some of the Optional Rules. The Basic Rules, stated in Part II.B.1, cover most standard family law situations. The Optional Rules deal with other situations, *e.g.,* a multilingual family where it would be useful to state the language for the arbitration proceeding. *See also* Basic R. 1 and its Comment; AAA Separation Agreement Rules, at 23,304; AAA, Standard Arbitration Clause; AAA R. R-1; AAML Model Act, note 11, pp. 104-05. Forms B.1 - B.6 are the same as those published in the Handbook, pp. 32-33.

c. Form C. Ethics Standards for Arbitrators:

C. North Carolina Canons of Ethics for Arbitrators. The North Carolina Canons of Ethics for Arbitrators shall apply to this Arbitration Agreement.

Comment

The North Carolina Bar Association approved North Carolina Canons of Ethics for

Arbitrators (Feb. 12, 1998) at its April 23-25, 1998 Board of Governors meeting and recommended them for adoption by the Supreme Court of North Carolina. The Court approved them by Order Adopting the North Carolina Canons of Ethics for Arbitrators, Sept. 9, 1999, 350 N.C. 877 (1999), effective October 1, 1999. They and the Comments following each Canon as part of the Order are now binding for court-ordered arbitrations under N.C. Gen. Stat. § 7A-37.1. Other government agencies, *e.g.,* the North Carolina Industrial Commission, may declare them to be binding in certain cases, *e.g.,* court-ordered arbitrations in cases before the Commission, in the future. The Canons may be incorporated by reference in any arbitration agreement. They are not binding in arbitrations under the Act unless parties agree that they are binding. Subject to other provisions of law, *e.g.,* FLAA child abuse reporting requirements in N.C. Gen. Stat. 50-44(h) (2005), parties adopting the Canons for arbitration under the Act may modify them for a particular arbitration. *See* Canon VIII.A. The Canons are modeled on the American Bar Association-American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes (1977) and other standards. This Code and the recently-published ABA-AAA Revised Code of Ethics for Arbitrators in Commercial Disputes are designed for commercial arbitration and not necessarily for family law arbitrations. *See generally* George K. Walker, *State Rules for Arbitrator Ethics,* 23 J. Legal Prof. 155 (1999), also published in American Bar Association Section of Dispute Resolution, Arbitration Now: Opportunities for Fairness, Process Renewal and Invigoration 241 (Paul N. Haagen ed. 1999), which analyzes the Canons and appends a copy of them identical with the Court-adopted version except where the Court omitted lawyer-arbitrator standards in Canon I.D and material in Comments to Canons I and VIII.

New N.C. Gen. Stat. § 50-45.1 (2005) sets standards for arbitrator disclosure. A violation of these statutory standards can be a predicate for a motion to vacate. *See* the Comment to § 50-45.1, Part I.B.8. Canon VIII of the North Carolina Canons requires that legislation trump any standards the Canons recite. If parties agree on Form C as part of an agreement to arbitrate, the rest of the Canons remain in effect. Although Canons standards cannot themselves be a predicate for a motion to vacate, *cf.* ANR Coal Co. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999), they are useful reminders of the standards arbitrators should follow and can be cited to support a vacatur motion. Although this State does not now have an arbitration institution for family law cases, these institutions may appear in the future; violation of the Canons may be cause for such an institution's parting company with an offending arbitrator. Today, if it becomes known that an arbitrator has violated Canons standards not covered by § 50-45.1 or other statutory standards such as those in the ICACA, such an arbitrator risks being never asked to arbitrate any more cases. The word will get around.

Form C is the same as that published in the Handbook, p. 33. AAA R. R-16 provides for transmitting disclosure notices. AAA R. R-17 establishes arbitrator disqualification standards. *See also* AAML R. 2.e; AAML Model Act, note 11, pp. 105-06.

d. Form D. Site of Arbitration:

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

Comment

Form D, which remains the same as published in the Handbook, p. 34, is congruent with Basic R. 7(a). Parties should be mindful of the impact of legislation like N.C. Gen. Stat. §§ 22B-2, 22B-3 (2005). They should also be mindful of conflict of laws and enforcement issues if they decide on an arbitration site outside North Carolina. Arbitrators making an award as N.C. Gen. Stat. § 50-51(a) (2005) requires should clearly declare that the arbitration was conducted, and the award was made, in North Carolina to eliminate these kinds of problems. Generally speaking, if parties elect an arbitration site outside North Carolina with its Family Law Arbitration Act and there is a need for recognition and enforcement of an award, there may be statutory issues like those in Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982), which held arbitration of child custody and support under the then-current NCUAA against child support and child custody legislation because of the finality of NCUAA arbitral awards.

See also Part I.B.14; Optional R. 105; AAML Model Act, note 11, p. 106; AAA R. R-10.

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

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

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

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

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

Comment

Forms E-1 and E-2 are the same as those published in the Handbook, p. 34-35.

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

See also AAML Model Act, note 11, pp. 106-07.

2. Optional Forms

These Optional Forms might be included where parties wish to deviate from the Rules in

particular circumstances. Forms B.1-B.6 give options for choices among the Basic Rules and Optional Rules.

a. Rules for the Arbitration:

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

Comment

Optional Form AA, which is the same as Optional Form AA published in the Handbook, p. 35, would freeze the Basic and Optional Rules to a date the parties choose, perhaps the date of the agreement or some other date. Because of its reference to Rule 1, Form AA is dependent on use of one of the six options, Forms B.1 - B.6. The final clause should refer to that selection clause in the arbitration agreement; "B. --- " refers to the Form lettering in Part II.B.1. If parties reletter the forms as paragraphs within an arbitration agreement, they should be sure that cross-references such as this match.

Basic R. 1 is "forward leaning," *i.e.,* it declares that arbitration rules in force as of the date of the demand for arbitration govern. Until publication of this Handbook in 2006, unless parties added special rules by a combination of Forms B and E, arbitration rules in the 1999 Handbook governed. Now that an amended set of rules has been published in this Handbook, if parties wish to keep or use the 1999 rules for an agreement to arbitrate, they should negotiate an agreement to that effect, unless they added Form AA to the original agreement to arbitrate.

See also Part II.C.I, Comment for Basic R. 1; AAML Model Act, note 11, pp. 107-08.

b. Number of Arbitrators:

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

Comment

Optional Form BB is the same as when it was published in the Handbook, pp. 35-36.

N.C. Gen. Stat. § 50-45(a) (2005)'s and Basic R. 2's default provisions are that there shall be one arbitrator in these cases. Form BB suggests a provision for a three-arbitrator panel. If five are desired, the Form may be rewritten so that each party chooses two, and the four arbitrators must choose a fifth panel member. N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) (2005) apply to multiple arbitrator panels; if a party fails to choose an arbitrator, the court may do so. Parties may agree to choose an even number of arbitrators. If parties choose two or another even number of arbitrators, they should consider agreeing on the arbitrator who will be the "tie-breaker." A multi-arbitrator panel might be considered for a large case with provision for review and appeal of issues of law under N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005) if there is a

dissent.

