



**Association for
Conflict Resolution**

**ACR Consideration of the Revised Uniform Arbitration Act (RUAA)
ACR Member Comment Period Now Open**

Dear ACR Members:

ACR's Legislative and Public Policy (LPP) Committee has initiated a legislative review of the Revised Uniform Arbitration Act (RUAA), which was drafted and adopted in 2000 to update the Uniform Arbitration Act (UAA) of 1956. The RUAA is now being considered at the state level. A LPP Committee proposal regarding ACR and the RUAA follows this letter.

The LPP Committee is conducting a comment period on this proposal for ACR members from December 9, 2005 through February 1, 2006, during which all ACR members are invited to contribute their opinions and suggestions. Please email your comments to ACR Program Manager Jennifer Druliner at jdruliner@ACRnet.org by February 1, 2006.

Sincerely,

Gregory Firestone, Co-Chair, ACR Legislative and Public Policy Committee
Anne B. Thomas, Co-Chair, ACR Legislative and Public Policy Committee
Richard Fincher, Chair, RUAA Policy Subcommittee

Should ACR Endorse the Revised Uniform Arbitration Act (RUAA)?

I. Overview of the RUAA

Background

Over the past decade, there has been significant growth of arbitration to resolve civil litigation. Arbitration is now used in a broad range of matters, including commercial, employment, personal injury, and even class action matters. This development has evolved from the unprecedented case support from the United States Supreme Court and corporate dissatisfaction with the litigation process. With this growth, there have arisen problems, those being inconsistent law and practices between states, and poorly drafted and pre-modern arbitration state statutes.

The statutory foundation of arbitration law stems from the Federal Arbitration Act of 1925 (FAA). The purpose of the FAA was to assure the enforceability of agreements to arbitrate in the face of hostile state governments. Over time, that goal has been accomplished. Today, arbitration is a primary mechanism favored by courts and parties to resolve disputes in many areas of the law.

Influence of the FAA and Federal Preemption on the Uniform Arbitration Act

In light of cumulative decisions by the United States Supreme Court concerning the FAA, any revision of the Uniform Arbitration Act (UAA) must take into account the doctrine of preemption. To date, the preemption-related opinions of the Supreme Court have centered in large part on the two key issues that arise at the “front end” of the arbitration process: enforcement of the agreement to arbitrate, and issues of substantive arbitrability. The FAA also speaks to the “back end” of the arbitration process, including vacatur, confirmation and modification of arbitration awards.

Issues Left to the States to Regulate

Matters not addressed in the FAA are open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (*e.g.*, discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption. Less certain is the effect of FAA preemption with regard to substantive issues like the authority of arbitrators to award punitive damages (RUAA Section 21) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA Section 12) that have a significant impact on the integrity and/or the adequacy of the arbitration process.

History of the Uniform Arbitration Act UAA of 1956

The UAA, promulgated in 1956, has been one of the most successful uniform laws drafted and adopted by the National Conference of Commissioners on Uniform State Laws* (NCCUSL). Forty-nine states have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation.

**Formed in 1892 to promote uniformity of state law, the National Conference of Commissioners on Uniform State Laws (NCCUSL) is best known for the Uniform Commercial Code (UCC). The goals of NCCUSL are to: a) enhance commercial development in interstate commerce through minimum business standards, b) reaffirm and promote states' rights to frame solutions to their needs, c) provide for timely and progressive legal solutions, d) provide more stability of regulation than is possible under regulatory models, and e) develop proposed language arising from a detached and objective drafting process.*

Development of the Revised Uniform Arbitration Act of 2000

In the past 20 years, the United States Supreme Court has used the FAA to federalize commercial arbitration. However, the Court has also assumed a collaborative role for the states in providing guidance for the uses of arbitration within its boundaries. For the most part, state arbitration statutes are modeled on the 1956 UAA, which has many gaps. This growth in arbitration motivated NCCUSL to appoint a Drafting Committee to consider revising the UAA in light of the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in this area.

The UAA of 1956 did not address many issues that arise in modern arbitration cases. The statute provided no guidance as to (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) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process.

The UAA of 1956 also did not address (9) when a court may enforce a pre-award ruling by an 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 can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the UAA would not be waivable—an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process. RUAA examines all of these issues and provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.

Drafting Principles of the RUAA

There were three prevailing drafting principles of the RUAA. First, 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. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs. In most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue. Second, the underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. Third, in most cases parties intend the decisions of arbitrators to be final, with minimal court involvement unless there is clear unfairness or a denial of justice.

