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

Volume III: Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act (1999); North Carolina Arbitration Act; North Carolina Family Law Arbitration Act as Amended Through 2003

Prepared for and Published by the North Carolina Bar Association

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A. Reprint of Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act (1999)

This Handbook, published in 1999 and until now available on the North Carolina Bar Association website through links to its Family Law Section, has been removed as a separate document. Volume III, Part A republishes the 1999 Handbook with misprint corrections in N.C. Gen. Stat. §§ 50-47 and 50-60(c) to the Family Law Arbitration Act as enacted in 1999. It does not reprint the 2003 amendment to what is now N.C. Gen. Stat. § 50-53(a) (2005). In other respects the Handbook is republished verbatim.

There are two reasons for republishing the Handbook as Volume III:

(1) Agreements to arbitrate in force since 1999 through enactment of the 2005 amendments to the Act may refer specifically to the 1999 Forms and Rules as standards governing the arbitration. Form AA in the 1999 Handbook was an option for those agreements; for analysis, *see* Form AA in the 1999 Handbook and Volume I and commentaries to the Form.

(2) This 2006 Revised Handbook refers to the 1999 Handbook; researchers may wish to consult it.

Counsel and parties concerned with website availability of the 1999 Handbook or this 2006 Revised Handbook should consider downloading them for future reference. Although research libraries may now have hard copies, there is a risk that those copies may disappear.

Parties may use forms and rules in Volume III in connection with new agreements to arbitrate, but there is a risk that provisions of the 2005 legislation, e.g., N.C. Gen. Stat. § 50-50.1 (2005)'s new consolidation principles, or the developing case law related to class action arbitration, for which 2006 Rule 5B would bar consolidation with a family law arbitration, may affect arbitrating under the 1999 Forms and Rules.

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.

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Prepared for and Published by the North Carolina Bar Association

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PREFACE

The North Carolina Family Law Arbitration Act (FLAA, or the Act) 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. The Act and suggested forms and rules may be used in connection with a premarital agreement, an agreement during the marriage, or an agreement after spouses separate. A North Carolina Bar Association Dispute Resolution and Family Law Sections Joint Committee drafted the Act for submission to the 1999 General Assembly.[1] The Joint Committee also prepared model forms and rules and these, like the draft Act, were approved by the Bar Association Board of Governors. The forms and rules were available for examination in the 1999 General Assembly during its consideration of the Act. With some exceptions and additions, the Handbook's suggested forms and rules are 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. As with all model forms and rules, *drafters must consider the facts and circumstances of the client and the particular case and must determine that 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 chair of the Bar Association Family Law Section.

The initiative for the Act came from the 1982 *Crutchley* case,[2] which, when later cases are taken into account,[3] says 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

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[1] 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 General 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 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.

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

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

cases in District Court, the proper court for divorces, may be mediated.[4] Other alternative dispute resolution (ADR) methods, *e.g.,* negotiated settlement, may be employed. However, if parties want to arbitrate by agreement, *Crutchley* limits issues that can be arbitrated. Family law cases are not subject to court-ordered arbitration[5] unless parties agree to it and the court approves.[6] The result will be a binding award if no party seeks trial de novo. Here too *Crutchley* would result in removing child custody and child support issues from arbitration. (The chief difference between the Act and court-ordered arbitration is that in the latter, cases are only sent to arbitration, perhaps after agreement of the parties and a court order after suit has been filed. There is opportunity for trial de novo if a litigant is dissatisfied with the award. Under the Family Law Arbitration Act, there is no right to trial de novo.) The result in either case, arbitration by agreement or through court-ordered arbitration, is that a case before an arbitrator could not consider the total marital estate in making provision for, *e.g.,* equitable distribution and child support, under current law.

Another initiative for the Act came from a realization among family law counsel that in some District Courts 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 where issues are complicated and require considerable court time to hear. Under the Act, parties are free to choose a family law specialist, or any other lawyer in whom there is mutual confidence, as an arbitrator. (As in all agreements to arbitrate, the arbitrator candidate must agree to serve.[7]) This may be particularly useful if there are complex legal issues in the case. Some parties may prefer the privacy and convenience arbitration affords; for example, if the arbitrator and the parties agree, arbitration can be conducted over a weekend, when courts are not usually in session.

North Carolina is among at least nine States with legislation permitting agreements to arbitrate family law cases.[8] 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 premarital agreement whose agreement to arbitrate includes

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[4] *See* N.C. Gen. Stat. §§ 7A-38.4, 7A-494 - 7A-495, 50-31.

[5] *Id.* § 7A-37.1; N.C. Ct.-Ord. Arb. R. 1(a)(3)(i).

[6] N.C. Ct.-Ord. Arb. R. 1(b).

[7] *Cf.* N.C. Gen. Stat. § 50-45(c).

[8] Mo. Ann. Stat. § 435.405; N.H. Rev. Stat. Ann. § 542.11; Okla. Stat. Ann. tit. 43, § 109 (medical services only); S.D. Codified Laws § 21-25B-2; Tenn. Code Ann. § 36-6-410(b)(1)(B); Tex. Family Code §§ 6.601, 153.0071; Wash. Rev. Code §§ 7.06.020(2), 26.09, 26.09.175; Wis. Stat. Ann. §§ 766.58(1), 802.12. Fla. Stat. Ann. § 44.104(12) forbids voluntary binding arbitration of disputes involving child custody, visitation or child support.

them, may be submitted to arbitration under the Act. The arbitrator must make findings of fact and conclusions of law in the award (unless the parties agree otherwise),[9] similar to civil litigation practice.[10] Parties can file this award with the court, like any arbitral award, for confirmation as a judgment, and it will be treated like any other order or judgment for enforcement purposes.[11] 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. The Act, following North Carolina's version of the Uniform Arbitration Act and the North Carolina International Commercial Arbitration and Conciliation Act[12] 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.[13] 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.[14] 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.[15] Child custody and child support cannot be subjects of a premarital agreement to arbitrate,[16] and a court may review arbitrator findings of fact for or modify interim measures for child support or child custody.[17] Emergency protections for spouses or children cannot be modified by the agreement to arbitrate.[18]

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.[19] Other major differences between the Uniform Act and the Family Law

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[9] N.C. Gen. Stat. 50-51(b).

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

[11] N.C. Gen. Stat. §§ 50-53, 50-57.

[12] *Id.* §§ 1-567.1 - 1-567.87.

[13] *Id.* § 50-54(a)(6).

[14] *Id.* § 50-56.

[15] *Id.* § 50-55.

[16] *Id.* § 50-42(a).

[17] *Id.* § 50-44(e).

[18] *Id.* § 50-44(g).

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

Arbitration Act include a default provision for a single arbitrator to hear a case,[20] protection of assets pending arbitration,[21] better access to discovery procedures,[22] consolidation[23] and costs.[24]

The Act preserves all rights children and spouses now have under State and federal law for emergency protection.[25] Although parties may agree 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 can not opt out of these protections.[26] 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.,* mediation. If they agree to arbitrate under the Act, that will affect their option to, *e.g.,* litigate.

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

Besides legislation, the Joint Committee prepared forms and rules, which have been approved by the Board of Governors. 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 amendment after experience under the Act by the Bar Association Dispute Resolution and Family Law Sections with final approval by the Bar Association Board of Governors. This procedure reflects prior practice of other Bar Association 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 dispute resolution institutions, *e.g.,* the American Arbitration Association. 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,

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

[21] *Id.* § 50-44; *see also id.* §§ 1-567.39, 1-567.47.

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

[23] *Id.* § 50-50; *see also id.* § 1-567.57(b).

[24] *Id.* § 50-51; *see also id.* § 1-567.61.

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

[26] *Id.* § 50-44(g).

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[27]; this is echoed in Basic Rule 2. 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.

The same principle applies for the Rules, which would 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. Parties interested in varying the terms of an agreement to arbitrate, after reviewing the Act for deviations allowed 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 a marriage.