See also Part I.B.7; Basic R. 2 and Part II.C.1.2; Form A and its Comment; AAML Model Act, note 11, p. 108.

c. Other Forms

These are not the only forms that might be considered. Volume II publishes documents used by North Carolina family law practitioners in connection with arbitrations. Consult other form books, *e.g.,* AAA Guide, for ideas, particularly if business matters will be arbitrated.

Family law practitioners should be cautious in boilerplate use of forms, particularly those incorporating by reference a set of arbitration rules, to be sure the forms or rules fit needs of family law arbitration and a particular case. For example, forms or rules for business arbitration may declare arbitral awards are final, a result being that the forms or rules reintroduce the *Crutchley* issue and might jeopardize an award upon application to a court. Other forms or rules, particularly older ones based on the NCUAA or the Uniform Act in other jurisdictions, may waive or restrict parties' action in violation of N.C. Gen. Stat. §§ 1-569.4 or 50-42.1 (2005). *See* Part I.B.3. Those considering arbitration must carefully think through procedures they wish to adopt through forms and rules, mindful of North Carolina and federal legislation and public policy.

C. North Carolina Rules for Arbitrating Family Law Disputes

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

1. Basic Rules for Arbitration of Family Law Disputes

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

Comment

Rule 1's source is AAA R. 1, with important differences. Rule 1 contemplates the possibility of two or more agreements to arbitrate; this could occur, *e.g.,* where a couple have a business enterprise agreement which provides for arbitration upon dissolution of the business, and the couple later sign a premarital agreement under the FLAA or still later sign an arbitration agreement under the Act after filing for divorce. *See* N.C. Gen. Stat. §§ 50-42, 50-50 and their Comments. These Rules will have primacy in any conflict between them and, *e.g.,* commercial arbitration rules that might apply to dissolution of a family business. The reason for this is protection of alimony, child support and child custody rights, for which the procedures in N.C. Gen. Stat. §§ 50-52 - 50-56 have been enacted. Rule 1 tracks AAA R.1 in providing for carrying forward the Rules as amendments to the Rules are made from time to time. Optional Form AA suggests an option to freeze the rules as of a certain date if the parties wish to do this in, *e.g.,* a premarital agreement that may be signed years before matrimonial discord erupts, and divorce is sought. Rule 1 also tracks AAA R. 1 in providing for amendment of the Rules by written agreement. In the hypothetical of the premarital agreement signed years before divorce is sought, parties could agree that the then-current set of the Rules will apply to the divorce, etc. proceedings rather than the Rules in force when the premarital agreement was signed. The parties can modify the Rules they wish to apply, even if there is only one arbitration agreement. Forms B.1-B.6 suggests ways to do this.

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

Comment

Basic R. 2 has been amended to reflect a 2005 amendment to N.C. Gen. Stat. 50-45(a) (2005); an agreement for variance from the one-arbitrator default rule must be in writing. In other respects Rule 2 is the same as published in the Handbook, note 3, pp. 36-37.

Although many agreements to arbitrate state the number of arbitrators in the agreement, this default provision will apply if these Rules are incorporated by reference in an arbitration agreement. Parties wishing to use more than one arbitrator should consider inserting Form BB in the agreement. A three or five member arbitral panel might be appropriate if the case is large and complex, *e.g.*, concerning a premarital agreement and the dissolution of a family business. Having three or five arbitrators triples or quintuples arbitrator fees, and for most family law arbitrations a single arbitrator should suffice. On the other hand, a multi-arbitrator panel might be considered for a large case with provision for review and appeal of issues of law under N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005) if there is a dissent.

Parties may agree on an even number of arbitrators. If they do, to break a tie vote and possible impasse in the arbitration, the agreement should specify a "tie-breaker" for that situation.

N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) (2005) say that if parties cannot agree on an arbitrator, the court upon application shall appoint one. Rule 2 follows the former NCUAA, *id.* §§ 1-567.40 (2001); the Act, *id.* 50-45(a) (2005); AAA R. R-15; and AAA Int. R., Art. 5 in providing for a single arbitrator.

Although agreements to arbitrate can designate a specific person to be the arbitrator, agreements governing long term relationships, *e.g.*, prenuptial agreements, usually do not; the named individual may not be available when a matter goes to arbitration. Unless there is a default provision for selection in that case, the result can be that arbitrator selection becomes a matter for the court unless parties can agree on a substitute. The second Form A provides for a single arbitrator where parties agree to arbitrate an existing dispute; Rule 2 covers the circumstance of a contract which includes an arbitration agreement, which might begin like the first Form A.

See also Form A, Part II.B.1.a; Form BB, Part II.B.2.b; Early et al., note 60; Comment; AAML Model Act, note 11, pp. 113-14.

3. Initiation Under Arbitration Provision in a Contract.

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

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

(c) Failure to make an answering statement within 30 days after receiving notice from claimant shall be treated as a denial of the claim. Failure to make an answering statement within 30 days after receiving a counterclaim shall be treated as denial of the counterclaim. Dispositive motions and/or affirmative defenses (e.g., failure to state a claim for which relief can be granted, payment, statute of limitations, breach of fiduciary duty) must be made within 30 days after receiving a demand or a counterclaim and may be included in the answering statement to a notice or a counterclaim.

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

Comment

The last sentence in Rule 3(c) has been added to require a respondent to assert dispositive motions or affirmative defenses to a demand, or a claimant to assert dispositive motions or affirmative defenses to a counterclaim, within 30 days after service of the demand or the counterclaim.

Rule 3 must be read in connection with N.C. Gen. Stat. § 50-42.2 (2005), Notice. Before a controversy arises that is subject to the agreement to arbitrate, *id.* § 50-42.1(b)(2) forbids parties from agreeing to unreasonably restrict the right to notice of the initiation of an arbitration under *id.* §§ 50-42.2(a) or 50-42.2(b) (2005). Section 50-42.2(a) provides for written notice of the initiation of an arbitration proceeding to other parties in accordance with the agreement to arbitrate; if there is nothing in the agreement like Basic R. 3, discussed in this Comment, notice of initiation of the arbitration may be given by certified or registered mail, return receipt requested, or by service as authorized by the North Carolina Rules of Civil Procedure for beginning a civil action. Section 50-42.2(b) says that unless a person, defined in N.C. Gen. Stat. § 50-59(b) (2005), objects to lack or insufficiency of notice not later than the beginning of the hearing, that person's appearance at the hearing waives the objection. The rest of *id.* § 50-42.2 (2005) may be waived or varied by the parties to the extent provided by law. Waivers or agreements must be in writing. *Id.* § 50-42.2.1(a) (2005). Basic R. 3 supplements and does not contradict the § 50-42.2(b) limits. Basic R. 3(a), 3(b) and 3(d) are the same as published in Handbook, note 3, pp. 37-38.

Amended Basic R. 26 provides for serving notice; *see* Part II.C.1, Comment for Basic R. 26.

Rule 3 parallels AAA Separation Agreement R. 1 and AAA R. R-4(a)(i), R-4(b) and R-6. A principal difference is the 30-day time for responding to a demand or an answering statement that includes a counterclaim. AAA R. R-6 has a 10-day turnaround time and does not provide for an answering statement to a counterclaim. AAA Separation Agreement R. 1 has a 7-day turnaround time and no provision for response to a counterclaim.

