REPORT ON THE
REVISED UNIFORM ARBITRATION ACT

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Executive Summary

This Report recommends the enactment by New York State of the Revised Uniform Arbitration Act (RUAA). The Report is submitted by a broad array of Bar organizations of the State: the Commercial & Federal Litigation Section (CFLS), the Standing Committee on ADR (ADR Committee) and the Standing Committee on the CPLR (CPLR Committee) of the New York State Bar Association (NYSBA), the Committee on Arbitration (Arbitration Committee) of the Association of the Bar of the City of New York (ABCNY) and the ADR & Arbitration Committee (County Lawyers Committee) of the New York County Lawyers Association (NYCLA).

The original Uniform Arbitration Act (UAA), which the RUAA revises, was adopted in 1955 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). It is one of the most successful of the Uniform Laws, having been adopted in 49 states, either intact or with amendments. Although New York is the one state that did not formally adopt the UAA, the State's arbitration law, embodied in Article 75 of the CPLR (CPLR Article 75) has some language and much of substance in common with the UAA, and the 1920 New York arbitration statute was the basis for the 1925 United States Arbitration Act (FAA), which, in turn, was the basis for the UAA.

The RUAA is a comprehensive statute, designed to bring clarity to modern arbitration by fleshing out and, largely, codifying the arbitration law that has been developed by the courts over the years under the skeletal framework of the existing statutes. It has been adopted in twelve states, and, hopefully, it will be as successful as the UAA, especially if it is adopted by New York, which has been the leading state to date in developing arbitration law and practice.

As this report points out, the RUAA has a number of provisions that codify what is already the arbitral law of New York. Where the RUAA is different from existing New York law, the RUAA brings

improvement. Most importantly, where New York law has been different from the norm, especially as compared with the FAA, the RUAA brings it into conformity, eliminating what has been the source of costly and time-consuming litigation for parties in New York.

The form of RUAA -- the Consensus Draft RUAA -- that is being urged for adoption in New York is not entirely the pristine form of RUAA adopted by NCCUSL in 2000. It is the product of years of hard work by New York lawyers, experienced with arbitration, who have brought differing perspectives to the process. They have worked through differences, noted below. And they have crafted modifications discussed in this Report that are improvements to the RUAA and are for the most part existing aspects of New York law and practice deserving of, and susceptible to, preservation without disruption of the over-all uniformity of the RUAA.

While the work on the RUAA was ongoing the ABCNY's Arbitration Committee and its International Commercial Dispute Committee proposed a change to CPLR Section 7502(c) that was enacted into New York law in 2005. The change brings New York law into conformity with that of virtually all other jurisdictions in permitting the courts of the state to provide for preliminary relief in aid of arbitrations outside the State, as well as, those within the State. With one change, the revised Section 7502(c) has been incorporated into the Consensus Draft RUAA as Section 8(a). The change eliminates language that might be asserted as a spurious ground for avoiding or delaying needed interim relief.

As is outlined in this Report, the Consensus Draft RUAA will be a significant improvement to the arbitral law of New York. The State should continue in its near-century-long leadership role in arbitration and adopt the Consensus Draft RUAA as the law of the State.

Background of This Report

As noted above, the RUAA is a comprehensive statute for the regulation of the arbitration process. It was adopted by NCCUSL five years ago. The twelve states that have already adopted it, sometimes with modifications, are listed below.[1] In the process of drafting the RUAA, NCCUSL received input from bar associations, arbitration-provider organizations, practitioners and academics throughout the United States. Its work drew on decades of experience under the 1955 UAA, the 1925 FAA, and the pioneering New York State arbitration statute, adopted in 1920.

New York established its leadership role in arbitration early on. Its 1920 arbitration statute was the first in the United States to put agreements to arbitrate on an equal footing with other contracts and to combat a then-prevailing judicial antipathy to arbitration. As noted above, New York's statute was the model for the FAA, which was the model for the UAA, and New York's arbitration law in CPLR Article 75 contains much substance in common with federal law and the law of other states.