Unlike the Act, which is positive law, the Forms and Rules can be amended or supplemented through experience by the Bar Association Dispute Resolution and Family Law Sections, which could propose amendments and additional rules. While Form AA allows parties to "freeze" the rules under which they operate, a procedure more appropriate when 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. A premarital agreement can be modified to retain rules in force when the agreement was signed.

The Act allows arbitration of all family law issues while affording protections for changing child custody and child support awards,[28] thereby superseding *Crutchley.* The Act otherwise follows current arbitration law 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 the arbitration procedure for their case, with few exceptions, *e.g.,* protections for emergency support under State or federal law.[29]

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

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[27] *Id.* § 50-45(a).

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

[29] *Id.* § 50-44(g).

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.

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I. THE NORTH CAROLINA FAMILY LAW ARBITRATION ACT

A. Introduction

The purpose of the North Carolina Family Law Arbitration Act 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. Suggested forms and rules, submitted in Part 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 Board of Governors, are subject to amendment through experience under the Act by the Bar Association Dispute Resolution and Family Law Sections with final approval by the Bar Association Board of Governors. Readers with suggestions for amendments for the Act, the forms and rules, or this Handbook may communicate them to the chair of the Bar Association Family Law Section.

The *Crutchley* case,[1] as interpreted by *Cyclone Roofing*,[2] held child custody or child support issues are not subject to binding arbitration. Other issues related to a marriage breakup, *e.g.,* equitable distribution,[3] are subject to binding arbitration by the parties' agreement before, during or after litigation. The North Carolina Uniform Arbitration Act[4] applied to these issues. Cases in District Court, the proper court for divorces,[5] may be mediated.[6] If a complaint for divorce is filed in Superior Court, although the case would usually be transferred to the District Court,[7] the Superior Court could keep the case, jurisdictionally speaking, and send it to mediation.[8] Some courts provide for child custody mediation today.[9] Family law cases are not

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

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

[3] *See* N.C. Gen. Stat. §§ 50-20 - 50-21.

[4] *Id.* §§ 1-567.1 - 5-567.20.

[5] *Id.* §§ 7A-240, 7A-244.

[6] *Id.* § 7A-38.4.

[7] *Id.* §§ 7A-256 - 7A-259.

[8] *Id.* §§ 7A-38.1 - 7A-38.2.

[9] *Id.* §§ 7A-494 - 7A-495, 50-13.1.

subject to court-ordered arbitration[10] unless parties agree to arbitration and the court approves the procedure.[11] However, *Crutchley* limited issues that can be arbitrated by agreement.

The result has been that although family law issues may be mediated, most but not all family law issues are 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.[12] Child custody and child support cannot be the subject of a premarital agreement to arbitrate.[13] The Act also protects other aspects of a marriage dissolution currently not subject to arbitration by agreement.[14]

The statute has been adapted from the Uniform Arbitration Act in force in North Carolina with reference to amendments currently being discussed by the Commissioners on Uniform State Laws which may be available for adoption as the Revised Uniform Arbitration Act by the States in a few years.[15] The statute also adapts provisions of the North Carolina International Commercial Arbitration and Conciliation Act (ICACA).[16] The Uniform Act in force in North Carolina today has been found deficient in some respects, *e.g.*, no provision for pre-award protection of assets. These innovations have been incorporated in the FLAA. 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 resolution of these issues in the courts. Resolution of these issues in the courts can be taken away only if parties have signed a valid agreement to arbitrate. If parties agree to arbitrate, the procedure follows the path of the State Uniform Act and the ICACA, with special provisions for family law incorporated from the General Statutes, plus ideas from the Draft Revised Uniform Act, now being prepared and only available for adoption by the States after being prepared in final format.

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[10] *Cf.* N.C. Gen. Stat. § 7A-37.1.

[11] N.C. Ct.-Ord. Arb. R. 1(a)(3)(i), 1(b).

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

[13] N.C. Gen. Stat. § 50-42(a).

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

[15] Commissioners on Uniform State Laws, The Revised Uniform Arbitration Act (Tent. Draft No. 2, Mar. 20, 1998) (Draft Revised Uniform Act, or Draft Act).

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

Because the FLAA contemplates premarital agreements as allowed under, *e.g.,* Chapter 52B of the General Statutes, 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 premarital agreement.[17] *Allied-Bruce Terminix* held Congress intended that interstate commerce under the FAA extend to the limits of the Commerce Clause,[18] and 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 Uniform Act in the following analysis, possible application of the FAA has been noted in some instances. The FAA, except those provisions implementing international agreements,[19] does not confer subject matter jurisdiction on the federal courts. The FAA must be enforced by the State courts[20] 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 premarital or postmarital agreement to arbitrate. The possibility of applying treaty-based legislation, part of the FAA, is beyond the scope of this analysis.[21] 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 treaties to which the United States is a party, *e.g.,* those dealing with child abduction.[22]

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

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[17] *See* 9 U.S.C. §§ 1-2, 201, 301.

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

[19] *E.g.,* 9 U.S.C. §§ 203, 302.

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

[21] *See generally* George K. Walker, *Trends in State Legislation Governing International Arbitrations,* 17 N.C.J. Int'l L. & Com. Reg. 419 (1992) for a partly-dated study of these issues, which could arise in an international business context. The North Carolina ICACA, discussed in this article, has been amended since then.

[22] *See* N.C. Gen. Stat. § 50-44.

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 enacted version of the Act is different in some instances from the draft act submitted in Proposed Legislation; these differences have been noted in the Comments.

B. The North Carolina Family Law Arbitration Act

§ 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 Uniform Act and the ICACA, N.C. Gen. Stat. §§ 1-567.1, 1-567.30. The FAA has no similar statement, but decisions like *Doctors' Associates* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) have found the same strong policy for arbitration under that Act. 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. *See also* N.C. Gen. Stat. § 50-62. *Id.* § 50-41 follows Proposed Legislation § 1.

§ 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 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 tracks *id.* §§ 1-567.2(a) - 1-567.2(b)(1) of the Uniform Act, 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; N.C. Gen. Stat. § 1-567.37. The intent of § 50-42 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 the separation; after difficulty in a marriage arises; after a complaint for absolute divorce or other causes related to dissolution of a marriage has been filed; or even after an absolute divorce judgment has been entered. N.C. Gen. Stat. § 50-42 is consistent with *id.* § 50-50 (consolidation of arbitrations), because the other agreement(s) would be governed by the Uniform Act, and arbitrations under an agreement governed by this Act could be consolidated with agreements under the Uniform Act. *See also* the Comment to N.C. Gen. Stat. § 50-50. Draft Revised Uniform Act § 2 retains the heart of the Uniform Act, N.C. Gen. Stat. § 1-567.2(a) --- § 1-567.2(b) being a local variant --- and read with Draft Revised Uniform Act § 1(d), broadens the number of agreements subject to the Draft Revised Uniform Act to include electronic (*e.g.,* E-mail) agreements. The FLAA does not include provision for E-mail and similar correspondence, although parties may consent to these forms of communication by special provision in the agreement to arbitrate. N.C. Gen. Stat. § 50-42 differs from Proposed Legislation § 2 in two respects. First, premarital agreements to arbitrate cannot include provisions to arbitrate child support or custody. Parties may agree to arbitrate these matters, subject to other provisions of the Act, *e.g.,* court review of interim measures as provided in N.C. Gen. Stat. § 50-44(e), after marriage, however. Second, Proposed Legislation § 2(c), providing for a single arbitrator as a default rule, is in N.C. Gen. Stat. § 50-45(a).

§ 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 it finds for the opposing party, the court shall order the parties to go to arbitration.

