WRITTEN TESTIMONY OF
FRANCIS J. PAVETTI, COMMISSIONER
CONNECTICUT COMMISSION ON UNIFORM LAWS

Connecticut General Assembly
Judiciary Committee Public Hearing
March 3, 2008

RAISED BILL 5660, AN ACT ADOPTING THE REVISED UNIFORM ARBITRATION ACT

Senator McDonald, Representative Lawlor and Members of the Judiciary Committee, thank you for the opportunity to submit written testimony in support of Raised Bill 5660, *An Act Adopting the Revised Uniform Arbitration Act.*

Why Revise the Original Uniform Arbitration Act (UAA)?

The original UAA was approved in 1955 by the National Uniform Law Commissioners (ULC). It was a bare bones Act that is now outdated. Today, arbitration is a vital alternative to litigation, chosen by numerous parties to resolve disputes in many areas of the law. More than ever before, Connecticut needs to update and revise the Uniform Arbitration Act (UAA) in light of the increased use of arbitration, the greater complexity of the disputes submitted to arbitration, and the need to resolve ambiguities, fill in gaps and codify the developing case law over the past 50 years. Whether or not one favors arbitration, it is clear that many parties have chosen this alternative and it is critical to provide such parties with a clear, balanced and reasonable set of guidelines to govern the its conduct.

RUAA Provisions Which Are Not Covered By the Original UAA.

Determining Arbitrability: RUAA helps to resolve the confusion over who decides arbitrability and by what criteria. The rationale of the RUAA provision providing for the arbitrator to make the initial decision on procedural issues was relied on heavily by the U.S. Supreme Court in an important arbitration case. *See* Howsam v Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

Provisional Remedies: Occasions arise where a restraining order, attachment or other provisional remedy is necessary in an arbitration in order to maintain the status quo in the proceeding and make it possible for the ultimate award to be effective. RUAA provides for this.

Consolidation: In situations where separate arbitrations involve the same transactions or parties, RUAA establishes a way to consolidate the arbitrations if no one is prejudiced so that unnecessary time and expense are reduced for the parties.

Arbitrator Disclosure of Conflicts: RUAA strengthens the fairness and impartiality of the proceeding by requiring arbitrators to disclose known financial interests or personal relationships that could affect impartiality of the arbitrator. If a neutral arbitrator fails to disclose a known material interest or relationship' it may be used to establish "evident partiality" which is a ground for which the Court could vacate such an unjust result.

Arbitrator Immunity: The willingness of highly qualified individuals to serve as arbitrators is enhanced by RUAA provisions which grant immunity to arbitrators from being sued by parties, similar to the immunity currently provided to judges

Obtaining Necessary Evidence: RUAA recognizes that parties to arbitrations sometimes need to obtain important evidence for their positions on issues. RUAA addresses this need by allowing a limited form of discovery. All discovery is controlled by the arbitrator. The arbitrator decides the extent of the discovery based on demonstrated need while taking in to account the desirability of making the proceeding fair, expeditious, and cost effective.

Pre-Hearing Conferences: RUAA expressly authorizes the parties and the arbitrator to confer in advance of the actual hearing. Pre-hearing conferences can be beneficial in terms of the efficiency and

cost effectiveness of the arbitration process. For example, issues can be clarified, facts can be stipulated, documents can be exchanged and witnesses can be identified.

Addressing Punitive Damages: First, it must be clearly understood that current case law (and not RUAA) makes punitive damages already available in an arbitration, if such damages would be available in a civil court action for the same type of claim. RUAA wisely guards against an improper exercise of punitive damages awards by statutorily requiring that the arbitrator state in writing the basis in fact and in law if punitive damages are made a part of the award. Failure of the arbitrator to so state, or if erroneously stated, can result in the award being vacated for exceeding the arbitrator's authority.

Initiating Arbitration: The UAA is silent on how to initiate arbitration. RUAA fills this gap by setting forth the steps for initiating the arbitration and giving notice to adverse parties.