The UAA, the FAA and CPLR Article 75 are all bare-bones statutes. In sharp contrast, the RUAA fleshes out state arbitration law, based on the wealth of experience with arbitration, and with litigation in the courts about arbitration. Unlike the existing statutes, the RUAA provides to private parties, the bar, and arbitrators a far greater degree of articulation, specificity and clarity about the law that governs their proceedings.

The RUAA does not constitute a radical departure from existing New York arbitral law. As a general matter, the RUAA codifies what is already the law, often the law of New York. Furthermore, the

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[1] Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington.

changes that the RUAA does make to existing law are improvements that advance the underlying objectives of arbitration, helping to create a fair and efficient means of alternative dispute resolution.

For example, current New York arbitration law imposes certain limitations on the arbitration process that are unwarranted and are not to be found in the FAA or the RUAA. One such limitation derives from 1976 when the Court of Appeals ruled that arbitrators do not have the power to award punitive damages, even if the parties agree that they do. See Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976). Another is a pair of provisions (CPLR §§7502-03) that permit a party to avoid arbitration for disputes over statute of limitations issues. A third (CPLR §7513) forbids the award of attorneys' fees in arbitration, absent party agreement. These limitations place New York arbitration law in conflict with federal arbitration policy which, as expressed in the FAA, (1) holds that all such issues may be decided by an arbitrator, and (2) preempts such limitations of state arbitration law in all cases having even a slight link to interstate or foreign commerce. See Citizens Bank v. Alafabco, 539 U.S. 52 (2003). These conflicts between New York law and the FAA have spawned extensive litigation at all levels of the state and federal judiciary, as courts have tried to determine whether the parties should be deemed to have agreed to arbitrate under the restrictive rules of New York State or the broader rule of the FAA. The RUAA would eliminate these anomalies of New York law, ensuring that, if the parties have agreed to arbitrate "all disputes," all disputes will indeed be subject to arbitration, even if the parties have stated elsewhere in their agreement that arbitration will be "under New York law."

Adoption of the RUAA will also place New York in line with other jurisdictions that have adopted, or will adopt, the uniform act as their state arbitration law.

As noted, the Consensus Draft RUAA, as recommended by committees of state and local New York bar organizations for adoption in the state, is not entirely in the form of the RUAA as adopted by

NCCUSL. For the most part, the modifications retain valuable features of New York practice and are intended to maintain procedural consistency with other provisions of the CPLR. For example, the Consensus Draft RUAA, as modified for New York, applies New York's liberal rules governing appeal of court orders in general to those relating to arbitration. The proposed form of statute also preserves an important pro-arbitration provision contained in CPLR section 7503(c) that streamlines the commencement of arbitration and allows arbitrability issues to be decided early, a goal of the RUAA. It does so by authorizing a party to give notice of its intent to arbitrate, thereby imposing on a respondent a choice between allowing arbitration to proceed or commencing within 20 days (extended to 30 days in the Consensus Draft RUAA) an action in court to stay the arbitration. These amendments are of a kind not likely to interfere with the goal of uniformity of the RUAA.

Contributions by New York Bar Committees: Development of Consensus Draft

The process of revision of the UAA began with the appointment by NCCUSL of a Study Commission to look at areas in which the UAA might usefully be revised. After its report was issued in 1995, a Drafting Committee was appointed in 1997 to explore the issues raised in the report and draft a revised statute to propose to the full Commission. The NCCUSL Drafting Committee met eight times over three years. It produced a draft that was given a first reading by the full Commission in July, 1999, and a revised draft that received a second, and final, reading at the Commission's annual meeting in July, 2000, when the RUAA was adopted by NCCUSL.

The ABCNY Arbitration Committee monitored the drafting process from its inception, discussed a succession of drafts at committee meetings and conveyed comments to the Drafting Committee from time to time. In the spring of 2000 the Arbitration Committee issued a report urging NCCUSL to adopt the final draft of the RUAA.