(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 tracks *id.* § 1-567.3 of the Uniform Act; *see also* 9 U.S.C. §§ 3-4; N.C. Gen. Stat. § 1-567.38. Amendments suggested by Draft Revised Uniform Act §§ 3(b)-3(e) have been added. N.C. Gen. Stat. § 50-43 also follows Proposed Legislation § 3.

§ 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.

Comment

There is no equivalent for N.C. Gen. Stat. § 50-44 in the FAA or the Uniform Act. One weakness of proceedings under the FAA, except for those under 9 U.S.C. § 8, and all proceedings under the Uniform Act, unless cured by special legislation, 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. The Uniform Act revisors are considering proposals to close this loophole. *See* Draft Revised Uniform Act § 4. N.C. Gen. Stat. § 50-44 was adapted from *id.* §§ 1-567.39 and 1-567.47; *id.* §§ 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; federal legislation; or treaties to which the United States is a party; 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. If arbitrators have not been appointed, a party 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 arbitrators for interim measures, which can be coextensive with interim relief ordered by a court, 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) 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. Apart from rewording and updating to reflect current legislation, N.C. Gen. Stat. § 50-44 differs from Proposed Legislation § 4 in these respects: authority for a party to seek enforcement of the arbitrators' order granting interim measures and review or modification of any interim measures governing child support or child custody, N.C. Gen. Stat. § 50-44(b); court review of findings of fact or court modification of interim measures governing child support or child custody, *id.* § 50-44(e); reporting procedures for suspected child abuse or neglect cases, *id.* § 50-44(h).

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

(a) Unless the parties agree otherwise, 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 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 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, as provided in G.S. 50-51(f), in connection with

applications and other proceedings under this section.

Comment

N.C. Gen. Stat. § 50-45(a), submitted as Proposed Legislation § 2(c), is the default provision for a single arbitrator. Parties may agree on more than one arbitrator. This Act generally refers to arbitrators in the plural but should be interpreted to apply to a single arbitrator if the parties' agreement so provides. N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) track the Uniform Act, *id.* § 1-567.4. *Id.* § 50-45(c) 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 lawyers 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.) Draft Revised Uniform Act § 6 recommends no amendments. N.C. Gen. Stat. § 50-45(d) tracks *id.* §§ 1-567.41(e). *See also* 9 U.S.C. § 5. 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. Draft Revised Uniform Act § 1(a) defines "arbitration institution"; N.C. Gen. Stat. § 50-45(g) tracks it. There is no equivalent to *id.* § 50-45(e) in the Uniform Act or other legislation. N.C. Gen. Stat. § 50-45(e) covers the situation where parties sign a bare-bones agreement to arbitrate, perhaps in a premarital agreement, and then cannot agree on rules of procedure. In this situation 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 AAA. The arbitrators or the court could 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. There is no equivalent to N.C. Gen. Stat. § 50-45(f) in the Uniform Act; § 5(d) tracks N.C. Gen. Stat. § 7A-37.1(e) and N.C. Ct.-Ord. Arb. R. 5(f), declaring immunity for arbitrators in court-ordered arbitration. Draft Revised Uniform Act § 9 provides for arbitrator and arbitration institution immunity, and N.C. Gen. Stat. § 50-45(f) was drafted with this in mind. This provision may spark controversy before it is adopted by the Commissioners on Uniform State Laws. N.C. Gen. Stat. § 50-45(h) has been added to provide for costs in the court's discretion, *e.g.,* where a party fails to comply with terms of an arbitration agreement to appoint an arbitrator, and the court must appoint one pursuant to *id.* §§ 50-45(b) - 50-45(c). In other circumstances, *e.g.,* when an arbitrator dies and the court appoints a successor, usually no costs should be assessed. *Id.* § 50-45(h) is a financial incentive for parties to comply with an

arbitration agreement. Draft Revised Uniform Act § 7 sets standards for arbitrator disclosure of conflicts of interest, etc. There is no provision in the Uniform Act or the FAA. However, there are disclosure provisions in some arbitrator ethics rules, *e.g.*, the ABA-AAA Code of Ethics for Commercial Arbitrations, and the North Carolina Bar Association has approved Canons of Ethics for Arbitrators which include disclosure rules. There are disclosure provisions in N.C. Gen. Stat. § 1-567.42. The North Carolina Canons would be superseded by legislation, *e.g.*, N.C. Gen. Stat. § 1-567.42, for international arbitrations but would govern in other cases, *e.g.*, court-annexed arbitration, Uniform Act arbitrations, or arbitrations under this Act if adopted by the parties' agreement; *see* Form C, Ethical Standards for Arbitrators, in Part II.B.1.c. N.C. Gen. Stat. § 50-45 follows Proposed Legislation § 5 except for changes in language, addition of N.C. Gen. Stat. § 50-45(a) from Proposed Legislation § 2(c), expanding Proposed Legislation § 5(a) into N.C. Gen. Stat. §§ 50-45(b) - 50-45(c), and renumbering remaining subsections.

§ 50-46. Majority action by arbitrators.

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

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.5, except for substituting "shall" for "may"; Draft Revised Uniform Act § 8 makes no changes. This was adopted verbatim from Proposed Legislation § 6.

§ 50-47. Hearing.

Unless otherwise provided by the 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 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 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 Uniform Act, N.C. Gen. Stat. § 1-567.6; *see also id.* § 1-567.54; Draft Revised Uniform Act § 1(c). Draft Act § 10 substantially amends the Uniform Act on this point, inter alia providing for the equivalent of a pretrial conference. There is nothing in the proposed legislation prohibiting a "pretrial conference"; the Draft Act makes the conference optional unless rules chosen by the parties require otherwise. N.C. Gen. Stat. § 50-44 interim relief measures contemplate a "pretrial" hearing, in most cases, for that purpose. *Id.* § 50-47 tracks Proposed Legislation § 7 except for changes in wording; although Proposed Legislation § 7(d) had allowed the parties to agree on the cost of the record with authority of the arbitrators to settle the issue if the parties cannot, the same result obtains with the chapeau paragraph for N.C. Gen. Stat. § 50-47.

§ 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 Uniform Act, N.C. Gen. Stat. § 1-567.7, except to substitute "counsel" for "an attorney" to make it clear that more than one lawyer can represent a party; it adds an amendment proposed in Draft Revised Uniform Act § 11; *see also* N.C. Gen. Stat. §§ 1-567.48(b), 1-567.79. *Id.* § 50-48 follows Proposed Legislation § 8.

§ 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) track the Uniform Act, *id.* §§ 1-567.8(a) - 1-567.8(c); *id.* §§ 50-49(d) - 50-49(e) track *id.* § 1-567.57(a) with references to the North Carolina Rules of Civil Procedure and Chapters 50, 50A and 52C added. *See also* 9 U.S.C. § 7. Draft Revised Uniform Act §§ 12-13 propose revised discovery principles, and like N.C. Gen. Stat. §§ 1-567.8(a) - 1-567.8(c), 1-567.57(a), allow discovery to be ordered by a court. 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. 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 and its Comment. N.C. Gen. Stat. § 50-49(b) 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.

§ 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.

Comment

N.C. Gen. Stat. § 50-50(b) tracks *id.* § 1-567.57(b). *Id.* § 50-50(a) allows parties to agree to consolidate without court intervention; § 50-50(b) court intervention procedure is included as a precaution if it is thought necessary to make consolidation a part of an official record, and to cover situations where a party objects to consolidation. There is no Uniform Act equivalent, and this is considered a defect in that Act; the Draft Revised Uniform Act has such a provision in *id.* § 5. Draft Act § 5 allows a court to order consolidation even if parties to the agreements cannot agree on consolidation. Although multiple arbitration agreements in a family law context will 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; these two people later sign an premarital agreement pursuant to, *e.g.,* N.C. Gen. Stat. Ch. 52B and marry; and still later there is a divorce proceeding. Id. § 50-50 follows Proposed Legislation § 10 except for a correction to id. § 10(b); 1999 legislation conforms N.C. Gen. Stat. § 1-567.57(b) of the ICACA with id. § 50-50(b).

