
Family Law Arbitration in the United States

§ 1.1 History of Arbitration

Early American settlers brought with them their experience of the use of arbitration to settle maritime and trade disputes in the ports of Europe.¹ In 1632, Massachusetts became the first colony to adopt an arbitration statute, which became the model for other states' arbitration laws.² The Pennsylvania colony adopted laws supporting arbitration in 1705 that were commonly used only for maritime and trade disputes.³ In 1768, the New York Chamber of Commerce established the first American tribunal for resolving commercial disputes.⁴ After the Civil War, disputes between former slaves and slave owners were resolved by arbitration panels, and war-related claims between the United States and Great Britain were submitted to multinational tribunals.⁵ The New Orleans Cotton Exchange and the New York Stock Exchange adopted arbitration to resolve disputes in the 1870s.⁶ Maryland was the first state to allow for voluntary, binding arbitration of labor disputes in 1878, and other states soon followed suit.⁷ The first federal labor dispute law was

1. Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*, 3 N.Y. DISPUTE RESOLUTION LAW., no. 1, Spring 2010, at 10.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 11.

6. *Id.*

7. *Id.*

the Arbitration Act of 1888, providing for investigative authority and voluntary arbitration.⁸ This law was superseded by the Erdman Act in 1898, in which Congress allowed for mediation, in addition to voluntary arbitration, for federal labor disputes, at the request of either party.⁹

In the early 20th century, major trade groups, including the Association of Food Distributors, began to use arbitration panels to resolve disputes among members.¹⁰ As the nation became more industrialized, there was a steep rise in the use of arbitration and mediation in labor contracts.¹¹ The only law governing arbitration in the United States until that point was the common law doctrine established by Lord Coke's opinion in *Vynior's Case* from 1609: "1) either party to an arbitration might withdraw at any time before an actual award; and 2) that an agreement to arbitrate a future dispute was against public policy and not enforceable."¹² Under this doctrine, the parties could not agree to deprive the court of jurisdiction to hear their dispute. The New York legislature first abrogated the common law doctrine in 1920, and many other states followed their lead, allowing for agreements to arbitrate future disputes to be legally binding and judicially enforceable.¹³

Congress adopted the U.S. Arbitration Act, 9 U.S.C. §§ 1–14,¹⁴ also known as the Federal Arbitration Act (FAA), in 1925 "in response to a perception that courts were unduly hostile to arbitration" because until that point, American courts had routinely refused to enforce agreements to arbitrate.¹⁵ This refusal evolved from the English courts' hostility toward arbitration, as it impinged on their livelihood: English judges were paid based on the number of cases they decided.¹⁶ The business community sought legislation allowing merchants to enter into binding arbitration agreements in order to have an expeditious and economical way to resolve their disputes.¹⁷ Congress recognized the benefits of arbitration in providing quicker, more informal, and often cheaper resolutions for the parties involved and, therefore, directed the courts to treat arbitration agreements as "valid, irrevocable, and enforceable."¹⁸

The U.S. Supreme Court has stated that the FAA establishes a "liberal federal policy favoring arbitration agreements."¹⁹ The Supreme Court has also concluded

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 12.

12. *Id.*

13. *Id.*

14. See Appendix H, Federal Arbitration Act.

15. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1621 (2018), Gorsuch, J. (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

16. Certilman, *supra* note 1, at 12.

17. *Epic Sys. Corp.*, 138 S. Ct. at 1642 (2018), (Ginsburg, J., dissenting) (citing Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926)).

18. 9 U.S.C. § 2 (2020).

19. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

that Congress intended for the courts to “rigorously” enforce the parties’ arbitration agreements according to their terms, including with whom they have chosen to arbitrate and the rules under which the arbitration will be conducted.²⁰ Through the Arbitration Act, Congress sought to “make arbitration agreements as enforceable as other contracts, but not more so.”²¹ Thus, the FAA provides that an agreement to arbitrate a present or future controversy is enforceable “save upon such ground as exist at law or in equity for the revocation of any contract.”²² Pursuant to this “savings clause,” arbitration agreements and terms may be invalidated based on “generally applicable contract defenses such as fraud, duress, or unconscionability.”²³

