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REPORT ON LEGISLATION

NEW YORK CITY BAR ASSOCIATION

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S4148
A7826

Senator Volker
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AN ACT to amend the civil practice law and rules, the administrative code of the city of New York, the New York city civil court act, the general business law, the uniform district court act, the labor law, the education law and the executive law, in relation to arbitration proceedings and to repeal article 75 of the civil practice law and rules relating thereto.

THIS BILL IS APPROVED

The New York City Bar Association strongly endorses and supports passage of the Revised Uniform Arbitration Act (RUAA) in New York (NY) State.

Immediate Problem: Adoption of the RUAA, as embodied in Senate Bill 4148 and Assembly Bill 7826, would remedy serious flaws in our State's present arbitration law, CPLR Art. 75 and related case law.[1]

When acting under present state law the arbitrator sitting in NY lacks authority under that law to decide important issues that could be decided by a civil court or by an arbitrator acting under the Federal Arbitration Act (FAA). Thus, the arbitrator acting under NY state arbitration law may not be able to decide a party's contention regarding application of the statute of limitations (a party may require the issue to be referred to court), cannot decide a claim for punitive damages (even if the parties have agreed to refer the issue to arbitration), cannot make an award of attorneys' fees (unless the parties have specifically agreed to such an award), cannot decide issues of antitrust or competition law, cannot decide the application of human-rights-related statutes, and

[1] The accompanying Bill (S4148 & A7826) would replace the existing CPLR Art. 75, adopting a new numbering system in the same 7501 series.

cannot decide other matters which are deemed related to public policy, even though the parties have agreed that all disputes related to their commercial contract shall be decided in arbitration.

In current practice there may be substantial uncertainty as to whether these limitations or any other provisions of NY state arbitration law apply when the arbitration arises in a transaction that may be considered to be linked to interstate commerce, since the FAA applies at least in part to such arbitrations, and the pertinent case law clearly establishes that under the FAA the arbitrator does have authority to decide all such issues. For purposes of FAA arbitration, the scope of interstate commerce is deemed very broad, as the U.S. Supreme Court has said that it encompasses all transactions that Congress would have power to regulate under the commerce clause. [2] Thus, the U.S. Supreme Court summarily reversed the NY Appellate Division, First Department, which had held that a contract for management of Manhattan real estate did not involve interstate commerce for purposes of federal arbitration law.[3] However, under other U.S. Supreme Court rulings[4], parties can choose to have state law apply to their arbitration, a choice that would also import the limitations on arbitrator power that are built into the chosen state law.

This situation has led to embroilment of NY arbitrations in considerable litigation that has spoiled the process for the parties and brought only more uncertainty, with case law turning on fine distinctions no doubt not actually intended by the parties. For example, under rulings by NY's Court of Appeals, parties calling for the application of NY law to their commercial agreement will get federal arbitration law applied to their arbitration proceedings, unless they specify that state "arbitration" law is to apply or that state law is to apply to the "enforcement" of the agreement, enforcement being deemed to include arbitration.[5]

Solution – the Proposed Bill: The RUAA would avoid such problems, as it was drafted to be consistent with, but substantially more detailed and comprehensive than, the FAA. The hallmark of the RUAA is to bring more certainty to arbitration, to fill in the gaps in the very general and skeletal FAA and provide a uniform scheme for arbitration across the board, subject, of course, to the parties' general right to adopt differing arrangements, which is enshrined in the FAA itself, and recognized in the RUAA.

Historical Background: In urging enactment of the RUAA, bar groups have recognized that NY's existing law, CPLR Article 75, is in fact a venerable, pioneering enactment whose original version was adopted in 1920 and reflected NY's historic leadership in this field, dating back to the early Nineteenth Century with the use of

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[2] See Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003).