§ 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 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 agreement. Time of delivery shall be computed from the date of personal delivery or date of mailing.

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

(c) Unless the parties agree otherwise, 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 agree otherwise, 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, 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 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 N.C. Gen. Stat. § 1-567.61 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, and specific provision for sanctions if imposed by the arbitrators or a court before the award is made. *Compare* 9 U.S.C. § 9, the Uniform Act, N.C. Gen. Stat. §§ 1-567.9, 1-567.11, and Draft Revised Uniform Act §§ 14, 16. The last sentence in N.C. Gen. Stat. § 50-51(a) is in neither Act and establishes the date from which time will be computed for purposes of, *e.g., id.* § 50-52. Many commercial awards under the Uniform Act are not "reasoned," *i.e.,* do not go beyond stating a dollar amount and who owes it. They are like general verdicts. *Id.* § 1-567.61(b) follows this pattern for international commercial arbitration awards. However, *id.* § 50-51(b)

takes an opposite tack from *id.* § 1-567.61(b) and requires a reasoned award unless the parties agree otherwise, *i.e.,* simply 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. *Id.* § 50-51(e) differs from the Draft Uniform Act, which would authorize punitive damages in an appropriate case and thereby would resolve a conflict among the cases, saying that no punitive damages can be awarded unless the parties agree that the arbitrators may award them. N.C. Gen. Stat. § 50-51 follows Proposed Legislation § 11 except for rewording and requirements in N.C. Gen. Stat. § 50-51(f)(3) that arbitrators must specify who is entitled to costs, who pays costs, the amount and manner, etc.

§ 50-52. Change of award by arbitrators.

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 award upon grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 50-55, or clarify the award. The application shall be made within 20 days after delivery of the award to the opposing party, stating that the opposing party must serve objections to the application, if any, within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-53 through 50-56.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.10; compare *id.* § 1-567.63. Draft Revised Uniform Act § 15 reorganizes substantially the same material. N.C. Gen. Stat. § 50-52 follows Proposed Legislation § 12 except for rewording.

§ 50-53. Confirmation of award.

Upon a party's application, the court shall confirm an award, unless 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. The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.12; compare *id.* § 1-567.65, from which the last sentence is taken, 9 U.S.C. § 9, and Draft Revised Uniform Act § 17. Cross-reference to N.C. Gen. Stat. § 50-51(f) has been inserted for clarity. Costs may be awarded if the application lacks merit. Since an agreement to arbitrate is a contract, the statutes of limitation for

contracts apply to applications under § 13. N.C. Gen. Stat. §§ 1-47(2) (10 years, contracts under seal); 1-52(1) (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 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. These limitations could come into play where the 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. The interstate commerce aspects, or those coming under the treaty legislation, would be governed by federal and not State law. 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. Once confirmed as a judgment, the 10-year N.C. Gen. Stat. § 1-47(1) judgment enforcement limitation would apply. Rewording apart, *id.* § 50-53 follows Proposed Legislation § 13.

§ 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) If an application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award and may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.13, except *id.* § 50-54(a)(6), added for child support or child custody issues; vacating an award of punitive damages, *id.* § 50-54(a)(7) if the parties agree that the arbitrator may award punitive damages under *id.* § 50-51(e), suggested by Draft Revised Uniform Act §§ 16(c), 18(a)(6); and vacating an award for errors of law in N.C. Gen. Stat. § 50-54(a)(8) if the parties agree to such, suggested by Draft Act § 18(b). 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) omits "new" before "arbitrators"; compare 9 U.S.C. §§ 10, 12-13 and the Uniform Act, N.C. Gen. Stat. § 1-567.13(c). 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) follows *id.* § 1-567.65's costs provisions with cross-reference to *id.* § 50-51(f) for clarity. Imposing costs of an application would normally occur when a court deems an application is without merit. *See also id.* § 1-567.64. *Id.* § 50-54 is substantially in line with the rest of Draft Revised Uniform Act § 18, aside from an exception for failure to disclose. *See* Comment to N.C. Gen. Stat. § 50-55, discussing disclosure requirements in North Carolina arbitrations, covered in the North Carolina Canons of Ethics for Arbitrators. N.C. Gen. Stat. § 50-54 differs from Proposed Legislation § 14 in wording of some provisions, and in court determination of an award for child support or child custody, N.C. Gen. Stat. § 50-54(a)(6); possible ("may") court determination of all issues when an award involving child support or child custody is vacated, *id.* § 50-54(c).

§ 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 Uniform Act, N.C. Gen. Stat. § 1-567.14, with modifications added to parallel Draft Revised Uniform Act § 19, except for that Act's amendments related to "record" as defined in *id.* § 1(d). Compare 9 U.S.C. §§ 10-13 and N.C. Gen. Stat. § 1-567.64. 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, 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) allows a court to award costs if it deems an application to modify or vacate is without merit. *See id.* § 1-567.65. Cross-reference to *id.* § 50-51(f) has been added for clarity. Costs may be awarded if an application for modification or correction lacks merit. *Id.* § 50-55 tracks Proposed Legislation § 15.

§ 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 under conditions stated in G.S. 50-13.7 and 50-16.9 in accordance with procedures stated in subsections (b) through (f) of this section.

(b) Unless the parties have agreed that an award for postsepartion support or alimony

shall be nonmodifiable, an award by arbitrators for postseparation support or alimony pursuant to 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 pursuant to 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 pursuant to 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 pursuant to G.S. 50-53, upon the parties' agreement these matters may be submitted to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through 50-56 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 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

There is no equivalent for N.C. Gen. Stat. § 50-56 in the Uniform Act. It has been added to allow 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 by which a court may modify an award for alimony, postseparation support, child support or child custody after a case has been filed and has been litigated or settled. In the situation of young children, *e.g.,* there may be a succession of modifications throughout the time for custody and support. In each case a decision on modifying postseparation support, alimony, child support or child custody could be made by the court or by arbitrators (perhaps the same arbitrators, since they would have the file and be familiar with the case), in the court's discretion if the parties agree and file an appropriate motion under *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 (admittedly a rare case), *id.* § 50-56(d) permits them to agree to arbitrate substantial change of circumstances without getting the initial award confirmed under *id.* § 50-53 and moving the court for arbitration. The second, modified award could be confirmed under § 50-53 or not, with either party having the option to seek confirmation. *Id.* § 50-56(f) incorporates *id.* § 50-55 by reference unless modified by *id.* § 50-56. Thus, *e.g., id.* § 50-55(f)'s costs provisions also apply to *id.* § 50-56 proceedings. Wording changes apart, *id.* § 50-56 tracks Proposed Legislation § 16.

§ 50-57. Orders or judgments on award.

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.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.16, omitting reference to decrees; compare 9 U.S.C. § 9 and N.C. Gen. Stat. § 1-567.65. Draft Revised Uniform Act § 21 proposes no changes. Cross-reference to N.C. Gen. Stat. § 50-51(f) has been added for clarity. Costs may be awarded if an application lacks merit. *Id.* § 50-57 tracks Proposed Legislation § 17.

§ 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 agree otherwise, 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

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.16; compare 9 U.S.C. §§ 6, 12 and Draft Revised Uniform Act § 22, which suggests no changes to the Uniform Act. Except for changes in wording, N.C. Gen. Stat. § 50-58 tracks Proposed Legislation § 18.

§ 50-59. Court; jurisdiction.

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.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.17, with modifications suggested by Draft Revised Uniform Act § 1(b); compare N.C. Gen. Stat. § 1-567.66. Draft Act § 23 tracks N.C. Gen. Stat. § 1-567.17, aside from omitting a definition of "court," which appears in Draft Act § 1(b). Wording changes apart, N.C. Gen. Stat. § 50-59 tracks Proposed Legislation § 19.