Although parties may agree on shorter deadlines, the 30-day default rule follows the turnaround time for civil actions in the North Carolina courts and the 30-day standard in AAA Int. R., Art. 3. A critical difference between the Rules of Civil Procedure and arbitration practice is that failure to respond to a complaint or counterclaim is an admission of liability; the opposite is true for arbitration by agreement. The responsive pleading in an arbitration is also a counterclaim; if claimant, i.e., plaintiff, does not respond within 30 days, the counterclaim is deemed denied under Basic R. 3(c). However, if parties wish to admit some allegations in a demand or a counterclaim and deny others, they may do so by admitting some allegations and not responding to allegations they would deny. There is nothing barring parties from responding to a demand or a counterclaim as they would in a lawsuit, i.e., admitting some allegations and denying the rest. On the other hand, if a respondent served with a demand or a claimant served with a counterclaim has what amounts to a defense, e.g., failure to state a claim for relief, statute of limitations or payment, that defense must be made within the 30 day limit for answering statements.

N.C. Ct.-Ord. Arb. R. 3(j) provides for a default hearing by an arbitrator. *See also* NASD R. 10314 for a more complex procedure for initiating arbitration if cross-claims are involved. Most family law cases involve spouses as principal parties; an arbitrator can use N.C. Gen. Stat. § 50-45(e) (2005) authority to establish procedures analogous to the Rules of Civil Procedure for these cases if the agreement to arbitrate does not provide for them.

See also N.C.R. Civ. P. 4; Parts I.B.3, I.B.4, I.B.7; AAML Model Act, note 11, pp. 113-14.

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

Comment

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

See also Handbook, note 3, p. 38; AAML Model Act, note 11, p. 114.

5. Changes of Claim; Amendments. After a claim or a counterclaim has been filed, if either party desires to make any new or different claim or counterclaim, to otherwise amend a claim or counterclaim or to amend an answering statement, this claim, counterclaim or answering statement must be in writing and sent to the other party, who shall have 30 days from the date of mailing to file an answer or otherwise respond pursuant to Basic Rule 3. If an arbitrator has been chosen, the arbitrator shall be mailed a copy at the same time. After the arbitrator has been appointed, no new or different claim or counterclaim may be submitted without the arbitrator's

consent.

Comment

Rule 5's caption has been amended. The first sentence in Rule 5 has been amended to link Rule 5's amendment procedure with amended Basic Rule 3(c). *See also* the Comment to Basic Rule 3. The remainder of Rule 5 is unchanged.

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

See also Handbook, note 3, p. 38; AAML Model Act, note 11, pp. 114-15.

5A. Consolidation. Arbitration pursuant to this agreement shall not be consolidated with any other arbitration.

Comment

Basic R. 5A is new.

Multiple arbitrations may be rare in family law cases, but they can happen if, *e.g.,* two business partners have an agreement to arbitrate for dissolving the business and then sign an agreement to arbitrate as part of a prenuptial contract. Former N.C. Gen. Stat. § 50-50 (2003) only allowed consolidation of arbitrations if parties agreed to consolidation. If a party agreed to consolidate and then refused to do so, a court could order consolidation. The new statute, *id.* § 50-50.1 (2005), establishes standards for consolidating arbitrations by a court, but under *id.* § 50-50.1(c) (2005) a court may not order consolidation if parties agree that an arbitration should not be consolidated with other arbitrations. Basic Rule 5A would bar consolidation. If parties want consolidation, they can omit this rule, using Forms B.2, B.5 or B.6. The result will be that if they do not later agree on consolidation, N.C. Gen. Stat. §§ 50-50.1(a) and 50-50.1(b) (2005) standards can be invoked against an objecting party. If a party wants to consolidate some but not all matters for arbitration, Basic Rule 5A should be retained and a special rule under Forms E added. AAML Model Act pp. 108-09, Optional Form CC, offers a draft provision:

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

See also Part I.B.13; Forms B.2, B.5 or B.6; Form E; Basic R. 5B, and their Comments.

5B. Class Actions. Arbitrations under this agreement shall not be subject to consolidation with any class action subject to arbitration.

Comment

Basic R. 5B is new.

Green Tree Finan. Corp. v. Bazzle, 539 U.S. 444, 447-55 (2003) (Breyer, J., plurality op.; Stevens, J., concurring) held that State law and terms in an agreement govern whether a claim in

an agreement to arbitrate is subject to class action treatment by arbitrators in a case otherwise subject to the FAA. Livingston v. Associates Finan., Inc., 339 F.3d 553, 558-59 (7th Cir. 2003) enforced an arbitration agreement clause precluding class actions. Although class actions will be rare in family law arbitrations where all at stake is a marriage breakup, if such an arbitration is consolidated with a business arbitration under N.C. Gen. Stat. § 50-50.1 (2005), or if there are claims related to a class action by a marital partner, likelihood of a class action consolidation issue increases. Basic R. 5B would bar consolidation with class actions.

If parties wish to consolidate with an arbitrated class action, this could be substituted:

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

See also Basic R. 5A and its Comment, particularly if partial consolidation is desired; AAML Model Act, note 11, pp. 133-34.

2004 Proposed Amendments, note 9, pp. 62-63, recommended Basic Rule 5B, Class Actions, as Optional R. 106. 2005 Recommended Amendments, note 12, pp. 34-35, approved by the Bar Association Board of Governors, placed Basic R. 5A, suggested by the Committee Reporter, and Basic R. 5B here in the Basic Rules sequence.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

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

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

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

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

(e) With the parties' consent, the arbitrator may arrange a mediation conference under principles stated in the North Carolina District Court and Superior Court mediation rules. The mediator may not be an arbitrator appointed to the case. A consent under this rule must provide for the rules to be followed in the mediation and compensation for the mediator.

Comment

Basic R. 6(c) has been revised; previously it read:

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

See Handbook, note 3, p. 39. AAML Model Act, note 11, pp. 115-16, suggested amendments for Basic R. 6(c). *See also* 2005 Recommended Amendments, note 12, pp. 35-36. The amendment adds Basic R. 6(c)(ii)-6(c)(iv) and moves former Basic R. 6(c)(ii)-6(c)(iii)'s content to Basic R. 6(c)(v)-6(c)(vi).

Rule 6 parallels AAA Separation Agreement R. 3 and AAA R. R-8 and R-9; *see also* AAML R. 3.a, 3.b. Rule 6(a) follows State and federal practice for initial pretrial conferences. See, *e.g.*, Fed. R. Civ. P. 16(b), 26(f); N.C.R. Civ. P. 16; N.C. Prac. R. 7; E.D.N.C.R. 26.1(e)(2); M.D.N.C.R. 16.1-16.3; W.D.N.C.R. 16.1. Rule 6(b) follows State and federal practice for final pretrial conferences. *See, e.g.*, Fed. R. Civ. P. 16(d); N.C.R. Civ. P. 16; N.C. Practice R. 7; E.D.N.C.R. 16.1; M.D.N.C.R. 40.1(c).

