Memorandum

To: Drafting Committee, Revised Uniform Arbitration Act
From: Dean Tim Heinsz, Reporter
Subject: Contracts of Adhesion
Date: March 19, 1998

The Drafting Committee will consider the issue arbitration agreements in the context of contracts of adhesion at its upcoming meeting. Professor Steve Hayford, Professor Tom Stipanowich and I, in conjunction with a number of you, have discussed possible alternatives for treatment of arbitration agreements which may result from unequal bargaining power or otherwise in adhesion agreements.

As you know, this is a very difficult issue. Unconscionability and contracts of adhesion have been roadblocks to the drafting of a number of uniform laws, including the recent proposals to revise the Uniform Commercial Code. I have discussed this matter with members of the drafting committees for Articles 1, 2, 2A, and 2B.

In general, courts have examined several factors to determine whether an arbitration agreement is unconscionable. These factors include: unequal bargaining power, the conspicuousness of the arbitration clause, whether the weaker party has the option to opt out of arbitration, clarity of the term, whether an unfair advantage obtained, whether the term is negotiable, whether the term is boilerplate, whether the aggrieved party had a "meaningful choice or was compelled to accept, whether the arbitration agreement is within the reasonable expectations of weaker party, and whether the stronger party used any deceptive tactics. *See, e.g.,* Beldon Roofing & Remodeling Co. v. Tanner, 1997 WL 280482 (Tex.Ct.App.); Chor v. Piper, Jaffray & Hopwood, Inc., 261 Mont. 143, 862 P.2d 26 (1993); Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996); Sosa v. Paulos, 924 P.2d 357 (Utah 1996); Broemmer v. Abortion Serv. of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992); Powers v. Dickson, Carlson & Campillo, 54 Cal.App.4th 1102, 63 Cal.Rptr.2d 261 (Ct.App. 1997).

Courts often discuss substantive versus procedural unconscionability. In general, substantive unconscionability is whether the arbitration agreement itself is so one-sided that it shocks the senses; while procedural focuses on the bargaining process to reach the agreement. The prevailing view is that these two elements must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of

unconscionability. In fact, legal commentators have written of a sliding scale, meaning, that gross procedural unconscionability will make up for slight substantive unconscionability, and vice versa. *See, e.g.,* Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Cassarotto,* 31 Wake Forest L. Rev. 1001, 1016 (1996). In general, very seldom do courts find an arbitration agreement to be unconscionable.[1]

With this background in mind, we are suggesting the following four options for consideration:

A. Add specific statutory language in every section of the RUAA that might touch on adhesion situations.

Those sections that we have identified would be Sections 1, Definitions; 2 Validity of Arbitration Agreement; 3 Proceedings to Compel or Stay Arbitration; 5 Consolidation; 6 Appointment of Arbitrators; 10 The Arbitration Process; 12 Witnesses, Subpoenas, Depositions, Discovery; 16 Remedies; 18 Vacating an Award[2].

B. Have the RUAA cover only commercial agreements and propose that the National Conference of Commissioners on Uniform State Laws have separate acts for situations likely involving unequal bargaining power, such as consumer, employment, franchises, etc.

C. Discuss the special problems of adhesion contracts in the arbitration setting in the Prefatory Note and/or Reporter Comments but leave to developing state (and federal) substantive law the applicable doctrines for contracts of adhesion and unconscionability.

D. Discuss the use of industry protocols similar to the DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (May 9, 1995) .

I should add that Professor Hayford has serious questions of preemption by the Federal Arbitration Act if we pursue Option A or Option B. I attach his memorandum and strongly urge you to review the Supreme Court decisions that Steve has cited.

I look forward to hearing an additional options that you might bring to the meeting and to our discussion of this important issue.

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[1]However, the recent case of Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138 (1997), is worth noting where the court concluded that an arbitration agreement in an adhesion contract between a company and an executive employee was unconscionable and, thus, unenforceable.

[2]A provision for vacatur such as that proposed by Commissioner Cramer may be applicable in an adhesion situation.