§ 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

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.18 except for a rewritten initial sentence in *id.* § 50-60(a), adding the clarifying "any of the following," taken from Draft Revised Uniform Act § 25(a) in N.C. Gen. Stat. § 50-60(a); deleting material in *id.* § 1-567.18(b); and adding *id.* § 50-60(b). Compare 9 U.S.C. § 16 and N.C. Gen. Stat. § 1-567.67. *Id.* § 50-60 tracks Proposed Legislation § 20, except for deleting *id.* § 20(b).

§ 50-61. Article not retroactive.

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

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.19, except the last clause; compare 9 U.S.C. § 14, N.C. Gen. Stat. § 1-567.31(g), and Draft Revised Uniform Act §§ 26, 27. N.C. Gen. Stat. § 50-61 tracks Proposed Legislation § 21.

§ 50-62. Construction; uniformity of interpretation.

Certain provisions of this Article have been adapted from the 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.

Comment

This tracks the Uniform Act, N.C. Gen. Stat. § 1-567.20 and Draft Revised Uniform Act § 27 in providing for parallel construction, but specifically incorporating this State's version of the Uniform Act 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. N.C. Gen. Stat. § 50-62 follows Proposed Legislation § 22 except for inserting effective dates.

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 North Carolina International Commercial Arbitration and Conciliation Act, and provisions under consideration for the Revised Uniform Arbitration Act. The principal differences include: specific provision for one arbitrator,[23] provision for pre-award assets protection,[24] additional provisions for discovery,[25] and consolidation.[26] 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.[27] Rights under federal and State law for emergency protection of spouses and children are assured[28]; the Act does not derogate from these.

Unlike court-annexed arbitration, the procedure is entirely voluntary. Parties may agree to arbitrate as part of a premarital agreement,[29] as part of an agreement during the marriage and prior to separation, after divorce proceedings have begun, and even after an absolute divorce judgment has been entered. The Act offers numerous options for parties to tailor family law arbitration to suit the needs of a particular case, although they cannot cut off postseparation

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[23] N.C. Gen. Stat. § 50-45(a).

[24] N.C. Gen. Stat. § 50-44.

[25] N.C. Gen. Stat. § 50-49.

[26] N.C. Gen. Stat. § 50-50.

[27] N.C. Gen. Stat. § 50-54 - 50-56.

[28] N.C. Gen. Stat. §§ 50-44(c)(7) - 50-44(c)(8), 50-44(g).

[29] 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).

support, alimony, custody and support rights except as allowed by North Carolina law.[30] The Act, in common with other arbitration legislation, requires a signed agreement to arbitrate.[31] 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.

[30] N.C. Gen. Stat. § 50-56.

[31] N.C. Gen. Stat. § 50-42.

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 the details of how, where and when arbitration will be held and conducted, who will participate, and what will be covered in the proceeding, parties may agree on their own rules. However, today most arbitration is conducted by incorporating a set of predrafted rules by reference into an arbitration agreement, sometimes with designation of an arbitration institution, *e.g.*, the American Arbitration Association (AAA), or Duke University's Private Adjudication Center (P-A-C). 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 the 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.[1]

Except insofar as a Form or Rule might contravene law,[2] 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 forms and rules, drafters 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 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,[3] 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 the Act if the parties elect this form of alternative dispute resolution (ADR) that are low-assets cases, the drafters decided to minimize the number of choices that must be made to use the forms

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[1] N.C. Gen. Stat. § 50-45(e).

[2] *E.g.*, no form or rule may derogate from rights under federal or State law for immediate, emergency relief for children or spouses. *Id.* § 50-44(g).

[3] *Cf. id.* § 50-45(e).

and rules. For example, the Act provides that parties may agree on one or more arbitrators.[4] Rule 2, echoing the Act,[5] 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 (July 1, 1996) (AAA R.); AAA, Drafting Dispute Resolution Clauses: A Practical Guide (1997) (AAA Guide); AAA, International Arbitration Rules (Apr. 1, 1997) (AAA Int. R.); National Association of Securities Dealers, Code of Arbitration Procedure (Aug. 1996), which publishes the National Association of Securities Dealers Rules (NASD R.); P-A-C, Form Arbitration Agreement (1998) (P-A-C Agreement); P-A-C, Rules of Practice and Procedure (1998) (P-A-C R.). 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 to 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.

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[4] *Id.* § 50-45.

[5] *Id.* § 50-45(a).

1. Basic Forms

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

A. Arbitration. Any controversy or claim arising out of or relating to this contract, or the breach of this contract, shall be settled by arbitration, and judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction.

A. Arbitration. We, the undersigned parties, hereby agree to submit to arbitration the following controversy: [here describe briefly the controversy]. We agree that the controversy shall be submitted to one arbitrator. We agree that we will faithfully observe this Arbitration Agreement and the rules incorporated by reference or stated in this Arbitration Agreement, that we will abide by and perform any award the arbitrator renders, and that a judgment of a court having jurisdiction may be entered on the award.

Comment

The first Form A follows the AAA suggested form for contracts, omitting reference to the rules to be followed. The second Form A follows the AAA suggested form for an existing dispute, e.g., where parties have filed for divorce. *See* AAA, Commercial Arbitration Rules 2 (1997); *see also* AAA Separation Agreement Rules, at 23,301. *See* Forms B.1-B.6 for choices among rules. Parties should pay close attention to describing the controversy to be inserted in the second Form A, *e.g.,* does the family law proceeding include only alimony, or is child support and child custody also an issue? The second Form A provides for a single arbitrator; it is consistent with Rule 2, a default provision for contracts that include an arbitration agreement, and which provides for a single arbitrator. If parties desire three or five arbitrators, they should change the second Form A. Multiple arbitrators may be a useful option in large, complex cases involving, *e.g.,* a family business in addition to a divorce under a premarital agreement, but having three or five arbitrators triples or quintuples arbitrator compensation. *See also* Optional Form BB.

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* Rule 1, its Comment; AAA Separation Agreement Rules, at 23,304; AAA R. 1.

c. Form C. Ethical 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. --- (No. 5, 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), 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. The recently-revised ABA-AAA Code is designed for commercial arbitration and not necessarily for family law arbitrations. *See generally* George K. Walker, *State Rules for Arbitrator Ethics,* 23 J. Legal Prof. 155 (1999), also published in American Bar Association Section of Dispute Resolution, Arbitration Now: Opportunities for Fairness, Process Renewal and Invigoration 241 (Paul N. Haagen ed. 1999), 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. Another chapter in Arbitration Now analyzes the new ABA-AAA Code.

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 is congruent with Basic Rule 7(a). Parties should be mindful of the impact of legislation like N.C. Gen. Stat. §§ 22B-2, 22B-3.

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

Form E.1 is a catchall and clause paramount if there are any special provisions or terms not covered in the Forms or Rules that are part of the Agreement. If there are no such special provisions or terms desired, "NONE" can be written in the form. If there are special provisions or terms, they may be recited in numbered paragraphs as suggested. If Form E.1 is included, and special terms are listed, these will trump any provisions in the Basic or Optional Rules that

conflict. Form E.2 uses the same language without the clause paramount and can be included if there is no conflict between the special provisions or terms and the Forms and Rules. The Agreement can list the special provisions or terms as paragraphs without using Form E.2. However, Form E.2 does serve as an identifier.

2. Optional Forms

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

a. Rules for the Arbitration:

AA. Rules in Force for Arbitration. Notwithstanding Rule 1, the rules in force for the arbitration shall be the 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 would freeze the Basic and Optional Rules to the date chosen by the parties, 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 up.

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

Section 2(c)'s and Rule 2's default provisions are that there shall be a single arbitrator in these cases. Form BB suggests a provision for a three-arbitrator panel. If five are desired, the Form should be rewritten so that each party chooses two, and the four arbitrators must choose the fifth panel member. N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) applies to multiple arbitrator panels; if a party fails to choose an arbitrator, the court may do so. *See also* Form A and its Comment.