In recent years, an increasing tension has arisen between this policy in favor of enforcing agreements to arbitrate and an interest in allowing employees to pursue their workplace-related claims in their forum of choice. For example, in a 5–4 ruling, while the U.S. Supreme Court held that employment contracts could bar employees from bringing class actions in court, the vocal dissent, led by Justice Ruth Bader Ginsburg, argued strenuously that employer-dictated “collective-litigation stoppers, i.e. ‘waivers,’ are unlawful[,]” and, therefore, do not prevent the employees from litigating their claims through collective or class actions under federal or state law.²⁴

The FAA applies where there is a contract “evidencing a transaction involving commerce”;²⁵ however, it expressly does not apply to employment contracts for “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”²⁶ Thus, a court must first determine whether this categorical exclusion applies before ordering arbitration.²⁷ On the other hand, if the agreement does fall within the parameters of the FAA, the parties can agree to delegate to the arbitrator not only the merits of their dispute but also “gateway” questions of arbitrability, such as whether the parties have agreed to arbitrate or whether

20. *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

21. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

22. 9 U.S.C. § 2.

23. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

24. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1640 (2019) (Ginsburg, J., dissenting). *See also* *Styczynski v. MarketSource, Inc.*, 340 F. Supp. 3d 534 (2018) (Court was bound by the FAA to compel arbitration of employee’s sexual harassment claims under the terms of her employment contract, despite concerns about the adequacy and fairness of arbitration as the primary mechanism for enforcing federal laws governing the workplace.).

25. 9 U.S.C. § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

26. *Id.* § 1 (“[N]othing herein contained shall apply to contracts for employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

27. *New Prime v. Oliveira*, 139 S. Ct. 532, 537 (2019).

their agreement covers a particular claim.²⁸ A court must enforce this delegation of authority to the arbitrator, even if the court thinks the argument for arbitration is “wholly groundless.”²⁹ Further, the court may not rule on the merits of the underlying claim even if it appears to the court to be frivolous.³⁰ When a valid arbitration agreement exists, the court must respect the parties’ express decision to delegate the arbitrability of the dispute to the arbitrator, who can dispose of frivolous arguments by, for example, imposing fee-shifting and cost-shifting sanctions.³¹ If an issue in a federal court proceeding can be referred to arbitration according to an existing arbitration agreement, the court may stay the trial until after that arbitration is completed.³²

The FAA preempts state statutes that require a judicial forum for the resolution of claims “involving commerce” that the parties have agreed to resolve by arbitration.³³ Thus, the substantive rules of the FAA are intended to apply in state as well as federal courts in an effort to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.³⁴ However, since Congress enacted the FAA under its Article I interstate commerce power,³⁵ the FAA governs only those arbitration agreements arising out of a transaction involving commerce.³⁶ Additionally, if parties specify in their contract to arbitrate that they will conduct the arbitration under state laws, this trumps the FAA so long as the state law does not conflict with the pro-arbitration agreement policy of the FAA.³⁷ Issues not addressed by the FAA, such as procedural issues, are open to regulation by the states.³⁸ Additionally, general contract defenses under state law, such as unconscionability, can nevertheless invalidate an agreement to arbitrate, as long as the state laws are not applicable only to arbitration provisions.³⁹

In 1970, the FAA was expanded to provide enforcement of foreign arbitral awards in the United States under the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).⁴⁰ The New York Convention requires courts of contracting states to enforce private

28. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

29. *Henry Schein, Inc. et al. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 526 (2019).

30. *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649–50 (1986).

31. *Henry Schein, Inc. et al. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

32. 9 U.S.C. § 3.

33. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

34. *Id.* at 16.

35. U.S. CONST., art. I, § 8: “The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States. . . .”

36. *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 400 (1967).

37. *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999); *Russ Berrie & Co. v. Gantt*, 988 S.W.2d 713 (Tex. Ct. App. 1999).

38. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

39. *Doctor’s Assocs. v. Cassarotto*, 517 U.S. 681, 688 (1996); *Styczynski v. MarketSource, Inc.*, 340 F. Supp. 3d 534, 541 (2018).