After adoption of the RUAA by NCCUSL, in the fall of 2000, the NYSBA ADR Committee undertook a study of the RUAA that lasted over two years. Starting in September, 2001, members of the ADR Committee met regularly with representatives of the ABCNY Arbitration Committee to analyze the RUAA with a view toward its adoption by New York. The NYCLA Committee was also represented at those meetings.

Working together, the representatives of the several organizations (the Joint Committee) drafted several proposed amendments to the RUAA for enactment in New York (the 2003 Draft RUAA). In a report issued in June, 2003, the ADR Committee urged adoption of the 2003 Draft RUAA and, at the same time, provided a critical analysis of several sections of the RUAA (the ADR Committee Report). When it reviewed the 2003 Draft RUAA the ABCNY Arbitration Committee raised questions about several of the modifications that were being proposed by the Joint Committee and had been accepted by the ADR Committee.

The ADR Committee Report was circulated broadly within the NYSBA, and, in January, 2004, the NYSBA CPLR Committee issued its own report on the RUAA (the CPLR Committee Report). The CPLR Committee Report noted that the RUAA improved on the CPLR in a number of respects, but the report was critical of other RUAA provisions. The CPLR Committee's concerns were largely directed to aspects of arbitration law and practice in CPLR Article 75, but not in the RUAA, that were believed to be valuable and worthy of preservation.

With this background of general support for the RUAA but remaining specific substantive and drafting issues of concern, a new Joint Committee was created, with members from the ABCNY Arbitration Committee, the NYCLA Committee and the NYSBA ADR and CPLR Committees and its CFLS. The new Joint Committee set about resolving the differences between the respective

modifications to the RUAA that the ADR Committee and the Arbitration Committee had endorsed, and addressing the remaining concerns of the ADR Committee and those of the CPLR Committee -- as well as any remaining issues that may be perceived by any member of the Joint Committee.

The work of the new Joint Committee spanned seven months. It included several meetings, the exchange of numerous e-mails, and the consideration of a number of drafts. One focal point of discussion was on pre-arbitration procedures. As a result of those discussions the Joint Committee decided to retain the provision of CPLR §7503(c), referred to above, that provides for a Notice of Intention to Arbitrate, which enables a party to precipitate early decision of arbitrability issues. On the other hand, the Joint Committee decided not to adopt the mechanism of CPLR Sections 7502-03 that permits a party to have a judicial decision of statute of limitations issues in advance of arbitration even if its agreement purports to require arbitration of such issues. In addition to preemption problems, such a provision was thought to be inconsistent with the prevailing majority view and the philosophy of the RUAA to have all decisions, other than those concerning the existence of an enforceable agreement to arbitrate, made by the arbitrator in the absence of party agreement to the contrary.

The work of the new Joint Committee resulted in a Consensus Draft RUAA that is discussed in this Report and is being recommended for enactment in New York. In the Consensus Draft the Joint Committee succeeded in resolving the differences between the ADR Committee and the Arbitration Committee, addressed the concerns of the CPLR and ADR Committees and made additional improvements in the RUAA. The Consensus Draft also incorporates the provision in Section 7502(c), as amended in 2005, that brings New York law into conformity with the law elsewhere and permits courts of the state to provide interim relief in aid of arbitrations outside the state, as well as, within. The Consensus Draft has been endorsed by the Arbitration Committee, the ADR Committee, the CPLR Committee, and the CFLS, which all recommend support for its enactment in New York.

Benefit from Increased Clarity through Codification

Lawyers and parties to civil litigation in court benefit from the fact that in New York and other states the rules of civil procedure are spelled out in a thoroughly articulated code. Such a code reduces uncertainty, facilitates the adjudicative process, and helps assure fair and evenhanded application of the law.

The same considerations apply in arbitration. Parties have an interest in knowing what the arbitration law of a state is and how it will shape their arbitration. Indeed, having a detailed code is of particular benefit in arbitration, where the parties are not limited to applying the immutable rules that govern litigation in court but instead can shape the procedure to be used to resolve their specific disputes. Thus, the clarity that comes through codification facilitates the parties' determination of whether to choose arbitration as the means to resolve their disputes and what, if anything, they may wish to add to their contract to customize their proceedings rather than relying on the default provisions provided by state law. The benefits of the clarity derived from well-executed codification are particularly compelling in an arbitration context, which, because of the limitations on judicial review, does not generate a high volume of court decisions.