These are not the only forms that might be considered. Consult other form books, *e.g.,* AAA Guide, for ideas, particularly if business matters will be arbitrated.

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, a single arbitrator shall be chosen by the parties to arbitrate matters in dispute.

Comment

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 be sufficient. N.C. Gen. Stat. §§ 50-45(b) - 50-45(c) say that if parties cannot agree on an arbitrator, the court upon application shall appoint one. Rule 2 follows N.C. Gen. Stat. §§ 1-567.40, 50-45(a) and AAA Int. R. 5, default provisions for international arbitrations, in providing for a single arbitrator. Although agreements to arbitrate can designate a specific person to be the arbitrator, agreements governing longterm relationships, *e.g.,* premarital agreements, usually do not, because the named individual may not be available when the matter goes to arbitration. Unless there is a default provision for selection in that case, the result can be that arbitrator selection becomes a matter for the court. 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.

3. Initiation Under Arbitration Provision in a Contract.

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

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

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

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

Comment

Rule 3 parallels AAA Separation Agreement R. 1 and AAA 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. 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. 3. One 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. 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, where cross-claims are involved. Most family law cases involve a husband and wife as principal parties, and an arbitrator can use Rule 17(d)'s general authority to establish procedures analogous to the Rules of Civil Procedure for these cases.

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

Comment

Rule 4 parallels AAA R. 7. 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.

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

Comment

Rule 5 parallels AAA Separation Agreement R. 2 and AAA R. 8. The 30-day turnaround time instead of the 10 days stated in AAA R. 8, or the 7 days in Separation Agreement R. 2, parallels Rule 3. An arbitrator faced with a party's request to file a new or different claim or counterclaim should be guided by the liberal amendment rules applicable in civil actions. *See generally* N.C.R. Civ. P. 15.

6. Administrative Conference; Preliminary Hearing; Mediation Conference.

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

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

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

Rule 6 parallels AAA Separation Agreement R. 3 and AAA R. 10. Rule 6(a) follows practice in the State and federal courts for initial pretrial conferences. See, *e.g.,* Fed. R. Civ. P. 16(b), 26(f); N.C.R. Civ. P. 16; N.C. Prac. R. 7; E.D.N.C.R. 23; M.D.N.C.R. 16.1-16.3, 26.1. Rule 6(b) follows practice in the State and federal courts 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. 24; M.D.N.C.R. 40.1. The last sentence of Rules 6(a) and 6(b), not found in AAA R. 6, suggests use of conference calls, facsimile, E-mail, etc., as more expedited and economical means of holding the conference. Rule 6(c) applies these principles to administrative conferences and preliminary hearings; AAA R. 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. 10 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.

7. Site of the Arbitration.

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

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

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

Comment

Rules 7(a)-7(b) follow AAA Separation Agreement R. 4 and AAA R. 11. Form C might be used to implement Rule 7(a). Rule 7(b) covers the situation where parties do not designate a place in the arbitration agreement. Rule 7(c) follows the spirit of rules like AAA Separation Agreement R. 4 and AAA R. 3 and 5, which say that if parties choose the AAA to conduct the arbitration, this authorizes the AAA to administer the arbitration. The AAA may, in its discretion, assign administration of the arbitration to any of its regional offices. While these rules do not give the AAA direct authority to move the situs of an arbitration if the parties have chosen a particular place, their thrust is toward localizing administration for the convenience of the disputants. Rule 7(c) states the policies of litigation venue transfer statutes like N.C. Gen. Stat. §§ 1-83 - 1-87 and 28 U.S.C. § 1404. 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 the arbitration. Parties and witnesses may move or become incapacitated, with a result that arbitration may become more expensive and time-consuming and therefore not as fair as originally contemplated. Arbitration agreement drafters who do not wish to give this authority to the arbitrator may exclude Rule 7(c) by using Forms B.2, B.5 or B.6. The 30-day request times reflect State practice; AAA R. 10 has a 10-day deadline. Parties negotiating an arbitration situs agreement must be mindful of legislation like N.C. Gen. Stat. §§ 22B-2, 22B-3.

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 agreement of the parties specifies otherwise. The arbitrator shall send a notice of hearing at least 20 days before the hearing, unless otherwise agreed by the parties. Attendance at a hearing waives notice of the hearing.

Comment

Rule 8 follows AAA R. 21, 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.

9. Representation. Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the arbitrator of the name, address 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

Rule 9 follows AAA R. 22, except for extending the notice time to 7 days before the hearing date and also requiring counsel's telephone and facsimile numbers. AAA Separation Agreement R. 7 is similar to AAA R. 22, except for a 3-day notice time. Rule 9 is consonant with N.C. Gen. Stat. § 50-48 and *id.* §§ 1-567.7, 1-567.48(b), 1-567.79; *see also* NASD R. 10316; P-A-C R. 1.03.

10. Record of Arbitration.

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

Rule 10 follows AAA R. 23, 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.

11. Attendance at Hearings. The arbitrator, the parties and their counsel shall maintain the privacy of the hearings unless the parties agree otherwise, 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

Rule 11 follows AAA Separation Agreement R. 10 and AAA R. 25, adding requirements

that parties and counsel also preserve the privacy of hearings unless the parties agree otherwise. If the law provides otherwise, *e.g.,* through a subpoena to testify in a criminal case, the subpoenaed party must testify unless protected by other law, *e.g.,* the privilege against self-incrimination. *See also* P-A-C R. 1.06.

12. Postponements. The arbitrator, for good cause shown, may postpone any hearing upon a party's request or upon the arbitrator's own initiative. The arbitrator shall grant a postponement upon request of all parties.

Comment

Rule 12 follows AAA R. 26 and AAA Separation Agreement R. 15.

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. 27; 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, 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 the arbitrator's general reputation, that clause should be omitted.

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

Comment

Rule 14 follows N.C. Gen. Stat. § 50-46 and AAA R. 28, 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. Multimember arbitral panels should be rare in family law arbitration; *see* Rule 2 and its Comment.

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.

(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, 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; absent agreement, the arbitrator shall decide on apportionment of this cost.

Comment

Rule 15 follows AAA R. 29, except Rules 15(g) and 15(h), which follow AAA Separation Agreement R. 13-14, with provision for a child's separate counsel and how the Rule 15(h) cost will be apportioned.

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), AAA R. 30 and AAA Separation Agreement R. 11; *see also* N.C. Ct.-Ord. Arb. R. 3(j).

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. 31, AAA Separation Agreement R. 12, and P-A-C Agreement, ¶ 4; *see also* N.C. Ct.-Ord. Arb. R. 3(h), 3(p).

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 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

Rule 18 follows AAA R. 32.

19. Inspection or Investigation. An arbitrator who finds it necessary to make an inspection or investigation in connection with the arbitration shall advise the parties. The arbitrator shall set the date, time and place and shall notify the parties. Any party desiring to do so may be present at such an inspection or investigation. If one or all 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

Rule 19 follows AAA R. 33, except that Rule 19 requires written agreement of the parties for an oral report if a party is not present at an inspection or investigation.

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

Comment

Rule 20 does not follow AAA Separation Agreement R. 16 or AAA R. 34 on this point; *see* N.C. Gen. Stat. § 50-44.

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

Rule 21 follows AAA Separation Agreement R. 17 and AAA R. 35; *see also* N.C. Ct.-Ord. Arb. R. 3(o). Rule 21(a) preserves the right of final argument, usually delivered by counsel.

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

Rule 22 follows AAA Separation Agreement R. 18 and AAA R. 36.

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. 37.

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. 38, adding a requirement that the objection must be timely. The arbitrator decides whether the objection is timely. *See also* P-A-C R. 1.05.

25. Extensions of Time. The parties may modify any period of time by mutual agreement. 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 of any extension.