40. See Appendix I, 9 U.S.C. § 201 *et seq.*

agreements to arbitrate and arbitral awards made in other contracting states.⁴¹ The New York Convention covers any commercial agreement to arbitrate and the resultant arbitration award, unless the matter involves only American citizens and has no reasonable relationship to any foreign country.⁴² Then, in 1990, the FAA was amended to include the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”).⁴³ The Panama Convention also provides that arbitral decisions or awards made in contracting foreign states shall be recognized and enforced in the United States.⁴⁴ Where not all of the parties to the arbitration agreement are members of both conventions, if a majority of those parties are citizens of a state that has ratified the Panama Convention, or is a member of the Organization of American States, then the Panama Convention shall apply.⁴⁵

The FAA continues to provide the framework for arbitration where the agreement at issue involves a “transaction involving commerce.”⁴⁶ The basis for invoking the FAA is a contract evidencing a transaction involving interstate commerce, and the basis for the supremacy of the FAA is the plenary control of Congress over interstate commerce.⁴⁷ Because family law cases do not typically give rise to disputes involving transactions in interstate commerce, the FAA will not usually apply to these arbitrations.⁴⁸ However, the problem of preemption could arise in a family law case if it has interstate aspects—for example, where conflicts over marital property or spousal support cross state lines. In those cases, agreements to arbitrate might fall within the parameters of the FAA, and, as such, the FAA might preempt a state arbitration statute imposing special requirements inconsistent with the FAA.⁴⁹

41. 9 U.S.C. § 202.

42. The New York Convention does not conflict with domestic equitable estoppel doctrines that permit enforcement of arbitration agreements by nonsignatories to those agreements. *See* GE Energy Power Conversion Fr. SAS Corp. v. Outokumpu Stainless USA, LLC, No. 18-1048, 2020 WL 2814297 (U.S. June 1, 2020).

43. *Id.* § 301 *et seq.*

44. *Id.* § 304.

45. *Id.* § 305.

46. Certilman, *supra* note 1, at 12.

47. 9 U.S.C. § 1 (“commerce” is defined to include commerce between two states of the United States and a state of the United States and a foreign country); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

48. *See, e.g., In re Provine*, 312 S.W.3d 824 (Tex. App. Houston 1st Dist. 2009) (Texas Court of Appeals held that FAA did not preempt the Texas Arbitration Act where the agreement specified it was governed by Texas law; the agreement didn’t include reference to the FAA; the divorce decree resolved marital property within Texas rather than involving “interstate commerce”; and the parties “asserted that nothing in the TAA would subvert enforcement of the agreement where the FAA would otherwise enforce it.”).

49. *See* Appendix E, Uniform Family Law Arbitration Act (UFLAA), July 8–14, 2016, Prefatory Note at 3, citing *Verlander Family Ltd. P’ship v. Verlander*, 2003 WL 304098 (Tex. App. Feb. 13, 2003) (unpublished) (FAA applicable because parties held assets in family partnership located in both Texas and New Mexico).

The Uniform Law Commission (ULC)⁵⁰ created the Uniform Arbitration Act (UAA) in 1955, and it was approved, with amendments, by the American Bar Association on August 30, 1956.⁵¹ As of 2000, 49 jurisdictions had arbitration statutes; 35 of these had adopted the UAA, and 14 had adopted substantially similar legislation.⁵² The UAA had two fundamental features: it allowed the parties to agree to arbitrate a dispute before an actual dispute arose, thus reversing the common law rule; and it provided some basic procedures for the conduct of an arbitration. While the UAA had been successful in ensuring the enforceability of arbitration agreements in the face of sometimes hostile state law, it closely tracked the provisions of the FAA, which had been in effect since 1925.

The Uniform Law Commission therefore drafted the Revised Uniform Arbitration Act (RUAA) to address issues that had arisen with the increasing use and popularity of arbitration in dispute resolution, including (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) to what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations are required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process; (9) when a court may enforce a pre-award ruling by the arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages, or other exemplary relief; (11) when a court may award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court may award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; (13) which sections of the RUAA would not be waivable to ensure that fundamental fairness to the parties will be preserved, particularly when one party may have significantly less bargaining power than another; and (14) the permitted use of electronic information and other modern means of technology in the arbitration process.⁵³

50. The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, is an independent non-governmental organization comprised of representatives from every state, as well as the District of Columbia, the Virgin Islands, and Puerto Rico, formed in 1892 to create nonpartisan state legislation; voting power is exercised on the basis of "one state, one vote." Over 350 volunteer commissioners, including lawyers, judges, law professors, and legislative staff, draft and promote state laws where uniformity of these laws is practical and desirable. See <http://uniformlaws.org>.

51. See Appendix A, Uniform Arbitration Act (1956) (UAA).

52. Revised Uniform Arbitration Act, Uniform Law Commission, Dec. 13, 2000, Prefatory Note.

53. *Id.* at 1. See also Appendix B, Revised Uniform Arbitration Act (2000) (RUAA).