The RUAA provides an appropriate amount of structure without unduly constraining arbitration proceedings and without infringing unnecessarily on the rights of the parties to waive or change provisions that do not suit their purposes. Specifically, the RUAA brings the clarity of codification to a number of principles that are already tenets of New York case law. These include:

- The power of New York arbitrators to grant provisional remedies (RUAA Section 8(b)). We believe parties who agree to arbitrate future disputes should be able to obtain from the arbitration process at least the same remedies and protections that they could otherwise obtain from a court, including

provisional remedies such as attachment for security and preliminary injunction. Existing New York case law suggests that arbitrators already have such power. See Park City Assoc. v. Total Energy Leasing Corp., 58 A.D.2d 786, 396 N.Y.S.2d 377 (1st Dep't 1977). Although not unanimous, the strong consensus of the Joint Committee membership is that provisional remedies in arbitration have become widely accepted in the law and are an important feature of modern arbitration practice. The RUAA will explicitly recognize and codify the arbitrator's power to order interim relief and confirms the arbitrator's authority to alter or adjust a court order granting or rejecting an application for a provisional remedy once the arbitrator has undertaken his or her functions.

- The authority of the courts to consolidate related arbitrations in appropriate circumstances (RUAA Section 10). Such consolidation is permitted under New York case law, County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 397 N.Y.S.2d 371 (1977), and the RUAA will also codify this point, making consolidation possible in appropriate cases where the parties have agreed to arbitrate under New York law (or the law of another state that has adopted the RUAA).

- Arbitrator and arbitration organization immunity from civil liability (RUAA Section 14). Such immunity is widely accepted as appropriate and necessary to the process and is codified in the RUAA. See Richardson v. American Arbitration Assoc., 888 F. Supp. 604 (S.D.N.Y. 1995); Austern v. Chicago Board Options Exchange, Inc., 716 F. Supp. 121 (S.D.N.Y. 1989), aff'd, 898 F.2 882, 886 (2d Cir.), cert. denied, 498 U.S. 850 (1990); Seligman v. Allstate Ins. Co., 2003 WL 1092995 (N.Y. Sup.); Wally v. General Arbitration Council, 165 Misc. 2d 896, 898, 630 N.Y.S.2d 627 (S. Ct. N.Y. County. 1995), appeal dismissed, 241 A.D.2d 983, 660 N.Y.S.2d 978 (1st Dep't 1997); Candor Central School Dist. v. American Arbitration Ass'n, 97 Misc. 2d 267,411 N.Y. S.2d 162 (S. Ct., Tioga County. 1978); Rubenstein v. Otterbourg, Steindler, Houston & Rosen, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (Civ. Ct. N.Y. County 1973).

- Arbitrator freedom from compelled testimony (RUAA Section 14). The RUAA confirms arbitrator immunity from being compelled to testify about the substance of an award or in the absence of a showing of arbitrator wrongdoing. See Martin Weiner Co. v. Fred Freund Co., 2 A.D.2d 341, 155 N.Y.S.2d 802 (1st Dep't 1956), aff'd, 3 N.Y.2d 806, 144 N.E.2d 647, 166 N.Y.S.2d 7 (1957) (may not question arbitrator about process of arriving at decision or whether award reflects arbitrator's intention); Cavallaro v. Allstate Ins. Co., 124 A.D.2d 625; 507 N.Y.S.2d 886 (2nd Dep't 1986) (consideration of statements of arbitrator about intention or interpretation of award disapproved); Dahlke v. X-L-O Automotive Accessories, Inc., 40 A.D.2d 666; 337 N.Y.S.2d 86 (1st Dep't 1972) (not encourage post-award arbitrator affidavits); Temporary Commission of Investigation v. French, 68 A.D.2d 681; 418 N.Y.S.2d 774 (1st Dep't 1979) (arbitrator may not be questioned about factual or legal basis for decision, decision-making process or communications among arbitrators before or related to decision, and not about misconduct, illegality, fraud, corruption, bribery or other criminality without a minimal showing of evidence of same); Davis v. Esikoff, 105 Misc. 2d 955; 430 N.Y.S.2d 208 (S. Ct., N.Y. County 1980) (upholds questioning of arbitrator, limited to alleged arbitrator impropriety after preliminary showing of same).