[3] See Wien & Malkin LLP v. Helmsley-Spear, Inc., 300 A.D. 2d 37, 751 N.Y.S.2d 421 (1st Dep't 2002), vacated and remanded, 540 U.S. 801 (2003); subsequent decision in same case, 6 N.Y.3d 471, 813 N.Y.S.2d 691 (2006).

[4] See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 409 U.S. 468 (1989).

[5] See Smith Barney Shearson Inc. v. Sacharow, 91 N.Y. 2d 39 (1997); Diamond Waterproofing Sys. Inc. v. 55 Liberty Owners Corp. 4 N.Y. 3d 247 (2005).

arbitration to resolve disputes at the NY Stock Exchange. NY's 1920 statute became the model for the FAA, adopted by Congress in 1925.

The FAA, in turn, became the model for the original Uniform Arbitration Act (UAA), adopted by the Conference of Commissioners on Uniform State Laws (NCCUSL) in 1955. NY never enacted the UAA, although its law had similarities, it having been the starting point for the whole legislative process. But, since 1955, developing case law under the FAA has moved on, affirming a broader federal policy in favor of arbitration than the NY legislature apparently had contemplated in its pioneering enactment in 1920. And now uniform arbitration law as enacted by the states is also moving on. There is an RUAA, and it has been adopted by twelve states. While it is not a radical departure from existing law, it is a distinct improvement, designed to be consistent with federal law. In this Bill, it has also been modified to preserve some aspects of NY arbitration law and practice that were and are exemplary.

Most importantly, the RUAA draws on the experience of state and federal courts since 1920 and fills in and codifies the details. In this way it eliminates the aura of uncertainty that has been a traditional problem with arbitration, deterring some from using it in the past.

Codification:. Thus the RUAA makes explicit a number of principles that had already been asserted in NY case law but remained uncertain since they are not explicitly mentioned in the statute:

- Arbitrator power to grant provisional remedies;[6]
- Judicial authority to consolidate separate arbitration proceedings, originally provided for in the Civil Practice Act;[7]
- Immunity of arbitrators[8] and arbitration providers,[9] such as the AAA, from damage suits by disgruntled parties;

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[6] Park City Assoc. v. Total Energy Leasing Corp., 58 A.D.2d 786, 396 N.Y.S.2d 377 (1st Dep't 1977).

[7] County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 397 N.Y.S.2d 371 (1977).

[8] Seligman v. Allstate Ins. Co., 195 Misc. 2d 553, 756 N.Y.S.2d 403 (S. Ct. Nassau Cty. 2003) (arbitrator's award may be vacated if failure to disclose pertinent information relating to bias; however, arbitrator and arbitral organization that appointed arbitrator immune from claims of civil liability); Rubenstein v. Otterbourg, Steindler, Houston & Rosen, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (Civ. Ct. NY Cty. 1973) (summary judgment motions by arbitrator and association granted; association and arbitrator immune from liability for conduct while conducting judicial-type proceedings).

[9] Seligman v. Allstate Ins. Co., 195 Misc. 2d 553, 756 N.Y.S.2d 403 (S. Ct. Nassau Cty. 2003) (arbitrator's award may be vacated if failure to disclose pertinent information relating to bias; however, arbitrator and arbitral organization that appointed arbitrator immune from claims of civil liability); Wally v. General Arbitration Council, 165 Misc. 2d 896, 630 N.Y.S.2d 627 (S. Ct. N.Y. Cty. 1995), appeal dismissed, 241 A.D.2d 983, 660 N.Y.S.2d 978 (1st Dep't 1997) (under FAA arbitration council immune from civil liability for arbitrator's performance); Austern v. Chicago Board Options Exchange, Inc., 716 F. Supp. 121 (S.D.N.Y. 1989), aff'd, 898 F.2 882 (2d Cir.), cert. denied, 498 U.S. 850 (1990) (arbitration organization's motion to dismiss granted; organization's acts protected by qasi-judicial immunity; grounds for challenging award provided in FAA); Richardson v. American Arbitration Assoc., 888 F. Supp. 604 (S.D.N.Y. 1995) (organizations such as association that administered arbitration immune from suit); Rubenstein v. Otterbourg, Steindler, Houston & Rosen, 78 Misc. 2d 376, 357 N.Y.S.2d 62 (Civ. Ct. NY Cty. 1973) (summary judgment motions by arbitrator and association granted; association and arbitrator immune from