The state representatives of the ULC unanimously approved the RUAA on August 3, 2000, and thereafter the RUAA was endorsed and recommended for adoption by the American Arbitration Association, the National Academy of Arbitrators, and the National Arbitration Forum.⁵⁴ The RUAA expressly provides that it is a default act. The ULC acknowledged that arbitration is a consensual process “in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness.”⁵⁵ Thus, most of its provisions can be waived or varied by contract, except for those intended to protect the parties to the arbitration agreement. Further, the uniform law provisions were intended to further the goals of many parties choosing arbitration, including the relative speed, lower cost, and greater efficiency of the arbitration process. Finally, because most parties intend for the decisions of the arbitrator to be final and with minimal court involvement in the absence of clear unfairness or a denial of justice, the uniform law limited the bases for vacating the award and granted the arbitrators immunity from unwarranted litigation to ensure their independence.⁵⁶

The ULC rejected the option for review of challenged arbitration awards beyond those that were contemplated by the FAA and current state arbitration statutes, as this would obviate the purpose of arbitration to permit a final and binding alternative to traditional litigation in a court of law.⁵⁷ Instead, the parties remain free, within the context of state statutes and case law, to agree to contractual or judicial review of their arbitration awards. The RUAA did not specifically address international arbitration because few international cases will be dealt with in state courts. Further, these cases will more likely be governed by the FAA unless the parties designate a state arbitration law to govern their international arbitration, all parties agree to proceed in state court, and the state arbitration law is not preempted by the federal arbitration law.⁵⁸ The RUAA has been adopted in 22 states to date.⁵⁹

By July 2016, every state had adopted one of the arbitration statutes that the ULC had produced—either the UAA or the RUAA—and these statutes were used extensively in labor and commercial law. The ULC recognized that arbitration has been advocated for family law disputes at least since the 1960s, and that most

54. Revised Uniform Arbitration Act, Report to the Pennsylvania House Judiciary Committee Regarding House Bill 1625, Printer’s No. 2078, Raymond P. Pepel Uniform Law Commission, Sept. 9, 2008.

55. Prefatory Note, *supra* note 52, at 2.

56. *Id.*

57. *Id.* at 4–5.

58. *Id.* at 6.

59. *Arbitration Act*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736> (last visited May 15, 2020).

states had little law on the topic of family law arbitration. Instead, the parties were forced to rely on the commercial arbitration statutes.⁶⁰

§ 1.2 Development of Family Law Arbitration

The American Academy of Matrimonial Lawyers (AAML) adopted Rules for Arbitration of Financial Issues in 1990 and then, in 1999, North Carolina enacted the first comprehensive family law arbitration act based on the Uniform Arbitration Act.⁶¹ In 2005, the AAML adopted the Model Family Law Arbitration Act (MFLAA), which was modeled after the North Carolina statute and the Revised Uniform Arbitration Act.⁶² The MFLAA, like the North Carolina Family Law Arbitration Act, would create a complete, separate statute adopting standards for family law substance and practice and incorporating the RUAA's provisions intended to address open questions under the prior UAA, including who decides the arbitrability of the dispute and by what criteria, whether a court or arbitrators can issue provisional remedies, how a party can initiate an arbitration proceeding, whether arbitration proceedings may be consolidated, and whether arbitrators must disclose facts reasonably likely to affect their impartiality, among others.⁶³

The MFLAA would not amend substantive law, but rather offer an additional procedure for resolving family law issues if parties contracted for arbitration. The drafters noted that states could adopt variations of the forms and rules to accommodate substantive state law and determine whether specific provisions were appropriate for the jurisdiction. However, the AAML concluded that special family law arbitration is necessary because of the “usual rule in federal and [s]tate statutes that arbitral awards are final and binding. The result in family law cases has been courts’ refusal on public policy grounds to enforce awards involving [child-related] issues always open for review and modification by the courts.”⁶⁴ The MFLAA would allow for finality of family law arbitrated awards, but includes special provisions permitting court review of arbitral awards involving post-separation support, alimony, and child support and custody, and, in addition, it allows parties to contract for court review of errors of law.⁶⁵ The MFLAA also includes model forms.⁶⁶

60. Uniform Family Law Arbitration Act, July 8–14, 2016, Prefatory Note at 1.

61. *Id.*; N.C. GEN. STAT. §§ 50-41 to 62. The North Carolina Family Law Arbitration Act was amended in 2005 to conform to North Carolina’s RUAA, and included updated forms and rules specific to family law arbitration that are archived with the North Carolina Bar Association. See Appendix C, North Carolina Family Law Arbitration Act with comments, rules and forms, and discussion at Chapter 2, *infra*.

