POLICY STATEMENT
REVISED UNIFORM ARBITRATION ACT (RUAA)

1. Background and Objectives of RUAA

The Uniform Arbitration Act (UAA) was adopted by the Conference in 1955 and has been widely enacted (in 35 jurisdictions, and in similar form in additional 14 jurisdictions). UAA closely tracks the provisions of the Federal Arbitration Act (FAA) which was adopted in 1925. Neither UAA nor FAA have been amended since each were enacted. Therefore, for all practical purposes, American arbitration statutes have not been revised over the past 75 years. In 1995, the Conference appointed a Study Committee to study the feasibility of revising UAA. The Study Committee recommended 14 categories of subject matter for review by a Drafting Committee. The Revised Uniform Arbitration Act (RUAA) Drafting Committee has closely followed the Study Committee's report and revisions have been made in almost all of the categories identified by the Study Committee.

The prime objective of RUAA is to advance arbitration as a desirable alternative to litigation, but not to make arbitration simply another form of litigation. To this end, RUAA endeavors to render the arbitration process efficient, expeditious, and economical in a manner which is fair to the parties, and which promotes finality of the decision of the dispute submitted to arbitration. In accomplishing this goal, prime recognition is given to the agreement of the parties in the agreement to arbitrate. RUAA also recognizes that not only are more issues being submitted to arbitration, but they also have become increasingly complex, often involving higher monetary amounts. RUAA contains statutory coverage for a number of important issues that were not addressed in the UAA. RUAA also reflects aspects of arbitration practice as it has developed over the years. However, RUAA is a default Act on matters not covered by the agreement to arbitrate except for certain fundamental provisions which cannot be waived so as to insure fairness.

As of this writing, RUAA has been endorsed by the American Bar Association Section on Dispute Resolution.

2. Summary of the Revisions under RUAA

The following subjects were not addressed in the original UAA, and are now included in RUAA:

(1) What forum (arbitrator or court) decides arbitrability of a dispute and by what criteria; (§ 6)
(2) What forum issues provisional remedies such as attachments, restraining orders, etc.; (§ 8)
(3) The process for initiating an arbitration; (§ 9)
(4) Authority to consolidate arbitrations; (§ 10)
(5) Requiring arbitrators to disclose facts which may affect impartiality; (§ 12)

(6) Provisions for immunity of arbitrators and arbitration organizations; (§ 14)
(7) Whether arbitrators can be required to testify in other proceedings; (§ 14)
(8) Discretion of arbitrators to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process; (§ 15)
(9) Provisions for courts to enforce preaward rulings by the arbitrator; (§ 18)
(10) Defining arbitration remedies including provisions for attorney's fees, punitive damages and other exemplary relief; (§ 21)
(11) Specifying which sections of RUAA are not waivable or those that cannot be restricted unreasonably (this provision is designed to ensure fundamental fairness particularly in contract of adhesion situations); (§ 4)
(12) Provisions for enforcing subpoenas to witnesses who reside in states other than the arbitration state; (§ 17)
(13) Providing for vacatur when arbitrators fail to disclose facts which could reasonably affect impartiality; (§ 12 and § 23)
(14) Standards for giving and receiving notice in arbitration proceedings. (§ 2)

3. **Federal Preemption**

In drafting and applying RUAA, the doctrine of federal preemption must be considered. Essentially, state arbitration acts must be consistent with the federal pro-arbitration policy; and cannot conflict with the provisions of the Federal Arbitration Act, when the underlying activity under consideration involves interstate commerce. The Supreme Court of the U.S. has developed the federal preemption doctrine so as to preclude state arbitration acts from containing provisions which restrict the availability of arbitration. The Drafting Committee feels that the provisions of RUAA do not conflict with the federal preemption doctrine. A more extensive discussion of federal preemption appears in pages II through IV of the prefatory note to RUAA.

4. **Contracts of Adhesion and Arbitration**

Much has been written about so-called contracts of adhesion involving arbitration. The Drafting Committee has discussed this subject at great length. It is the consensus that it would be desirable to be able to address this subject in RUAA. However, the federal preemption doctrine does not allow a state arbitration act to treat the validity of an arbitration agreement differently than would be the case for other types of contracts. Attached to this policy statement, is a brief report by a Task Force of the Drafting Committee which dealt with this subject and recommended that it not be addressed in RUAA because of federal preemption. Therefore, because of federal preemption, if the issue of contracts of adhesion is to be dealt with legislatively, it must be at the federal level, or possibly through state consumer protection acts.

5. **Opting in for Judicial Review**

The Drafting Committee also considered at great length whether provisions should be included to permit the parties to an arbitration agreement to contract to allow for judicial review of errors of facts or law in the arbitrator's award. The Drafting Committee was split on this issue, some members reasoning that such a provision would destroy a prime feature of arbitration which is its finality, and that judicial review should continue to be governed by the grounds for vacatur. It was also felt that such a provision would cause widespread drafting of such clauses in arbitration agreements so as to become common practice. On the other hand, some members felt that the party's agreement for appeals should be recognized if they chose to provide for it, and that parties might well wish to allow for appeals as a protective measure when agreeing to arbitration. The various U.S. Courts of Appeals that have taken up the issue have been evenly split 2-2. Two circuits upheld the validity of such an agreement for judicial review, and two circuits have held that it is not legally permissable. The Supreme Court of the U.S. has not ruled on this issue. Finally, at the first reading of RUAA last year, the issue was debated and considered by the Committee of the Whole. A sense of the house motion not to include an opting in for judicial review provision was adopted by an overwhelming vote of the Committee of the Whole. Because of this decisive sense of the house resolution, an opting in for judicial review provision has not been included in RUAA. The RUAA does not prohibit an opt in provision but essentially defers this issue to developing state and federal law. Also, under RUAA the parties continue to be free to agree on the review of the arbitrators' award by an arbitral panel, and to provide for this in their agreement. There is a growing tendency on the part of arbitration organizations to provide for this type of arbitral review in their arbitration rules.