- Arbitrators incompetence to testify in court about their decisions unless prima facie showing of impropriety;[10]
- Arbitrator power to grant summary dispositions;[11] and
- Arbitrator power to impose sanctions.[12]

Improvements: In some other respects, the RUAA adopts specific improvements where existing law is silent or enigmatic. Thus, the RUAA requires arbitrators to disclose conflicts (new CPLR §7512). It makes explicit the fact of discovery in modern arbitration and restricts its bounds (see new CPLR §7517). It removes a license given to arbitrators by current CPLR §7502(b) to ignore the statute of limitations when the parties have allowed this issue to be decided by the arbitrator. And it removes a limitation on the award of attorneys' fees imposed by current CPLR §7513 on arbitrators but not on the courts.

The RUAA grants to NY arbitrators the power to award punitive damages that current NY law would deny them.[13] However, recognizing the limited review that arbitration awards receive in the courts, the RUAA provision on punitive damages contains limitations to safeguard against abuse (see new CPLR §7521), including a stricter standard for judicial review, which was added as a New York modification (new CPLR §7523(a)(7)).

The RUAA in new CPLR §7504 deals with the issue of which of the RUAA's provisions can be waived or modified by the parties. Existing CPLR Article 75 also touches on the subject and forbids waiver of several provisions, such as the right to apply for a stay of arbitration (current CPLR §7503(c)) – which new CPLR §7504(c) also protects. But the existing CPLR deals with the issue of waiver in an anecdotal, almost random way, while the RUAA deals with it comprehensively and systematically, preserving party autonomy – the parties' right to shape their own procedure -- to the maximum, consistent with ensuring a minimum of structure and fairness.

Preservation of NY Law: The RUAA as proposed for enactment in NY has been adapted to comport with NY practice, to bring additional clarity and to preserve a unique, pro-arbitration provision (current CPLR §7503(c); new CPLR §7505(c) -- notice of intent to arbitrate), which goes beyond the FAA and the RUAA as adopted by NCCUSL and requires a party wishing to resist arbitration to come forward early on to get its objections resolved.

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liability for conduct while conducting judicial-type proceedings); cf. Candor Central School Dist. v. American Arbitration Ass'n, 97 Misc. 2d 267, 411 N.Y. S.2d 162 (S. Ct., Tioga Cty. 1978) (motion to stay arbitration denied; parties bound by AAA rules which provided that AAA not necessary party to litigation between parties).

[10] Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003).

[11] Goldman, Sachs & Co. v. Patel, N.Y.L.J. August 18, 1999 (S. Ct., N.Y. Cty.) (claim for wrongful termination of at-will employee).

[12] Credit Suisse First Boston Corp. v. Patel, N.Y.L.J. August 18, 1999 (S. Ct., N.Y. Cty.).

[13] See Garrity v. Lyle Stewart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

Conclusion & Recommendation: At present, arbitration in NY State is often not the relatively fast, cost-effective, alternative means for resolving disputes that it can and should be. Instead of providing a comparable alternative to the judicial process, the state's arbitration system does not provide some of the important remedies available in court. Instead of providing a process free from the over-burdened judicial system, parties to arbitration in NY often find themselves embroiled in litigation about the arbitration itself, giving parties who choose arbitration the worst of both worlds -- the need to engage in both arbitration and litigation to resolve their dispute.

The RUAA will bring more certainty to arbitration by bringing NY state law into consistency with the FAA, by codifying the law and by making the new law consistent state to state. The NY City Bar Association strongly recommends enactment of the RUAA by NY, which will also restore the State to its traditional leadership role in the field.