62. Uniform Family Law Arbitration Act, July 8–14, 2016, Prefatory Note at 1. See Appendix D, AAML Model Family Law Arbitration Act with comments, rules and forms.

63. Model Family Law Arbitration Act, Executive Summary at 3.

64. *Id.* at 3–4.

65. *Id.*

66. See Appendix D.

The Uniform Law Commission appointed a Family Law Arbitration Study Committee in 2012, and, after considering the feasibility and desirability of a uniform or model act on family law arbitration for several months, the Study Committee unanimously recommended that a drafting committee be appointed to develop an act on family law arbitration.⁶⁷ The proposed model act was intended to contain the features of arbitration law that are essential for family law arbitration but are not typically addressed in commercial arbitration statutes.⁶⁸ The drafters concluded that a freestanding act would repeat much existing arbitration law and, therefore, the final Uniform Family Law Arbitration Act (UFLAA) incorporates by reference a state's existing arbitration law (e.g., the UAA or the RUAA) for many steps in the arbitration process.⁶⁹ It also includes some of the RUAA provisions necessary for family law arbitration that were not provided in the UAA, such as the arbitrators' power to conduct arbitration in a manner allowing for fair and expeditious resolution, allowing the parties to engage in discovery, and providing for arbitrator immunity.⁷⁰ The UFLAA covers issues that would arise under the enacting state's laws, such as property division, allocation of debt, spousal support, parenting time, child support, interpretation of marital agreements, and attorneys' fees.⁷¹ The UFLAA excludes status determinations such as the termination of parenting rights, the granting of an adoption, or the entry of a divorce decree.⁷² The UFLAA does not address agreements to arbitrate according to the tenets of a particular religion or before a religious tribunal.⁷³

The ULC addressed the key question of whether child custody and child support should be subject to arbitration and concluded that, while some states disagree, most states permit arbitration of these issues as long as meaningful judicial review is preserved.⁷⁴ Further, courts in at least one state had held that parents have a constitutional right to resolve their custody disputes by arbitration.⁷⁵ The ULC recognized that a minority of states disallowed arbitration of some or all child-related issues by statute or case law.⁷⁶ In order to accommodate the states that do

67. Uniform Family Law Arbitration Act, July 8–14, 2016, Prefatory Note at 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*, citing UFLAA § 3.

73. *Id.*

74. *Id.*, citing COLO. REV. STAT. ANN. § 14-10-128.5; GA. CODE. ANN. § 19-9-.1; N.M. STAT. ANN. § 40-4-7.2; TEX. FAM. CODE § 153.0071; WIS. STAT. ANN. § 802.12.

75. *Id.*, citing *Fawzy v. Fawzy*, 973 A.2d 347 (N.J. 2009).

76. *Id.*, citing CONN. GEN. STAT. § 46b-66 (binding arbitration is not permitted to resolve child visitation, custody, or support); *Goldberg v. Goldberg*, 1 N.Y.S.3d 360 (App. Div. 2015) (child custody is not subject to arbitration, but child support is subject to arbitration if award complies with Child Support Act).

not allow child-related issues to be arbitrated, the UFLAA presumptively applies to child-related disputes but includes an opt-out provision.⁷⁷

The UFLAA includes safeguards to preserve the *parens patriae* power of the court to protect children. For example, section 14 requires that all arbitration proceedings including child-related disputes must be recorded; section 15 requires that any award determining a child-related dispute must state the reasons on which it is based, unless otherwise agreed by the parties; and section 16 requires that the court find child-related awards are in the child's best interest and comport with the law before confirming the award.⁷⁸ Further, section 12 provides for protection of a child in requiring that the arbitrator terminate the arbitration of a child-related dispute and report suspected abuse or neglect of a child who is the subject of the proceeding.⁷⁹