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ADHESION ARBITRATION AGREEMENTS AND THE RUAA

Introduction

Encouraged by recent Supreme Court and appellate court opinions broadening federal arbitration law under the Federal Arbitration Act (FAA), many businesses have incorporated arbitration provisions in customer, employment and franchise contracts. Binding arbitration clauses are now a common feature of banking, credit card, financial, health care, insurance, and communication service agreements, and agreements for the sale of consumer goods. Such agreements often do not involve arm's-length negotiation, but consist of terms presented on a take-it-or-leave-it basis -- a classic indicium of the contract of adhesion. Boilerplate arbitration provisions raise particular fairness concerns, since they replace the right to go to court with a private adjudication system of which the consumer or employee may be unaware until she seeks legal redress. While "the speed and economy of arbitration ... could prove helpful to all parties," a private arbitration process may also fall short of parties' reasonable expectations of fairness and have a dramatic impact on consumers' substantive rights and remedies. The range of concerns raised by arbitration agreements in consumer or employment transactions include awareness of the arbitration agreement and of waiver of the right to trial; access to information about the arbitration program; the independence and impartiality of decision-makers, and of the administering institution, if any; the quality of the process and the competence of arbitrators; the cost, location, and time frame of arbitration; the right to representation; the fundamental fairness of hearings; access to information (discovery); the nature of arbitral remedies, including the availability of punitive damages in cases where they would be available in court; the availability of class actions, and the scope of judicial review of arbitration awards. On another level, some express alarm at the possibility that whole categories of contract-related disputes, including statute-based claims, will disappear from the court system into a private realm of justice and prevent further evolution of the law and effective oversight of decisions.

Such concerns are increasingly reflected in decisional law. While courts often sublimate such concerns to the principles of freedom of contract and "ascribed intent," a growing number appear to more closely scrutinize arbitration agreements in consumer and employment contracts.[1]/ Some arbitration providers and other groups have responded by promulgating rules that are designed to regulate arbitration and ADR procedures in special contexts. A growing trend is the evolution of fundamental due process standards for arbitration through the consensual efforts of broad-based groups representing affected public and private interests.[2]/

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[1]/ *See, e.g.*, Palladino v. Avnet Computer Tech, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns Int'l Security Serv., 105 F.3d 1465 (D.C. Cir. 1997); Broemmer v. Abortion Serv. of Phoenix. Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992); Engalla v. Permanente Med. Grp., 938 P.2d 903 (Cal. 1997).

[2]/ *See* Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship; National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems (May 21, 1997); National Consumer Disputes Advisory Conunittee, Due Process Protocol for Mediation and Arbitration of Consumer

Response of Drafters of the RUAA

In revising the Uniform Arbitration Act, the Drafting Committee's options were significantly limited due to the preemptive effect of the Federal Arbitration Act, (FAA),[3]/ which governs arbitration agreements in the vast range of transactions involving interstate commerce. The FAA provides that "a written provision ... to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[4]/ It preempts conflicting state law respecting the enforceability of agreements to arbitrate,[5]/ and, as such, dramatically limits meaningful choices for drafters addressing adhesion contracts under the UAA.[6]/ Legislation establishing enhanced formal requirements for arbitration agreements also runs afoul of the FAA. In Doctor's Associates. Inc. v. Casarotto, *supra,* the Supreme Court enforced an arbitration agreement under the FAA, preempting a Montana statute which required that "[n]otice that a contract is subject to arbitration ... shall be typed in underlined capital letters on the first page of the contract." 517 U.S. at 688. Therefore, the enforceability of arbitration agreements cannot be treated any differently from the enforcement of contracts generally under state contract law.

The Drafting Committee avoided specific references to consumer, employment or adhesion contracts in the RUAA. However, the Committee did elect to make certain rights non-waivable, such as the right to be represented by an attorney prior to the proceeding or hearing.[7]/ Section 6 of the RUAA encourages courts on a case-by-case basis to deny enforcement to arbitration agreements on "grounds that exist at law or in equity for the revocation or invalidation of any contract." At the Committee's direction, the Reporter added a lengthy Comment to section 6, which describes court decisions which void contracts of adhesion on the ground of unconscionability. Additionally, the Comment cites various due process protocols negotiated by affected public and private industry groups that are available to courts in addressing the unconscionability of contracts of adhesion.[8]/

Disputes (1998); Due Process Protocol for Mediation and Arbitration of Health Care Disputes (1998).

[3]/ 9 U.S.C. §§ 1-16.

[4]/ *See id., §* 2.

[5]/ *See* Doctor's Associates v. Casarotto, 116 S.Ct. 1652, 1656 (1996); Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995); Perry v. Thomas, 482 U.S. 483 (1987).

[6]/ The U.S. Supreme Court has declared that the FAA preempts state legislation excluding or denying enforcement to arbitration agreements. See Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 281 (1995)(FAA preempts Alabama law denying enforcement to pre-dispute arbitration agreements).

[7]/ " See RUAA § 27, Tentative Draft of May, 1999.

[8]/ I See note 2 *supra.*