- Arbitrator power to grant summary dispositions in appropriate circumstances (RUAA Section 15). Present law recognizes that some arbitration cases can be decided without an extended hearing, as where the facts are undisputed and only a question of law is presented, or where a "mini-hearing" may be sufficient to resolve a few disputed points. The RUAA would codify this authority. Goldman, Sachs & Co. v. Patel, N.Y.L.J. August 18, 1999 (S.Ct., N.Y. County) (claim for wrongful termination of at-will employee); see also, e.g., Sheldon v. Vermonty, 269 F. 3d 1202 (10th Cir. 2001) (motion to dismiss under NASD rules); Max Marx Color & Chemical Co. Employees' Profit Sharing Plan v. Barnes, Kemper Securities Group, Inc. 37 F. Supp. 2d 248 (S.D.N.Y. 1999) (same).

There was considerable discussion within the Joint Committee about whether a specific standard for summary disposition should be adopted, e.g., that in FRCP 56. It was ultimately concluded, however, that setting a specific standard was incompatible with the broad arbitrator power to conduct an arbitration "in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding" (RUAA Section 15(a)), and that an arbitrator's freedom to dispose of issues without hearing is very much constrained by the opportunity for an aggrieved party to get an award vacated (1) on the basis of an arbitrator's refusal "to consider evidence pertinent and material to the controversy" (Section 23(a)(3)), or (2) on the basis of an arbitrator's "manifest disregard" of a party's right to present evidence if there is a genuine issue of fact. See Neary v. Prudential Ins. Co., 63 F. Supp. 2d 208 (D. Conn. 1999).

- Arbitrator power to impose sanctions RUAA (Section 17(d)). Such power is recognized under existing case law. Credit Suisse First Boston Corp. v. Patel, N.Y.L.J. August 18, 1999 (S. Ct., N.Y. County); see also Asia 2000 PTE Ltd v. Oceana Petrochemicals AG, 373 F Supp. 2d 370 (S.D.N.Y. 2005) (under FAA and AAA rules upholding sanction against party but not against attorney).

Positive Changes to New York Law in RUAA

Despite some differences in format, the RUAA has relatively few provisions that would substantively alter New York law. In some instances the existing provisions of New York law are already preempted by federal arbitration law. In any case, where the RUAA would effect changes in New York law, the changes would be positive developments. They include:

- Waiveability (RUAA Section 4). The RUAA pulls together, in one section, in a comprehensive, systematic way, information about which of its provisions can be waived or modified by the parties. While some joint Committee members would have preferred such information to be contained in individual substantive provisions, generally it was felt that the RUAA approach was sound,

having the advantage for arbitration-clause drafters of having all waiver information in one place. It was also felt that Section 4 properly preserves party autonomy in most cases and departs from it only where necessary, and that Section 4 is a distinct improvement over the sketchy treatment of waiver in CPLR Article 75.

- Arbitrator Decision of Limitations Issues (RUAA Section 6). Consistent with the majority rule in the United States, the RUAA changes the law of New York and assigns to the arbitrator the task of deciding the question of whether a claim is barred by a statute of limitations. It thus removes the license that Article 75 gives to a party to have that decision made by a Court, even in the face of an agreement to the contrary. Finally, the RUAA does not contain the license in the CPLR for an arbitrator to disregard the statute of limitations entirely in those instances in which it is left the arbitrator to decide whether a proceeding is time-barred.

- Arbitrator disclosures (Section 12). The RUAA requires disclosures of interests and relationships by both neutral and non-neutral arbitrators, whether or not party-appointed.