The last sentence of Rules 6(a) and 6(b), not found in AAA R. R-8 and R-9, suggests conference calls, facsimile, e-mail, etc., as more expedited and economical means of holding the conference. Rule 6(c) applies these principles to administrative conferences and preliminary hearings; AAA R. R-9 applies them only to preliminary hearings. Rule 6(d) follows AAA Separation Agreement R. 8, except that Rule 6(d) provides for arbitrator approval of any waiver of updates and for sanctions as an option to vacating the award. Rule 6(e) also follows AAA R. R-8 but does not specify the exact title of the North Carolina mediation rules, since those may change if a single ADR procedure is created. Rule 6(d) also requires a provision for compensating the mediator. *See also* P-A-C R. 4.02-4.03, 7.01. NASD R. 10321 provides for a more elaborate pre-hearing proceeding.

See also amended Basic R. 26(b); Hamilton, note 17; Morelock, Part II.B.2 Comment; Morgenstern & Bloom, note 17.

7. Site of the Arbitration.

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

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

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

Comment

Basic R. 7 has been amended to require that agreements, requests and responses must be in writing. It reflects the philosophy and requirements of the 2005 FLAA amendments and parallels AAML Model Act, note 11, pp. 116-17; *compare* Handbook, note 3, p. 40.

Rules 7(a)-7(b) follow AAA Separation Agreement R. 4 and AAA R. R-10. Form C might be used to implement Rule 7(a). Rule 7(b) covers a situation where parties do not designate a place in the arbitration agreement. Rule 7(c) follows the spirit of rules like AAA Separation Agreement R. 4 and AAA R. R-2 and R-5, which say that if parties choose the AAA to conduct the arbitration, this authorizes the AAA to administer the arbitration. The AAA may, in its discretion, assign administration of the arbitration to any of its regional offices. While these rules do not give the AAA direct authority to move the situs of an arbitration if the parties have chosen a particular place, their thrust is toward localizing administration for convenience of the disputants. Rule 7(c) states the policies of litigation venue transfer statutes like N.C. Gen. Stat. §§ 1-83 - 1-87 (2005) and 28 U.S.C. § 1404 (2000). What was a situs that was convenient and fair to parties and witnesses may become unfair if time separates the situs choice and institution of arbitration. Parties and witnesses may move or become incapacitated, with a result that arbitration may become more expensive and time-consuming and therefore not as fair as originally contemplated. Arbitration agreement drafters not wishing to give this authority to the arbitrator may exclude Rule 7(c) by using Forms B.2, B.5 or B.6. The 30-day request times reflect State practice; AAA R. R-10 has a 15-day deadline. Parties negotiating an arbitration situs agreement must be mindful of legislation like N.C. Gen. Stat. §§ 22B-2, 22B-3 and other law that may void arbitration situs clauses.

See also Part II.B.1, Comment for Forms B.2, B.5, B.6.

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

Comment

Basic R. 8 has been amended to require that agreements, requests and responses must be in writing. It reflects the philosophy and requirements of the 2005 FLAA amendments and parallels AAML Model Act, note 11, p. 117; *compare* Handbook, note 3, pp. 40-41.

Rule 8 follows AAA R. R-22, except for doubling the default notice time to 20 days;

AAA Separation Agreement R. 9 has a 7-day default notice. This should give parties time to subpoena witnesses, etc., for the hearing. NASD R. 10315 suggested the last sentence, which is also in and is consistent with N.C. Gen. Stat. §§ 50-47(1), 50-42.2(b) (2005).

See also Parts I.B.4, I.B.10; Basic R. 3 and 4 and their Comments.

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

Comment

Basic R. 9 has been amended to require that notices must be in writing, reflecting the philosophy and requirements of the 2005 FLAA amendments. Rule 9 now also requires notifying the other party and the arbitrator of counsel's e-mail address as well as a postal address.

Rule 9 follows AAA R. R-24, except for extending the notice time from 3 to 7 days before the hearing date and also requiring counsel's e-mail address and telephone and facsimile numbers. AAA Separation Agreement R. 7 is similar to AAA R. R-24, except for a 3-day notice time. Rule 9 is consonant with N.C. Gen. Stat. § 50-48 (2005) and *id.* §§ 1-567.7, 1-567.48(b), 1-567.79 (2005); *see also* NASD R. 10316; P-A-C R. 1.03; Handbook, note 3, p. 41; AAML Model Act, note 11, pp. 117-18.

10. Record of Arbitration.

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

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

Comment

Basic R. 10(a) has been amended to require that agreements and notices must be in writing, reflecting the philosophy and requirements of the 2005 FLAA amendments.

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

See also Handbook, note 3, p. 41; AAML Model Act, note 11, p. 118.

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

Comment

Basic R. 11 has been amended to require that agreements must be in writing, reflecting the philosophy and requirements of the 2005 FLAA amendments. N.C. Gen. Stat. § 50-57(b) (2005) allows a court to redact or seal all or part of an award if the award is filed for court confirmation.

Rule 11 follows AAA Separation Agreement R. 10 and AAA R. R-23, adding requirements that parties and counsel also preserve the privacy of hearings unless the parties agree otherwise. If the law provides otherwise, *e.g.,* through a subpoena to testify in a criminal case, the subpoenaed party must testify unless protected by other law, *e.g.,* the privilege against self-incrimination. Rule 11 is consistent with N.C. Gen. Stat. § 50-47 (2005).

See also Parts I.B.10, I.B.20; AAML R. 4.b; P-A-C R. 1.06; Handbook, note 3, pp. 41-42; AAML Model Act, note 11, p. 118.

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

Comment

Amended Basic R. 12 reflects the philosophy and requirements of the 2005 amendments, that agreements and requests related to arbitration be in written format. The costs provision is new as a warning to a party who requests a hearing postponement and shows good cause for it, where the other party or the arbitrator has incurred considerable expense readying for the hearing, *e.g.,* nonrefundable tickets or reservations. N.C. Gen. Stat. § 50-51(f) (2005) recites costs and requirements for imposing them.

Rule 12 follows AAA R. R-28 and AAA Separation Agreement R. 15; *see also* Part I.B.14; AAML R. 2.d; Handbook, note 3, p. 12; AAML Model Act, note 11, p. 119.

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

parties, in accordance with their arbitration agreement, the North Carolina Canons of Ethics for Arbitrators and the rules incorporated into the parties' arbitration agreement; and will make an award according to the best of the arbitrator's understanding." The oath or affirmation shall be signed and dated by the arbitrator, who shall send copies to the parties and the court.

Comment

Rule 13 follows AAA R. R-25; the form of the oath follows those taken by AAA arbitrators. If a court appoints an arbitrator, *e.g.*, pursuant to N.C. Gen. Stat. § 50-45 (2005), the bracketed material applies. If the court does not appoint the arbitrator, there is no need to send a copy of the oath to the court. If the arbitration agreement chooses ethics principles other than the North Carolina Canons, those rules should be substituted in the oath. Similarly, if no biography or other information has been submitted, *e.g.*, where parties are satisfied with an arbitrator's general reputation, that clause should be omitted.

See also N.C. Gen. Stat. § 50-45.1 (2005) (disclosure rules for arbitrators); Parts I.B.7, I.B.8; Form C and its Comment; Handbook, note 3, p. 42; AAML Model Act, note 11, p. 119.