Comment

Rule 25 follows AAA Separation Agreement R. 19 and AAA R. 39.

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 or other written forms of electronic communication to give notices permitted or required by these Rules.

Comment

Rule 26 follows AAA R. 40, adding in Rule 26(b) that the alternative communications may be used for communications permitted but not required by the Rules. The Comment to N.C. Gen. Stat. § 50-42 says the Act does not include provision for E-mail and similar correspondence. However, parties may agree to such unless Rule 26(b) is excluded in the arbitration agreement.

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

Comment

Rule 27 follows AAA Separation Agreement R. 20 and AAA R. 41.

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. 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, the award shall state the reasons upon which it is based.

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

Comment

Rule 28(a) follows AAA Separation Agreement R. 21, AAA R. 42 and N.C. Gen. Stat. § 50-51(a), which specifies further details for the award, *i.e.,* date and place. Rule 28(a) states the minimum for an award. Rule 28(b) follows AAA R. 43 and N.C. Gen. Stat. § 50-51(d). 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). 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. If a Rule 28(c) reasoned award is necessary, the Rule 27 30-day limit for rendering the award might be extended by agreement of the parties. Parties should advise the arbitrator upon appointment to the 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). If parties want punitive damages to be part of the award, or that interest and/or costs not be part of the award, they should specify this in the arbitration agreement. Parties may wish to include some costs, *e.g.,* attorney fees normally awarded in divorce cases, but not others. If so, they should specify this in the arbitration agreement. 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). *See* Forms B.1-B.6.

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.

Comment

Rule 29 follows AAA R. 44.

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 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. 45; *see also* N.C. Gen. Stat. § 50-51(a).

31. Release of Documents for Judicial Proceedings. The arbitrator, upon a party's written request, furnish to the party at the 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

Rule 31 follows AAA R. 46. This relates to procedures for setting aside, confirming, etc., awards pursuant to N.C. Gen. Stat. §§ 50-52 - 50-56, but it might also relate to criminal proceedings (*e.g.*, perjury) arising from the arbitration. Rule 31 is not intended to bar the subpoena of material in the arbitrator's possession by prosecutors. Since modification of certain family law awards, *e.g.*, for alimony, child support or child custody, may occur years in the future and there may be judicial proceedings related to these, an arbitrator must be prepared to retain custody of papers related to these cases for many years, at least during the lifetime of a spouse entitled to alimony, unless that spouse remarries, and during the minority years of persons entitled to child support or child custody protection.

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.

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

Comment

Rule 32 follows AAA Separation Agreement R. 23 and AAA R. 47 except for Rule 32(d), which incorporates by reference principles in N.C. Gen. Stat. § 50-45 relating to immunities, and other applicable law. Rule 32(a) reverses case law elsewhere that says filing suit can be deemed a waiver of arbitration. Filing pleadings does not constitute waiver under North Carolina law, but trial of a case or other litigation activity that prejudices a party desiring arbitration may. Servomation Corp. v. Hickory Constr. Co., 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 would enhance those principles.

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

Comment

Rule 33 follows AAA R. 48. If incorporated in an arbitration agreement, this modifies assessment of costs for which N.C. Gen. Stat. § 50-51(f) provides; the statute allows modification by the parties' agreement. Parties wishing to use N.C. Gen. Stat. § 50-51 should omit Rule 33. *See* Forms B.1 - B.6.

34. Arbitrator's Compensation. The compensation of the arbitrator shall be agreed upon by the parties when they select the arbitrator, who must agree to the offered compensation.

Comment

Rule 34 states the principle for a contract, *e.g.*, a premarital agreement, that includes an arbitration agreement, and the arbitrator must be chosen at some time after the contract's execution. Arbitration by submission is governed by Rule 4. Under AAA practice arbitrator compensation is determined through the AAA. *See* AAA R. 50.

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. 51, which makes the AAA the collector of deposits. Although Rule 35 will not normally be invoked in simple cases; if it is necessary for the 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.

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. 52; the arbitrator has authority to interpret all rules incorporated in the arbitration agreement. AAA R. 52 would refer decision on some rules to the AAA.

37. Time. Time periods prescribed under these Rules or by the arbitrator shall be computed in accordance with 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.

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) allow a court to review errors of law in the award if parties agree to this. Rule 38, if incorporated in the agreement to arbitrate, denies parties this option. Traditional arbitration practice follows Rule 38; the option is in the draft Revised Uniform Arbitration Act; *see* the Comment to N.C. Gen. Stat. § 50-54. 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 G.S. §§ 50-54(a)(8), 50-60(b) provide." If parties want judicial review of some errors of law, *e.g.,* spousal support but not equitable distribution, they should so specify in the agreement to arbitrate.

2. Optional Rules for Arbitrating Family Law Disputes

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

Comment

AAA R. 16 is the source for Optional Rule 101. This Optional Rule might be incorporated by reference if parties to a divorce are from different countries. If one party is a U.S. citizen or national, and the other is a foreign subject, citizen or national, the result of this rule will be that a third-country national --- *i.e.,* not from the United States or the other party's country --- must be chosen as an arbitrator. The 30-day deadline reflects State practice and is not in AAA R. 16; a reasonable 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.

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

Comment

AAA R. 24 is the source for Optional Rule 102, except for the last clause, which reflects the policy of allowing parties to modify these rules to suit a particular arbitration.

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 Rule 103 follows AAA Int. R. 14 except for the last sentence.

104. Experts.

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

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

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

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

Comment

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

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 Rule 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 legislation *e.g.,* N.C. Gen. Stat. §§ 22B-2,

22B-3 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 Rule 105 does not apply to it. To the extent that it might be considered substantive in nature, *i.e.,* the offer and acceptance of the agreement to arbitrate, Optional Rule 105 is congruent with the Act.

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 they sign an agreement to arbitrate. The Act, like other arbitration legislation, presupposes that many procedural rules will be covered by clauses in the agreement to arbitrate; some clauses may change the rules in the Act if the Act or other law, *e.g.,* rights for emergency support, do not forbid it.[6]

Many agreements to arbitrate have a clause incorporating by reference a standard set of rules, to shorten the length of the agreement to arbitrate. (There is nothing wrong with writing the rules into the agreement to arbitrate, but this may create an unnecessarily long document in many cases.) The forms for clauses frequently have options, depending on the nature of the dispute, and parties must choose among these clauses to provide for the basic rules for the proceeding, *e.g.,* for the site of the arbitration. Similarly, the rules often have options, and it is the parties' option to include a rule, delete it, modify it, or draft a special rule not in standard rules, to suit their desires for arbitration, subject to limitations within the Act or other law such as rights for emergency support.[7]

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

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[6] *See id.* § 50-44(g).

[7] *See id.* § 50-44(g).

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,[8] 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.[9] 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.[10]

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.[11]

One major departure from traditional arbitration in all but simple consent divorce cases where there is no postseparation support, alimony, child support or child custody at issue will be the need for the arbitrator to issue a reasoned award[12] so that the 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 Dispute Resolution and Family Law Sections' Joint Committee has also prepared standard Forms and Rules for family law arbitration. Some Forms,

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

[9] *Id.* § 50-42.

[10] *Id.* § 50-50.

[11] *See generally id.* §§ 50-52 - 50-56.

[12] *Id.* § 50-51(b).

e.g., an agreement to arbitrate, are mandatory.[13] 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),[14] 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 that 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 chair of the Bar Association Family Law Section.

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.

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[13] *See id.* § 50-42 and Form A.

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

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B. North Carolina Uniform Arbitration Act (Superseded 2003)

The 2003 General Assembly enacted the North Carolina Revised Uniform Arbitration Act (NCRUAA), N.C. Gen. Stat. §§ 1-569.1 - 1-569.31 (2005). It replaced the North Carolina Uniform Arbitration Act (NCUAA), N.C. Gen. Stat. §§ 1-567.1 - 1-567.20 (2001). Older agreements to arbitrate under the former Uniform Act may continue to be governed by the older Act's provisions. See NCUAA, N.C. Gen. Stat. § 1-569.3 (2005). Annotations under the NCUAA may refer to cases under the old Act as well.