- Discovery (Section 17). The RUAA creates a statutory scheme for limited discovery in arbitration, and streamlines the procedures for obtaining discovery from out-of-state nonparties.

- Punitive damages with safeguards (Sections 21(a), (e). The RUAA allows punitive damages but imposes important procedural safeguards for such awards. Currently under New York case law, arbitrators do not have the power to award punitive damages, regardless of the parities' wishes. See Garrity v. Lyle Stuart, Inc., supra, 40 N.Y.2d. 354, 386 N.Y.S.2d 831 (1976). Pursuant to federal law, however, for transactions touching on commerce (defined broadly), arbitrators do have the power to award punitive damages, under the rules typically adopted by the parties (e.g., AAA, JAMS, NASD). See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

Thus, for the limited number of cases in which New York law applies, the narrow New York rule raises the problem of arbitrators in the state who are unable to provide as full relief as would be available in court in the same circumstances. On the other hand, for the great majority of cases in which federal law applies, the permissive federal rule raises a concern about the prudence of permitting such extensive power to be wielded in arbitration, where judicial review of an award is much more limited than that received by a jury verdict or a trial-judge decision.

The RUAA strikes a balance between these competing concerns. It provides arbitrators with the power to award punitive damages but includes safeguards regarding the use of that power to avoid misuse. Thus, Section 21(a) of the RUAA requires that any award of punitive damages be authorized by the law that would control such damages if awarded in court, and that it be supported by the factual and legal bases required in court. Section 21(e) requires an award of punitive damages to contain a written specification of the factual and legal bases for the award.

RUAA Section 4(a) permits waiver of the remedy of punitive damages "to the extent permitted by law." A concern has been expressed about the fairness of permitting such a waiver in circumstances of unequal bargaining power and contracts of adhesion. However, under current federal law, parties have the power to waive such damages. It is believed that interference with the parties' right to deal with punitive damages as they wish -- where there is no corresponding limitation imposed as to proceedings in court -- would violate the FAA and be preempted. See Mastrobuono, supra, 514 U.S. at 59.

- Attorney's fees without party agreement (Section 21(b)). The RUAA allows award of attorneys' fees in arbitration wherever they are permitted in court, which includes where they are provided for by statute. Current New York law (CPLR §7513) permits attorneys' fees to be awarded only

where there is agreement of the parties that they may be awarded.

Preserving Valuable New York Practices

A number of changes to the RUAA are proposed by the Joint Committee in its Consensus Draft. Most of them are designed to preserve the best aspects of New York's existing arbitration law. The changes include:

- Attorney representation (RUAA Section 4; CPLR 7506(d)). The CPLR prohibition of post-dispute agreement to waive the right to representation by an attorney is added to the prohibition contained in RUAA Section 4 of pre-dispute agreement to waive representation. Of course, the proposed statutory provision in the Consensus Draft, like the current one in the CPLR, merely bars an agreement to waive representation. It does not require a party to engage counsel and does not preclude a party from self-representation.

- Notice of Intention to Arbitrate (RUAA Section 5; CPLR 7503(c)). As noted above, it has been decided to retain the Notice-of-Intention-to-Arbitrate mechanism that permits a party to have arbitrability issues decided early in a proceeding, but with a longer, 30-day, response time.

- Court Provision of Preliminary Relief in Aid of Arbitration (RUAA Section 8(a); CPLR 7502(c). The Consensus Draft RUAA adopts most of the language of CPLR Section 7502(c), which deals with the power of the courts of the State to provide interim relief in aid of arbitration. The provision includes a 2005 amendment that brought New York law into conformity with the law elsewhere. The amendment permits the courts to provide interim relief in aid of arbitrations outside, as well as those within, the State. In one respect, however, RUAA Section 8(a) changes -- and improves on -- the amended CPLR Section 7502(c) by eliminating the phrase "arbitrable controversy." The change is intended to foreclose reliance on the phrase to try to block or delay a meritorious application for interim

relief that would be needed whether a case were ultimately to be heard on the merits in court or in arbitration. As drafted, RUAA Section 8(a) is also intended to be consistent with cases interpreting the prior language of CPLR 7502(c), such as S.G. Cowen Corp. v. Messih, 224 F.3d 79 (2nd Cir. 2000), and In re Cullman Ventures v. Conk, 252 A.D.2d 222 (1st Dep't 1998), which have held that a party in arbitration who seeks provisional relief from a court must show both that it is entitled to that relief under the ordinary legal principles applicable in a civil action and that an eventual arbitration award might be rendered ineffectual if the court failed to grant the relief.