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

Comment

Rule 14 follows N.C. Gen. Stat. § 50-46 (2005) and AAA R. R-25, adding the possibility that the arbitration agreement might provide for only majority decisions of the arbitrators before or when they render the award, or in both situations. *See* AAA R. R-40; *see also* AAA R. R-19(b). Multimember arbitral panels should be rare in family law arbitration; *see* Forms A, Form BB, Rule 2 and their Comments; *see also* Part I.B.9; Early et al., note 60; Comment; Handbook, note 3, pp. 42-43; AAML Model Act, note 11, p. 119.

15. Order of Proceedings; Communication with Arbitrator.

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

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

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

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

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

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

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

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

(i) If a court enters a parenting coordinating order pursuant to N.C. Gen. Stat. § 50-91(b), and the parties later sign or have previously signed an agreement to arbitrate, the parties and the arbitrator shall cooperate with the parenting coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration.

(j) If a court enters a parenting coordinator order pursuant to N.C. Gen. Stat. § 50-91(a) and the parties later sign an agreement to arbitrate, the parties and the arbitrator shall cooperate with the coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration.

(k) If parties to an arbitration wish appointment of a parenting coordinator pursuant to N.C. Gen. Stat. § 50-91(a), the parties shall recite the existence of an agreement to arbitrate under the Family Law Arbitration Act in the § 50-91 consent agreement. If a court enters a coordinator order pursuant to § 50-91 and the parties have previously signed an agreement to arbitrate, the parties and the arbitrator shall cooperate with the coordinator, and the coordinator shall cooperate with the arbitrator and the parties, in resolving issues remitted to the coordinator and the arbitration. If the arbitrator and the coordinator do not agree on a course of action, the arbitrator's decision shall prevail, unless the court otherwise rules in its § 50-91 orders.

Comment

Basic R. 15(f) and 15(h) have been amended; Basic R. 15(i)-15(k) have been added.

Basic R. 15(f) amendment's purpose is to allow parties and the arbitrator to agree in writing on simultaneous communications, rather than meeting face to face, to prepare for a hearing. They may also communicate with the arbitrator on issues arising during the hearing, *e.g.*, submissions to the arbitrator while the arbitrator drafts the award. Requiring the agreement to be in writing will minimize chances for misunderstandings. This option might be included in the agreement to arbitrate. 2004 Proposed Amendments, note 9, pp. 59-60, recommended the Basic R. 15(f) amendment. AAML Model Act Basic R. 15(h), AAML Model Act, note 11, pp.

120-21, suggested the Basic R. 15(h) amendment, which coincides with the 2005 FLAA amendments' philosophy and requirements for agreements in writing. *See also* amended Basic R. 26(b).

The 2005 General Assembly enacted parenting coordinator (PC) legislation, N.C. Gen. Stat. §§ 50-90 - 50-100 (2005), to formalize this kind of ADR for conflicted child custody situations. Parental coordination has been used for over 10 years in, *e.g.*, Mecklenburg County. The statutes do not provide for interface with FLAA arbitrations if a court enters a PC order under *id.* § 50-91(b) (2005) without parents' consent, or if a court enters a PC order under *id.* § 50-91(a) (2005) with parents' consent, before or after parties sign an agreement to arbitrate.

If a court enters a § 50-91(b) order, which does not involve the parties' consent, and the order is entered before or after there is an agreement to arbitrate, that order would seem to take precedence over the agreement to arbitrate, particularly if the agreement to arbitrate is signed later. Basic R. 15(i) covers these situations. Parties should move the court for an order similar to Rule 15(i). It is unfortunate that this legislation does not interlock with the FLAA as the collaborative law statutes, N.C. Gen. Stat. §§ 50-70 - 50-79 (2005), do. Judges and coordinators should be aware of the problem and resolve the issue in the court order. Basic R. 15(i) does not settle the issue of what an arbitrator should do if the arbitrator and the coordinator do not agree on a course of action affecting the coordination or the arbitration. Since a court's PC order would trump the agreement to arbitrate, a safe course is to get court resolution of the problem.

Basic R. 15(j) and 15(k) cover situations where a court enters a § 50-91(a) order after parties agree to a PC appointment, and the order does not reflect what to do if parties later agree to arbitration, or if parties sign an agreement to arbitrate and then sign a PC agreement. Rule 15(j) recognizes the reality that a § 50-91(a) order pursuant to the parties' agreement may come before they agree to arbitrate. If this happens, it is hoped that the parties and the court will be aware of the arbitration option and recite a cooperation principle in the order if the parties later decide to arbitrate. Basic R. 15(k), covering a situation where parties agree to arbitrate and then seek a § 50-91(a) order, requires parties (most likely through counsel) to tell an appointing court of a prior agreement to arbitrate. However, although the court can (and ordinarily should) require cooperation and may want the arbitrator to prevail if there is a disagreement between the arbitrator and the coordinator, the court would be free to set the terms of whose view prevails.

These issues should be resolved by future amendments to the legislation.

Basic R. 15(a)-15(f) follow AAA R. R-30. Basic R. 15(g)-15(h) follow AAA Separation Agreement R. 13-14, with provision for a child's separate counsel and how Rule 15(h) costs will be apportioned.

See also Grace, note 18; Holliday, note 19; Handbook, note 3, p. 43; AAML Model Act, note 11, pp. 120-21.

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

Comment

Rule 16 follows N.C. Gen. Stat. § 50-47(a) (2005), AAA R. R-29, and AAA Separation Agreement R. 11; *see also* Part I.B.10; Handbook, note 3, pp. 43-44; AAML Model Act, note 11, p. 121.

17. Evidence and Procedure.

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

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

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

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

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

Comment

Rule 17 follows AAA R. R-30, R-31; AAA Separation Agreement R. 12; P-A-C Agreement, ¶ 4. *See also* N.C. Gen. Stat. §§ 50-47, 50-49 (2005); Parts I.B.10, I.B.12; Handbook, note 3, p. 44; AAML Model Act, note 11, pp. 121-22.

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

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

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

Comment

Basic R. 18(b) has been amended; agreements must be in writing, reflecting the philosophy and requirements of the 2005 amendments.

Rule 18 follows AAA R. R-32. *See also* Handbook, note 3, p. 44; AAML Model Act, note 11, p. 122.

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

parties have agreed in writing to accept an oral report, to the parties and afford them opportunity to comment.

Comment

Basic R. 19 has been amended; notices must be in writing, reflecting the philosophy and requirements of the 2005 amendments. The last sentence begins "If one or more . . . " instead of "If one or all . . ." a clarification.

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

See also AAML R. 7; Handbook, note 3, pp. 44-45; AAML Model Act, note 11, p. 122.

20. Interim Measures. The grant of interim measures shall be governed by the North Carolina Family Law Arbitration Act.

Comment

Basic R. 20 does not follow AAA Separation Agreement R. 16 or AAA R. R-34 on this point; *see* N.C. Gen. Stat. § 50-44 (2005). Parties wishing to exclude some or most interim measures must do so by a special rule or clause; *see* Forms B and E and their Comments. Parties must be aware of N.C. Gen. Stat. §§ 50-42.1, 50-44 (2005) and limits on what relief can be waived. *See* Parts I.B.3, I.B.6; Handbook, note 3, p. 45.