The ULC also tackled the controversial issue of whether parties may agree to arbitrate disputes that may arise in the future, noting the widespread criticism of contracts of adhesion in consumer contracts. It concluded that such agreements in the family law context were acceptable, since the parties must consent to the arbitration process with a negotiated provision in a premarital agreement or marital settlement agreement. These clauses are routinely enforced by the courts, so long as the underlying agreement is valid.⁸⁰ Further, the parties to the agreement are typically dealing with each other at arm's length and select an arbitrator who may have special expertise to resolve the dispute.⁸¹

With respect to child-related issues, however, the UFLAA bars a pre-dispute agreement to arbitrate unless the parties reaffirm that agreement after the dispute arises or the agreement is incorporated in a court decree after a family law proceeding.⁸² The ULC noted that while the use of arbitration is "on the rise" in the United States, state law has generally not kept up with this trend, and the UFLAA was drafted with the intent to promote the fairness and efficiency of the process and to protect the interests of vulnerable family members.⁸³ The UFLAA was approved by the American Bar Association in 2017 and, to date, has been enacted in three states: Arizona, Hawai'i, and North Dakota.⁸⁴ The UFLAA does not include model forms.⁸⁵

77. *Id.*, citing § 3 of the UFLAA, which states: "This [act] does not authorize an arbitrator to make an award that: [(5) determines a child-related dispute]. . . ." The Note following specifies those provisions of the model act that should be deleted by a state seeking to exclude child-related issues.

78. *Id.* at 3.

79. *Id.*

80. *Id.* at 3–4, citing *LaFrance v. Lodmell*, 144 A.3d 373 (Conn. Sept. 6, 2016) (upholding agreement to arbitrate in premarital agreement); *Kelm v. Kelm*, 623 N.E.2d 39 (Ohio 1993) (upholding arbitration clause in premarital agreement relating to child and spousal support).

81. *Id.* at 4.

82. *Id.*

83. *Id.*

84. *A Few Facts About the Uniform Family Law Arbitration Act (2016)*, UNIFORM LAW COMM'N, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=74b20a78-c77a-8ebb-be2c-c96b8b30f9e7&forceDialog=0> (last visited May 15, 2020).

85. See Uniform Family Law Arbitration Act at Appendix E.

In addition to statutory provisions, a state may allow for common law arbitration of family law disputes. Common law arbitration, based on the English tradition of common law dating back to the 13th century, is the tradition relied on by all states except for Louisiana (whose legal traditions are derived from the French code).⁸⁶ Common law arbitration still exists in most of the 50 United States.⁸⁷ Common law arbitration has fewer formalities than statutory arbitration, which usually includes the need for a written agreement to arbitrate and an entry of judgment clause, requiring that a judgment of the court will be entered on an award made pursuant to the arbitration.⁸⁸ The parties to a common law arbitration agreement, which may be oral or written, may specify that the common law grounds for vacatur (which may be more varied than the statutory grounds) shall apply to a challenge of the award. However, if the parties do choose to include common law judicial review, this should be clearly expressed in a written agreement to arbitrate to allow for ease of judicial enforcement.⁸⁹

In some states, common law arbitration and statutory arbitration coexist, and the parties may specify which arbitration type they wish to utilize.⁹⁰ Without specifying, the type is determined by the proceedings and the agreement: typically, if the agreement and proceedings do not meet the requirements of the statute, the arbitration will be treated as common law. Alternatively, if the agreement follows the elements of and is enforceable under the statute, it is unnecessary to determine whether it meets the requirements of common law, as it will be considered statutory.⁹¹ Generally, states that have adopted arbitration statutes regard those statutes as enlarging the common law right to submit controversies to arbitration, rather than replacing the common law right. However, some states have abolished the common law right of arbitration altogether.⁹² Clearly, the trend is moving away from the common law arbitration model toward more detailed rules governing the process of arbitration in favor of more consistent, just, and predictable outcomes, particularly in family law cases.

86. Thomas H. Oehmke, J.D. & Joan M. Brovins, J.D., *Arbitration Award Vacatur & Confirmation at Common Law—A 21st Century Option*, 112 AM. JUR. TRIALS 365 § 6 (2020).

87. *Id.*

88. *Id.* at 20.

89. *Id.* at 22.

90. 21 WILLISTON ON CONTRACTS § 57:24 (4th ed).

91. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 55, Westlaw (database updated May 2020); see, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 7321.4 (abolishing common law arbitration in Pennsylvania after July 1, 2019).

92. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 15, Westlaw (database updated May 2020).