- Hearing notice (RUAA Section 15(c); CPLR 7506(b)). The traditional New York 8-day notice of hearing has been preserved in lieu of the shorter notice originally provided in the RUAA.

- Attorney subpoenas (RUAA Section 17(a); CPLR 7505). The right of attorneys to issue subpoenas in arbitration is preserved.

- Confirmation time limit (RUAA Section 22(a); CPLR 7510). The traditional 1-year time limit for seeking confirmation of an arbitral award is preserved.

- Venue (RUAA Section 27; CPLR 7502(a)). The venue provision, with which New York practitioners are already familiar, is preserved.

- Appeal of court orders related to arbitration (RUAA Section 28(a); CPLR Art. 57). The right to appeal all judicial decisions, including those related to arbitration, is preserved.

Other Positive Changes in Modifications for New York

The Consensus Draft contains additional beneficial changes to the original RUAA that do not involve existing New York practices. They include:

- Clarification of the limit on parties' right to modify grounds for vacatur (Section 4). The Consensus Draft removes an inconsistency between the text of the RUAA and the related Official Comment. The result is to clarify that parties may modify the grounds for vacatur only by enlargement of them not by narrowing them.

- Assignment of decision-making in absence of party agreement (Sections 6, 7). The Consensus Draft clarifies the matter of which issues are to be decided by the court, and which by the arbitrator, absent party agreement.

- Avoidance of duplication of proof where fair (Section 15). Provision is made for use of the existing record where fair, in case of the death or indisposition of an arbitrator.

- Judicial review of interim decisions (Section 18(a)). The right to judicial review of an order by an arbitrator, denying a provisional remedy, is provided for in addition to the right already contained in the RUAA for review of an order granting such relief.

- Judicial Review of Punitive damages (Section 23(a)(7)). The Consensus Draft contains a separate provision for review of an award of punitive damages. The provision requires that a reviewing court vacate an award of punitive damages that does not fulfill the requirements of Section 21(a) and (e). The addition of this provision to Section 23 prompted a strong dissent within the Arbitration Committee (attached to the Arbitration Committee version of this Report) on the ground that it imposes an unwarranted inhibition on the award of punitive damages. The prevailing view, however, was that a difference in treatment of punitive damages on review was required to meet expectations arising from the different language for the requirements for punitive-damage awards used in Section 21.

Limitation Imposed by Preemption on Special Protection for Consumers

The proponents of the Consensus Draft RUAA believe that the proposed statute does not favor any class of parties in arbitration and that it provides clear, fair arbitration rules for all users of arbitration in New York. However, some have expressed a concern that the RUAA does not provide special protections for consumers against fine-print arbitration clauses that might attempt to tilt the process in favor of powerful commercial organizations.

The Joint Committee believes that such issues cannot be effectively addressed in a state arbitration statute, such as the RUAA, because federal arbitration policy, as expressed in the FAA, preempts state law that would discriminate against agreements to arbitrate or impose any limitations on such agreements that are not applicable to commercial agreements generally. Thus the United States Supreme Court has struck down state arbitration statutes that sought (1) to protect employees and franchisees by excusing them from carrying out their agreements to arbitrate, or (2) to impose requirements on arbitration clauses not required for other contracts. See Perry v. Thomas, 482 U.S. 483 (1987) (employee arbitration); Southland Corp. v. Keating, 465 U.S. 1 (1984) (franchise arbitration); Doctors Associates v. Casarotto, U.S. 681 (1996) (large print requirement).