21. Closing of Hearing.

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

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

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

Comment

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

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

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

See also Handbook, note 3, p. 45; AAML Model Act, note 11, p. 123.

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

Comment

Basic R. 22 has been amended; agreements must be in writing, reflecting the philosophy and requirements of the 2005 amendments. The phrase "agreement to arbitrate or other written agreement" has been substituted for "contract" in former Basic R. 22.

Rule 22 follows AAA Separation Agreement R. 18 and AAA R. R-36. *See also* Handbook, note 3, p. 45; AAML Model Act, note 11, pp. 123-24.

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

Comment

Rule 23 follows AAA R. R-30(c); *see also* AAML R. 4.i; Handbook, note 3, pp. 45-46; AAML Model Act, note 11, p. 124.

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

Comment

Rule 24 follows AAA R. R-37, adding a requirement that the objection must be timely. The arbitrator decides whether the objection is timely. *See also* AAML R. 9; P-A-C R. 1.05; Handbook, note 3, p. 46; AAML Model Act, note 11, p. 124.

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

Comment

Basic R. 25 has been amended; agreements and notices must be in writing, reflecting the philosophy and requirements of the 2005 amendments.

Rule 25 follows AAA Separation Agreement R. 19 and AAA R. R-38. *See also* Handbook, note 3, p. 46; AAML Model Act, note 11, p. 124.

26. Serving Notice.

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

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

Comment

Basic R. 26(b) has been amended to deem consent for use of e-mail. *See also* Basic R. 6(a), 6(b), 9, 15(f) and 30 and their Comments on e-mail use.

Rule 26 follows AAA R. R-39, adding in Rule 26(b) that alternative communications may be used for communications permitted but not required by the Rules. The N.C. Gen. Stat. § 50-42 (2005) Comment, Part I.B.2, says the Act does not provide for e-mail and similar correspondence. However, parties will agree to such unless Rule 26(b) is excluded in the arbitration agreement.

AAA R. E-3 for expedited procedures allows telephone notice; if consistent with N.C. Gen. Stat. § 50-42.2 (2005), it could be the subject of a special provision. It was not included in Rule 26(b)'s options. The risk of phone service is the possibility of missed call slips or missed voice mails and the like; the means that Rule 26(b) lists offer a hard copy record of the precise notice for files.

See also Part I.B.4; Handbook, note 3, p. 46; AAML Model Act, note 11, pp. 124-25.

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

Comment

Basic R. 27 has been amended; agreements must be in writing, reflecting the philosophy and requirements of the 2005 amendments.

Rule 27 follows AAA Separation Agreement R. 20 and AAA R. R-41. *See also* Handbook, note 3, pp. 46-47; AAML Model Act, note 11, p. 125.

28. Form and Scope of Award.

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

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

(c) Unless the parties agree otherwise in writing, the award shall state the reasons upon which it is based.

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

Comment

Basic R. 28(a) has been amended to require that an award recite where the award was made in addition to the place where the arbitration was conducted; amended N.C. Gen. Stat. § 50-51(a) (2005) mandates this. Basic R. 28(c) and 28(d) have been amended; agreements and notices must be in writing, reflecting the philosophy and requirements of the 2005 amendments.

Rule 28(a) follows AAA Separation Agreement R. 21, AAA R. R-42(a) and N.C. Gen. Stat. § 50-51(a) (2005), which specifies further details for the award, *i.e.,* date and places where the arbitration was held and where the award was made. Rule 28(a) states the minimum for an award.

Rule 28(b) follows AAA R. R-43(a) and N.C. Gen. Stat. § 50-51(d) (2005).

Rule 28(c) declares that any award under the Rules shall be a reasoned award, as required by N.C. Gen. Stat. § 50-51(b) (2005). Reasoned awards may be almost necessary in family law cases where there are child custody or child support issues, because of the procedures in N.C. Gen. Stat. §§ 50-52 - 50-56 (2005). If a Rule 28(c) reasoned award is necessary, the Rule 27 30-day limit for rendering the award might be extended by the parties' written agreement. Parties should advise the arbitrator upon appointment to a case of the need for a reasoned award. If parties do not wish a reasoned award, they should exclude Rule 28(c) in the arbitration agreement. *See* Forms B.1-B.6.

Rule 28(d) tracks AAA R. 43 and N.C. Gen. Stat. §§ 50-51(c), 50-51(e) - 50-51(f) (2005). If parties want punitive damages as part of an award, or that interest and/or costs not be part of an award, they should specify this in the arbitration agreement. Parties may wish to include some costs, *e.g.,* attorney fees normally awarded in divorce cases, but not others. If so, they should specify this in the arbitration agreement. For example, parties could exclude costs other than attorney fees by excluding them in the arbitration agreement and deal with interest by excluding it as provided in N.C. Gen. Stat. §§ 50-51(c), 50-51(f) (2005). *See* Forms B.1-B.6.

See also Part I.B.14; Handbook, note 3, pp. 46-47; AAML Model Act, note 11, pp. 125-27.

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

Comment

Basic R. 29 follows AAA R. R-44, which suggested the last sentence, an amendment for Rule 29. *See also* N.C. Gen. Stat. § 50-51(f) (2005); Part I.B.14; Basic R. 11, 15, 28, 33, 34; Optional R. 102, and their Comments; Handbook, note 3, p. 47; AAML Model Act, note 11, p. 127.

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

Comment

Rule 30 follows AAA Separation Agreement R. 22 and AAA R. R-45, which suggested the amendment allowing e-mail. The e-mail option can disadvantage counsel or parties who do not have ready e-mail access. If that is the case, one choice is for the arbitrator to use other means (*e.g.*, postal mail) to assure legal and timely delivery. Another option is for an agreement to omit or modify Rule 30 through Forms B.2, B.5 or B.6 and E to craft a special rule for delivery, omitting an e-mail option. *See also* N.C. Gen. Stat. § 50-51(a) (2005); Part I.B.14; Forms B and E and their Comments; Basic R. 6(a), 6(b), 9, 15(f) and 26(b) and their Comments; Handbook, note 3, pp. 47-48; AAML Model Act, note 11, p. 127.

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

Comment

AAML Model Act Basic R. 31 suggested adding "shall" and revising "at the party's" to read "at that party's" in amended Rule 31. The first amendment, "shall," corrects an omission; the second amendment makes it clear that "the" party, the antecedent "party," must pay for the certified copies.

Rule 31 follows AAA R. R-47. This relates to procedures for setting aside, confirming, etc., awards pursuant to N.C. Gen. Stat. §§ 50-52 - 50-56 (2005), but it might also relate to criminal proceedings (*e.g.*, perjury) arising from the arbitration. Rule 31 is not intended to bar subpoena of material in the arbitrator's possession by prosecutors. Since modification of certain family law awards, *e.g.*, for alimony, child support or child custody, may occur years in the future and there may be judicial proceedings related to these, an arbitrator must be prepared to retain custody of papers related to these cases for many years, at least during the lifetime of a spouse entitled to alimony, unless that spouse remarries, and during the minority years of persons entitled to child support or child custody protection.