Electronic Records: RUAA is drafted to allow for the validation and use of electronic records, contracts and signatures consistent with the computer age and appropriate federal law.

Party Autonomy: The UAA does not state whether any of its provisions may be varied or waived by the parties in their agreement to arbitrate. This results in a loss of party autonomy because of this uncertainty and the implication that all of the provisions are mandatory. RUAA preserves party autonomy and corrects this problem by expressly specifying which provisions may be varied or waived by agreement thus allowing the parties to shape an arbitration agreement to meet their needs. Most of the RUAA provisions may be varied or waived. However, in order to protect parties with lesser bargaining power, certain basic provisions may not be waived such as the right to an attorney, and rights to confirm, vacate, modify or enforce an award.

RUAA Only Applies When There Is An Agreement to Arbitrate. Because RUAA applies only where there is an agreement to arbitrate, arbitrations prescribed and required by state statute are not covered by RUAA. Thus, statutory labor arbitrations and lemon law arbitrations, and other such statutory arbitrations are not covered.

The Doctrine of Federal Preemption. Under federal preemption, the Federal Arbitration Act (FAA) governs all arbitration agreements involving interstate commerce. Interstate commerce is defined so broadly that there is almost everything in the commercial world that is covered. The FAA provides that arbitration agreements shall be valid, irrevocable and enforceable except for grounds recognized by law for the revocation of a contract. This has been construed by the United States Supreme Court to mean that an arbitration agreement cannot be singled out for invalidation or restriction by a state statute except for grounds that exist for invalidation or restriction for all other types of contracts. In the case of consumer contracts containing an arbitration agreement as a contract of adhesion, this means that the arbitration agreement cannot be singled out for separate treatment in a state statute except for grounds under the contract law applying to all types of agreements. Case law is very consistent on this point. For example, the U.S. Supreme Court preempted and struck down a state statute which required that a "[n]otice that a contract is subject to arbitration...shall be typed in underlined capital letters on the first page of the contract" *See* Doctor's Associates v. Casarotto, 116 S.Ct. 1652 (1996). Therefore, RUAA is unable to include special provisions or carve outs pertaining only to consumer or other special interest groups. Because of federal preemption such tinkering or fine tuning can only be done by congressional amendment of the Federal Arbitration Act.

Conclusion. RUAA was carefully drafted in a lengthy and balanced deliberative process open to all interested parties. It has received the support and endorsement of many preeminent legal and arbitration organizations appearing on the attached list. In 2001, RUAA received joint favorable approval from this Judiciary Committee. Neither RUAA, nor the clear need for it in Connecticut, have changed and we respectfully request your favorable action at this time.

Attachments (4)

ENDORSEMENTS OF THE REVISED UNIFORM ARBITRATION ACT

The Revised Uniform Arbitration Act has been endorsed by the following:

American Arbitration Association;
National Arbitration Forum;
Jams Dispute Resolution Organization;
National Academy of Arbitrators;
American Bar Association as a full association position;
Individual ABA Sections on
- Dispute Resolution;
- Litigation;
- Business Law;
- Torts and Insurance Practice;
- Real Property, Trusts and Probate;
- Labor and Employment Law;
- Senior Lawyers;

Association of the Bar of the City of New York and the New York State Bar Association;
American College of Real Estate Lawyers.

Endorsements from Connecticut include:

- 2001 Joint Favorable Report of Judiciary committee, General Assembly;
- Connecticut Judicial Department;
- Connecticut Bar Association as a full association position, 2003;
- Individual CBA Sections on:
  - Litigation, 2003;
  - Dispute Resolution; 2003;
- Connecticut Association of Realtors.

uaa endorse

American Arbitration Association
Dispute Resolution Services Worldwide

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July 10, 2000

Francis J. Pavetti, Esq. Chair
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Dean Timothy J. Heinsz
University of Missouri-Columbia
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Dear Mr. Pavetti and Dean Heinsz:

The American Arbitration Association has been pleased to participate in the work of the Drafting Committee for the Revised Uniform Arbitration Act over the past few years, and encourages adoption of the Act in its latest draft form.