New York State has already enacted two statutes that purport to protect certain types of parties from so-called "binding" or "mandatory" arbitration. One is Section 55-c(7)(b) of the New York Alcoholic Beverage Law which states in pertinent part that "No brewer or beer wholesaler may impose binding arbitration of any issue as an [sic] term or condition of an agreement." This provision was recently found to have been preempted by the FAA. See Ryan v. Molson, 2005 WL 2977767 (E.D.N.Y.).

In the other statute the New York Legislature has addressed the question of protection of consumers in arbitration. Enacted in 1984, Section 399-c of the General Business Law prohibits contracts for the sale or purchase of consumer goods from requiring submission of future controversies to arbitration in which a decision applicable to a consumer would not be subject to court review. Thus, if consumers in New York need statutory protection from arbitration, and the state has the power to provide it, the protection has been provided in Section 399-c.

Section 399-c has been the subject of litigation, but it has not been the target of an argument urging preemption. See, e.g., Ragucci v. Professional Construction Services, 803 N.Y.S. 2d 139 (2d Dep't 2005) (contract to provide architectural services held to be contract for sale or purchase of consumer goods). If tested in the courts under the FAA, Section 399-c would probably be subject to preemption, like Section 55-c(7)(b) of the Alcoholic Beverage Laws. The same fate would likely befall the RUAA if it were to have added to it special limitations for consumer arbitration agreements not applicable to contracts in general. At the least, such a provision would be likely to subject users of the RUAA to litigation over its validity.

In any case, consumers can be protected from unfairness in arbitration without violation of the FAA. There is a proper way to provide such protection. The FAA does not prohibit a state from protecting consumers in arbitration with laws derived from general principles of unconscionability applicable to all commercial agreements, not just to arbitration agreements. See, e.g., Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Ingle v. Circuit City Stores, 328 F.3d 1165 (9th Cir. 2003). The FAA would not preempt a statutory enactment that does not treat arbitration as an evil unto itself, but rather addresses unfairness in dispute resolution in general and is applicable both to

arbitration and to litigation in court. However, the place for such a provision is not a state arbitration statute like the RUAA.

Other Arbitration Issues

The ADR Committee's support of the Consensus Draft RUAA is not conditioned on study of other issues related to arbitration. However, at the time of the June 2003 Report a majority of members of the ADR Committee held the view that, if New York were to adopt the RUAA, it should appoint a task force to look into several additional arbitration issues, such as the licensing of arbitrators and arbitrator ethics. Although a majority of ADR Committee members still believe that other arbitration issues warrant study, most members now believe that the RUAA merits passage on its own. It should also be noted (1) that the arbitration process has functioned effectively for a very long time without licensing of arbitrators, and (2) that the matter of arbitrator ethics has been recently and extensively studied, and the 1977 Code of Arbitrator Ethics has been recently updated.

Conclusion and Recommendations

The NCCUSL Drafting Committee was an able, experienced group, which understood the need to make arbitration a simpler, more uniform process throughout the United States, to fulfill the promise of speedy and efficient resolution of disputes, without need for endless litigation over conflicts between arbitration laws of different states or between federal and state arbitration law. They created a carefully-considered, quality product that has been further improved by the work of a knowledgeable group of New York lawyers who have been sensitive to New York's historic contribution to the arbitration process.

New York assumed a leadership role in arbitration at least by 1920 when it led the U.S. in throwing off the mistrust of arbitration that it had inherited from England, where the courts had rendered pre-dispute arbitration agreements unenforceable. New York has continued as the focal point of

arbitration practice ever since. The State has, once again, the opportunity to make an important difference in the development of arbitration in the U.S.

New York should be commended for its recent passage of an amendment to CPLR Section 7502(c) to bring it into conformity with virtually all other jurisdictions as to the authority of its courts to order interim relief in aid of international, as well as, domestic arbitrations. Now the State can again further the cause of uniformity--and at the same time the upgrading of arbitration procedures across the country -- by leading the way and swiftly passing the RUAA Consensus Draft.

A united New York Bar should now move forward to support enactment of the Consensus Draft RUAA in the State of New York.