See also Parts I.B.15 - I.B.19; Handbook, note 3, p. 48; AAML Model Act, note 11, p. 127.

32. Applications to Court; Exclusion of Liability.

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

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

(c) Parties to proceedings conducted pursuant to these Rules shall be deemed to have consented that the judgment upon the arbitration award may be entered in any federal or State court having jurisdiction, unless the parties have otherwise agreed in writing as permitted by N.C. Gen. Stat. 50-53(a).

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

Comment

The amendment to Basic R. 32(c) conforms the Rule to the option N.C. Gen. Stat. 50-53(a) (2005) allows.

Rule 32 follows AAA Separation Agreement R. 23 and AAA R. R-48 except for Rule 32(d), which incorporates by reference principles in N.C. Gen. Stat. § 50-45 (2005) relating to immunities, and other applicable law. Rule 32(a) reverses case law elsewhere that says filing suit can be deemed a waiver of arbitration. Filing pleadings does not constitute waiver under North Carolina law; trial of a case or other litigation activity that prejudices a party desiring arbitration may. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986); Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 227-32, 321 S.E.2d 872, 877-78 (1984). Rule 32 enhances those principles.

See also Parts I.B.7, I.B.16; Handbook, note 3, p. 48; AAML Model Act, note 11, p. 128.

33. Expenses, Costs and Fees.

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

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

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

Comment

Basic R. 33 has been substantially amended. The Rule title now adds "costs and fees." Rule 33(a), the substance of former Rule 33, now refers to "Expenses of witnesses . . . shall" instead of "Expenses of witnesses for either side shall . . . " New Rule 33(b) restates amended N.C. Gen. Stat. § 50-51(f)(2)(b) (2005). New Rule 33(c) does the same for other expenses, fees and costs. If parties wish to agree to different rules for, *e.g.*, attorney fees or other expenses, they

must draft a special rule for the agreement to arbitrate and delete reference to Basic R. 33(b) and/or Basic R. 33(c)) . The Rule 33 agreements must be in writing.

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

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

Under current North Carolina law, courts cannot award attorney fees and expenses for equitable distribution. N.C. Gen. Stat. § 50-51(f)(2)(b) (2005) declares that arbitrators may award attorney fees and expenses to the extent provided by law, unless parties agree otherwise. Basic Rule 33(b) recites this rule. If parties wish to negotiate award of attorney fees and expenses for other issues like equitable distribution, they may do so by including a special rule, using Form E.1. Parties cannot contract out of attorney fees and expenses where the law requires imposing them, however.

Rule 33 follows AAA R. 48; *see also* Part I.B.14; AAML R. 2.f; Handbook, note 3, p. 49; AAML Model Act, note 11, pp. 128-29.

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

Comment

Basic R. 34 has been rewritten. The first amendment, that the agreement among the parties and the arbitrator must be in writing, follows the philosophy and requirements of the 2005 amendments. Other amendments, requiring that the arbitrator be a party to the arbitrator's compensation contract, substituting "when the parties" for "when they," and omitting all after "arbitrator," in former Basic R. 34, clarify the Rule.

Rule 34 states the principle for a contract, *e.g.,* a premarital agreement, that includes an arbitration agreement, and the arbitrator must be chosen at some time after the contract's execution. Basic R. 4 governs arbitration by submission. Under AAA practice arbitrator compensation is determined through the AAA. *See* AAA R. R-51.

See also Basic R. 15, 28 and 33 and their Comments; Handbook, note 3, p. 49; AAML Model Act, note 11, pp. 129-30.

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

Comment

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

See also Handbook, note 3, p. 49; AAML Model Act, note 11, p. 130.

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

Comment

Rule 36 follows AAA Separation Agreement R. 24 and AAA R. R-53; the arbitrator has authority to interpret all rules incorporated in the arbitration agreement. AAA R. R-53 refers decision on some rules to the AAA. In North Carolina family law arbitrations, there is no sponsoring arbitration institution; the result is that the arbitrator's decision is final, subject to vacatur and similar procedures.

See also Handbook, note 3, pp. 49-50; AAML Model Act, note 11, p. 130.

37. Time. Time periods prescribed under these Rules or by the arbitrator shall be computed in accordance with the North Carolina Rules of Civil Procedure and North Carolina law.

Comment

P-A-C R. 1.12 suggested Rule 37. *See, e.g.,* N.C.R. Civ. P. 6. Rule 37 puts all participants (parties, counsel, arbitrator) on the same time track they would face if a case is in litigation.

See also Handbook, note 3, p. 50; AAML Model Act, note 11, pp. 130-31.

38. Judicial Review and Appeal. No judicial review of errors of law in the award is permitted.

Comment

N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) (2005) allow a court to review errors of law in the award if parties agree to this. Rule 38, if incorporated in an agreement to arbitrate, denies parties this option. Rule 38 follows traditional arbitration practice; 2005 meetings of the NCBA Family Law Section confirmed Section policy that the traditional practice should be the norm. *See also* Parts I.B.17, I.B.23; Burleson, Part II.B.8 Comment; Early et al., note 60.

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

38. Judicial Review and Appeal. The parties agree to judicial review of errors of law as N.C. Gen. Stat. §§ 50-54(a)(8), 50-60(b) provide.

If parties want judicial review of some errors of law, *e.g.,* spouse support but not equitable distribution, they should so specify in the agreement to arbitrate. *See also* Forms B and E and their Comments; Early et al., note 60.

2. Optional Rules for Arbitrating Family Law Disputes

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

Comment

Optional R. 101 has been amended; requests and agreements must be in writing under the philosophy and requirements of the 2005 amendments.

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

See also Handbook, note 3, p. 50; AAML Model Act, note 11, p. 131.

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

Comment

Optional R. 102 has been amended. The word "desiring" has been substituted for "wishing;" "other written agreement" has been added after "the arbitration agreement" to allow agreement on interpreters perhaps long after the agreement to arbitrate. Agreements must be in writing under the philosophy and requirements of the 2005 amendments.

AAA R. R-27 is the source for Optional R. 102 except the last clause, which reflects the policy of allowing parties to modify these rules to suit a particular arbitration. *See also* AAML R. 4.a; Handbook, note 3, pp. 50-51; AAML Model Act, note 11, p. 132.

103. Language. The language of the arbitration shall be that of the documents

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

Comment

Optional R. 103 follows AAA Int. R., Art. 14, except the last sentence. *See also* N.C. Gen. Stat. § 50-51(f) (2005); Part I.B.14; Basic R. 33 and its Comment; Handbook, note 3, p. 51; AAML Model Act, note 11, p. 132.

104. Experts.

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

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

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

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

Comment

Optional R. 104(a) has been amended; the independent expert's communication must be in writing to the parties. This follows the philosophy and requirements of the 2005 amendments.