Status of RUAA Adoption in the United States

The RUAA is now law in Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon and Utah. Hawaii and Utah adopted the RUAA without changes. New Mexico broadened the RUAA to bar enforcement arbitration clauses that limit procedural rights of

consumers, and New Jersey added language allowing parties to expand the scope of judicial review and requiring party-appointed arbitrators make the same disclosures as a neutral arbitrators. Nevada deleted the RUAA's language allowing arbitrators to award punitive damages, while North Dakota added language ensuring that insurance arbitration agreements remain enforceable even if they limit appeals from an award.

The RUAA died in a Maryland house committee, but bills to adopt the RUAA are under active consideration in Alaska, Colorado, Connecticut, Iowa, Massachusetts, Oklahoma, Vermont, and West Virginia. The RUAA has been taken up by states with varying degrees of uniformity, with most tailoring its provisions to address local concerns and court precedent.

RUAA and International Law

International arbitration is not specifically addressed in the RUAA. Twelve states have passed arbitration statutes directed to international arbitration. Seven states have based their statutes on the Model Arbitration Law proposed in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). Because few international cases are likely to be dealt with in state courts and because of the diversity of state law already enacted for international cases, the RUAA Drafting Committee decided not to address international arbitration as a specific subject.

Should States Enact the RUAA?

There are several reasons that states might enact the RUAA, including that the RUAA:

1. Promotes interstate commerce,
2. Efficiently fill the gaps in current arbitration agreements,
3. Provides sensitivity to specific commercial practices (e.g., construction),
4. Provides guidance to the judiciary,
5. Honors party choice to arbitrate commercial disputes,
6. Adopts rules to minimize arbitration costs, and
7. Modernizes the rules of commerce.

Is the RUAA perfect?

No uniform act includes every possible issue. The RUAA does not clarify the law of vacatur, does not refer to international issues, and does not add to the developing law of unconscionable contracts of adhesion. The RUAA does not resolve the question of allowing contractual provisions for "opt-re" review of challenged arbitration awards, which could permit parties to contractually render arbitration decidedly non-final and non-binding. The RUAA leaves these issues to the developing case law under the FAA and state arbitration statutes. Parties remain free, within the constraints imposed by the existing and developing law, to agree to contractual provisions for arbitral or judicial review of challenged awards.

Summary

The FAA of 1925 is a bare-bones law, focused primarily on front-end issues such as arbitrability and back-end issues such as vacatur. While the UAA of 1956 placed more substance on the process, there remain many voids for the states to consider. The RUAA of 2000 is a clear solution to a complex problem, intended as a default statute for use by the parties when state law or their own arbitration agreement is silent.

II. ACR's Consideration of the RUAA

ACR's Legislative and Public Policy (LPP) Committee is undertaking a principled legislative review of the RUAA, using the criteria outlined below:

The RUAA, if endorsed by ACR, should:

1. Address only those areas where national uniformity is beneficial;
2. Preserve party empowerment and self-determination in drafting terms of the arbitration agreement;
3. Reflect an understanding of the diversity of arbitration styles and the range of disputes;
4. Be easily understandable to party participants;
5. Preserve arbitration as a process that is separate and distinct from the practice of judicial proceedings;
6. Ensure that arbitrators may come from a variety of professional and non-professional backgrounds;
7. Preserve the impartiality of the arbitrator;
8. Provide sound procedural protections for the parties and the arbitrator; and
9. Build upon the foundational templates of the Federal Arbitration Act of 1925 and the Uniform Arbitration Act of 1956.

To view the full text of the RUAA, go to the NCCUSL website (http://www.nccusl.org/Update/Home_desktopdefault.aspx), click on "Final Acts & Legislation," and select "Arbitration Act" from the drop-down menu under "Select an Act Title."

ACR Member Comments Sought

The LPP Committee solicits ACR member input on whether ACR should endorse the legislation. Comments are welcome between December 9, 2005 and February 1, 2006. In particular, the LPP Committee asks ACR members to consider and comment on the following questions:

1. As drafted, what are the advantages of the RUAA?
2. As drafted, what are the disadvantages of the RUAA?
3. What changes to the RUAA would be proposed for ACR to consider recommending?
4. Do you recommend that ACR endorse the RUAA for enactment by the states?
5. Do you have any other comment?

Please email comments to the LPP Committee via ACR Program Manager Jennifer Druliner (jdruliner@ACRnet.org) by February 1, 2006. The LPP Committee will review and consider all comments received by the deadline before making a recommendation regarding the RUAA to ACR's Board of Directors.