Because the North Carolina Uniform Arbitration Act has disappeared from the current General Statutes, Part B of Volume III of this 2006 Revised Handbook reprints the Act as published in the 2001 General Statutes. Since the Family Law Arbitration Act follows the language of the North Carolina Uniform Arbitration Act in some cases, decisions under the NCUAA may be persuasive authority for issues arising under the Family Law Act. In some cases 2005 amendments to the Family Law Act incorporate language from the NCRUAA. Decisions under the NCRUAA may be persuasive authority for issues arising under the Family Law Act in those situations.

Former North Carolina Uniform Arbitration Act (Superseded 2003)

ARTICLE 45A.

Arbitration and Award.

§ 1-567.1 Short Title.

This Article may be cited as the Uniform Arbitration Act. (1927, c. 94, s.24; 1973, c. 676, s. 1.)

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

(b) This Article shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this

Article shall not apply or to any arbitration award thereunder;

(2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply. (1927, c. 94, s. 1; 1973, c. 676, s. 1; 1975, c. 19, s. 1.)

§ 1-567.3. Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

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

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown. (1973, c. 676, s. 1.)

§ 1-567.4. Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreement method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement. (1927, c. 94, s. 4; 1973, c. 676, s. 1.)

§ 1-567.5. Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this Article. (1973, c. 676, s. 1)

§ 1-567.6. Hearing.

Unless otherwise provided by the agreement:

(1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application 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) The hearing shall be conducted by all the arbitrators 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 arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(4) Upon the request of any party or any arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing. (1927, c. 94, ss. 6, 7; 1973, c. 676, s. 1.)

§ 1-567.7. Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this Article. A waiver thereof prior to the proceeding or hearing is ineffective. (1927, c. 94, s. 9; 1973, c. 676, s. 1.)

§ 1-567.8. Witnesses; subpoenas; depositions.

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the

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

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

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

(d) Fees for attendance as a witness shall be as provided in G.S. 7A-314. (1927, c. 94, ss. 10, 11; 1973, c. 676, s. 1.)

§ 1-567.9. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. (1927, c. 94, ss. 8, 14; 1973, c. 676, s. 1.)

§ 1-567.10. Change of award by arbitrators.

On application of a party or, if an application to the court is pending under G.S. 1-567.12, 1-567.13 or 1-567.14, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 1-567.14, or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within 10 days from the notice. The award so modified or corrected is subject to the provisions of G.S. 1-567.12, 1-567.13 and 1-567.14. (1973, c 676, s. 1.)

§ 1-567.11. Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. (1973, c. 676, s. 1.)

§ 1-567.12. Confirmation of an award.

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14. (1927, c. 94, s. 15; 1973, c. 676, s. 1.)

§1-567.13. Vacating an award.

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;
(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
(3) The arbitrators exceeded their powers;
(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or
(5) There was no arbitration agreement and the issue was not adversely determined in the proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising te objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

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

(c) In vacating the award on grounds other than stated in subdivision (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with G.S. 1-567.4, or, if the award is vacated on grounds set forth in subdivisions (3) or (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in according with G.S. 1-567.4. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award. (1927, c. 94, s. 16; 1973, c. 676, s. 1.)

§ 1-567.14 Modification or correction of award.

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

(1) There was an evident miscalculation of figures or an evident mistake in the description of any 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 and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award was made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award. (1927, c. 94, s. 17; 1973, c. 676, s. 1.)

§ 1-567.15. Judgment or decree on award.

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court. (1927, c. 94, ss. 19, 21; 1973, c. 676, s. 1.)

§ 1-567.16. Application to court.

Except as otherwise provided, an application to the court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1927, c. 94, s. 5; 1973, c. 676, s. 1.)

§ 1-567.17. Court; jurisdiction.

The term "court" means any court of competent jurisdiction of this State. The making in this State of an agreement described in G.S. 1-567.12, or any agreement providing for arbitration in this State or under the laws thereof, confers jurisdiction on the court to enforce the agreement

under this Article and to enter judgment on an award thereunder. (1927, c. 94, s. 3; 1973, c. 676, s. 1.)

§ 1-567.18. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under G.S. 1-567.3;
(2) An order granting an application to stay arbitration made under G.S. 1-567.3(b);
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A judgment or decree entered pursuant to the provisions of this Article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1927, c. 94, s. 22; 1973, c. 676, s. 1.)

§ 1-567.19. Article not retroactive.

This Article applies only to agreements made on or after August 1, 1973. (1973, c. 676, s. 1.)

§ 1-567.20. Uniformity of interpretation.

This Article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23; 1973, c. 676, s. 1.)

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C. North Carolina Family Law Arbitration Act, as Amended Through 2003

The 1999 General Assembly enacted the Family Law Arbitration Act. The 2001 General Assembly passed a minor amendment in 2001. The 2005 General Assembly substantially amended the Act to conform it to the North Carolina Revised Uniform Arbitration Act, preserving the general statutory sequence of the original legislation.

Because the original Act has disappeared from the current General Statutes, Part C of Volume III of this 2006 Revised Handbook reprints the Act as published in the 2003 General Statutes. Depending on the agreement to arbitrate, its terms may apply to older agreements to arbitrate.

§ 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.

§ 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.

§ 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 it finds for the opposing party, the court shall order the parties to go to arbitration.

(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.

§ 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.

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

(a) Unless the parties agree otherwise, 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 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 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, as provided in G.S. 50-51(f), in connection with applications and other proceedings under this section.

§ 50-46. Majority action by arbitrators.

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

§ 50-47. Hearing.

Unless otherwise provided by the 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 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 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.

§ 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.

§ 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 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.

§ 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.

§ 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 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 agreement. Time of delivery shall be computed from the date of personal delivery or date of mailing.

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

(c) Unless the parties agree otherwise, 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 agree otherwise, 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, 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 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.

§ 50-52. Change of award by arbitrators.

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 award upon grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 50-55, or clarify the award. The application shall be made within 20 days after delivery of the award to the opposing party, stating that the opposing party must serve objections to the application, if any, within 10 days from notice. An award modified or corrected under this section is subject to the provisions of G.S. 50-53 through 50-56.

§ 50-53. Confirmation of award.

Unless the parties agree otherwise, upon a party's application, the court shall confirm an award, unless 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 G.S. 50-56. The court may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

Effect of Amendments - Session Laws 2003-61, s.1, effective May 20, 2003, substituted "Unless the parties agree otherwise, upon a party's application" for "Upon a party's application" in the first sentence.

§ 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 a 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 such 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) If an application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award and may award costs, as provided in G.S. 50-51(f), of the application and subsequent proceedings.

§ 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.

§ 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 under conditions stated in G.S. 50-13.7 and 50-16.9 in accordance with procedures stated in subsections (b) through (f) of this section.

(b) Unless the parties have agreed that an award for postsepartion support or alimony shall be nonmodifiable, an award by arbitrators for postseparation support or alimony pursuant to 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 pursuant to 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 pursuant to 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 pursuant to G.S. 50-53, upon the parties' agreement these matters may be submitted to arbitrators chosen by the parties as provided in G.S. 50-45, in which case G.S. 50-52 through G.S. 50-56 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 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.

§ 50-57. Orders or judgments on award.

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.

§ 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 agree otherwise, notice of an initial application for an order shall be served in the manner provided by law for service of summons in civil actions.

§ 50-59. Court; jurisdiction.

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.

§ 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.

§ 50-61. Article not retroactive.

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

§ 50-62. Construction; uniformity of interpretation.

Certain provisions of this Article have been adapted from the 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.