Rule 104 follows AAA Int. R., Art. 22. Rule 104 introduces a form of conciliation report, a procedure favored by Asian parties and available for commercial arbitration in the International Commercial Arbitration & Conciliation Act, N.C. Gen. Stat. §§ 1-567.30 - 1-567.87 (2005). If parties agree on this procedure, perhaps after arbitration has begun, they might settle on the basis of the report. Although Rule 104 would seem to have slight relevance in family law, it might be useful in a premarital agreement on an international business that includes an arbitration agreement, and divorce is sought. Basic R. 15(h), permitting parties to allow an arbitrator to seek an outside opinion in determining what is in the best interests of a child, does not mean that the outside opinion must be an "expert" opinion within the meaning of Rule 105.

See also the Comment to Basic R. 15; Handbook, note 3, p. 51; AAML Model Act, note 11, pp. 132-33.

105. Law Applied. Subject to any choice of law clause or clauses in an applicable contract or other agreement and any law governing choice of law, the arbitrator shall apply the substantive law of North Carolina exclusive of North Carolina conflict of laws principles.

Comment

P-A-C R. 1.04 suggested Optional R. 105, which presumes that arbitration pursuant to the Act will occur in North Carolina. *See also* Restatement (Second) of Conflict of Laws § 187 (1988 rev.). If parties choose an arbitration site outside North Carolina in a contract or a submission to arbitration, they should be mindful of possibly adverse legislation *e.g.,* N.C. Gen. Stat. §§ 22B-2, 22B-3 (2005) or other law with respect to choice of law or arbitration situs clauses. If such law is chosen, consideration should be given to including a severability clause. In most cases involving a North Carolina divorce, the substantive law of North Carolina will govern as to property, etc., in the State. However, if a premarital agreement involving business transactions, etc., between the marriage partners is involved, or if there are property, etc. interests outside North Carolina, parties and counsel should consider carefully the advisability of a blanket rule that North Carolina substantive law governs all aspects of the marriage breakup. In those cases a choice of law clause must be drafted carefully, in all cases excluding conflict of laws rules to avoid renvoi problems, to take into account the several jurisdictions' substantive law. The phrase "applicable contract or other agreement" means that the procedural rules chosen by the parties, *e.g.,* the Basic and Optional Rules, will apply. Since the FLAA is procedural in nature, Optional R. 105 does not apply to it. To the extent that it might be considered substantive in nature, *i.e.,* the offer and acceptance of the agreement to arbitrate, Optional R. 105 is congruent with the Act.

See also Handbook, note 3, pp. 51-52; AAML Model Act, note 11, p. 133.

C. Forms and Rules: Summary

The Family Law Arbitration Act, like arbitration practice generally, offers parties many options on how the arbitration will be conducted. In the first place, a decision to arbitrate is completely voluntary, and parties should inform themselves of options under the Act before signing an agreement to arbitrate. The Act, like other arbitration legislation, presupposes that many procedural rules will be covered by clauses in the agreement to arbitrate; some clauses may change the rules in the Act if the Act or other law, *e.g.,* rights for emergency support, do not forbid it.[129]

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

[129] *See* N.C. Gen. Stat. § 50-44(g) (2005).

support.[130]

Parties considering arbitration as a family law dispute resolution alternative must therefore consider the forms for basic clauses, and rules for the arbitration, besides statutes, State and federal, and case law governing arbitration by agreement. No litigant in the North Carolina courts stops with Chapter 1, other General Statutes related to civil cases, and Constitutional provisions. Examination of the North Carolina Rules of Civil Procedure (also enacted by the General Assembly), the Practice Rules and the appellate rules (promulgated by the Supreme Court of North Carolina), local practice rules and case law is also necessary. The same kind of layered analysis is necessary in considering whether to arbitrate. The major difference is that parties have a much greater opportunity to draft the procedural regime under which they will operate in arbitrations by agreement than in traditional civil litigation.

III. CONCLUSIONS

The Family Law Arbitration Act makes the ADR option of arbitration by agreement available for resolution of all issues related to a marriage breakup if the spouses agree to it, except the divorce itself. The agreement can be part of a premarital agreement,[131] an agreement to arbitrate during the marriage. an agreement after separation and before divorce proceedings are filed, or even after entry of an absolute divorce judgment. This procedure can only be invoked if the parties want it and sign an agreement to that effect.[132] The scope of the arbitration is also determined by the parties' agreement. For example, a couple in business together can agree on arbitration of business issues but not family issues if they choose, and vice versa. The Act also provides for consolidation of arbitrations if two or more agreements to arbitrate are at issue.[133]

Alimony, child support and child custody issues may be arbitrated, but these issues may be subject to court action after the award has been rendered, or in the future when there have been changes of circumstances that would entitle a spouse or child to court action under North Carolina law. The parties can agree to have these issues initially decided by an arbitrator.[134]

A major departure from traditional arbitration in all but simple consent cases where there

---

[130] *See id.*

[131] *Id.* § 50-42(a) (2005) forbids including child support and custody in a premarital agreement to arbitrate. Subject to limitations and procedures in the Act, child support and custody may be a subject of a postmarital agreement to arbitrate.

[132] *Id.* § 50-42 (2005).

[133] *Id.* § 50-50 (2005).

[134] *See generally id.* §§ 50-52 - 50-56 (2005).

is no postseparation support, alimony, child support or child custody at issue is the need for the arbitrator to issue a reasoned award[135] so that a court can examine an award to determine if awards for postseparation support, alimony, child support or child custody are appropriate under North Carolina law.

The North Carolina Bar Association Family Law Section Arbitration Committee has reviewed standard Forms and Rules in the 1999 Handbook, reprinted in Volume III of this 2006 Revised Handbook, and has prepared revised standard Forms and Rules for family law arbitration in this Revised Handbook. Volume II of this Revised Handbook publishes documents used by practitioners in connection with arbitrations. Although the Revised Handbook supersedes the 1999 Handbook, the latter may apply to earlier arbitration agreements. Some Forms, *e.g.,* an agreement to arbitrate, are mandatory.[136] Parties have complete freedom of contract to choose among the Forms and Rules to determine, *e.g.,* how many arbitrators will be used (the default rule is a single arbitrator),[137] and how arbitration will be conducted. Even here, the interests of spouses for alimony, and children for support and custody, are protected. *Drafters must consider the facts and circumstances of the client and the particular case and must determine which of the suggested form(s) or rule(s) fit(s) the needs of clients and the case.* Readers with suggestions for amendments for the Act, the forms and rules, or this Handbook may communicate them to the Bar Association Family Law Section chair.

Arbitration by agreement, like its sisters, court-annexed arbitration or mediated settlement conferences, is not a panacea. It will not cure warts, nor does it guarantee better results in every case. It may promote a better, cheaper, and more efficient result in many situations, particularly where the North Carolina District Courts are extraordinarily busy with higher-priority cases (*e.g.,* criminal litigation), and where parties choose an able, experienced arbitrator by proper use of the Family Law Arbitration Act and incorporate appropriate clauses and rules in an agreement to arbitrate.

All three volumes of the 2006 Revised Handbook can be found on the North Carolina Bar Association website at http://family.ncbar.org/Legal+Resources/Publications/default.aspx.

---

[135] *Id.* § 50-51(b) (2005).

[136] *See id.* § 50-42 (2005) and Form A.

[137] *See* N.C. Gen. Stat. § 50-45(a) (2005) and Forms A, BB.