From the beginning of this process, the Association's position has been that the RUAA should continue to support arbitration as an expeditious, cost effective and efficient method of resolving disputes and resist "judicializing" the arbitral process. In our view, the RUAA, as well as other statutes which impact arbitration, need to draw the proper balance between two fundamental tenets of arbitration: party autonomy and finality. Parties must be free to draft private arbitration agreements to accommodate their particular circumstances. However, parties must also be assured of the final and binding nature of an arbitral award so that the conclusion of an arbitration is not simply a precursor to further litigation.

We believe the RUAA embraces these touchstone principles. Necessarily, compromises were made, but the Drafting Committee should be congratulated for their conscientious deliberations and thoughtful consideration of the opinions and desires of numerous competing interests.

Since the current draft of the RUAA continues to promote the use of arbitration and reflects a balance between the opinions and input of numerous constituencies, we encourage the committee to adopt the RUAA.

Thank you for permitting the Association to express its views on this important initiative.

Very truly yours,

Florence M. Peterson

Attachment "C" -- Testimony of Francis J. Pavetti
Raised Bill 5660, An Act Adopting the Revised Uniform Arbitration Act

National Academy of Arbitrators

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June 7, 2000

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Dean Timothy J. Heinsz, Reporter
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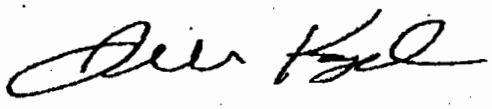
Dear Mr. Pavetti and Dean Heinsz:

Since its founding in 1947, the National Academy of Arbitrators has been the nation's leading professional association for arbitrators of labor-management disputes. While the Federal Arbitration Act and Section 301 of the Labor Management Relations Act have more impact than the Uniform Arbitration Act on labor arbitration, the UAA does apply directly to some public sector labor arbitrations. Moreover, many courts dealing with private sector labor arbitration cases have looked to the UAA for guidance in those areas of arbitration law not addressed by the other statutes.

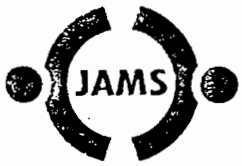
Because of our concern for the impact of state arbitration laws on labor arbitration, the Academy has followed the progress of the Revised Uniform Arbitration Act with great interest. We have made a number of suggestions to the drafting committee on those aspects of the RUAA that would most significantly affect our area of concern. The drafting committee carefully considered our suggestions and have addressed them in the proposed text or in the accompanying notes.

After carefully reviewing the latest draft of the RUAA, the National Academy of Arbitrators believes that proposed revisions represent significant improvements in the law of arbitration. We are pleased to offer our enthusiastic endorsement for the current draft of the RUAA. Please let us know if you have any questions or if we can assist you in any way.

Sincerely,



John Kagel
President



THE RESOLUTION EXPERTS

Via Facsimile and First Class Mail

July 20, 2000

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Dear Mr. Pavetti and Dean Heinsz:

As you know, JAMS has participated actively in the work of the Drafting Committee for the Revised Uniform Arbitration Act for the last several years. Because JAMS' neutrals provide significant arbitration services, we have appreciated the need for involvement in this important task.

We believe that the revised Act represents a significant accomplishment. It serves as the touchstone for parties and the arbitration community and provides a framework that balances the need for structure with flexibility.

In light of the participation of representatives of JAMS in the Drafting Committee meetings, and after review of the final draft of the Revised Uniform Arbitration Act, JAMS is pleased to express its support for the Revised Uniform Arbitration Act and encourages its adoption by the National Conference of Commissioners on Uniform State Laws.

Sincerely,

Deborah Masucci

Deborah Masucci
Vice President, JAMS

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