Study A-100 January 25, 2006

Memorandum 2006-6

Contractual Arbitration Improvements from Other Jurisdictions (Working Group Results)

As directed by the Commission, the staff recently convened a half-day meeting of arbitration stakeholders. The purpose of the meeting was to explore whether there are areas of the law relating to contractual arbitration that the Commission could productively study, with a reasonable likelihood of developing reforms that would be enacted and benefit the public. This memorandum discusses the results of the meeting. The following comments were submitted before the meeting:

Exhibit p.

- Roger Haydock & John Horn, National Arbitration Forum (11/30/05) 1
- Richard Holober, Consumer Federation of California (12/5/05) 3
- James Madison, California Dispute Resolution Council (11/29/05) 4
- Nancy Peverini, Consumer Attorneys of California (11/30/05) 7
- Cliff Palefsky, California Employment Lawyers Association (12/2/05) 8
- John Sullivan, Civil Justice Association of California (11/30/05) 9

The Commission needs to decide whether to proceed with its study of contractual arbitration.

BACKGROUND

The California Arbitration Act (Code Civ. Proc. §§ 1280 *et seq.*) was enacted in 1961 on recommendation of the Commission. The Act has been repeatedly amended and much new material has been added since it was enacted. Of the sixty-seven provisions governing contractual arbitration generally, however, forty have not been changed since they were adopted in 1961. Arbitration has remained on the Commission's calendar of topics, so that the Commission would have authority to make any needed adjustments in the law.

In 2000, the Commission decided to study whether to modernize and improve the California Arbitration Act. The Commission hired Prof. Roger Alford of Pepperdine University School of Law to prepare a background study.

Prof's Alford's report compares the California Arbitration Act with the Revised Uniform Arbitration Act ("RUAA") and makes recommendations regarding which provisions of the RUAA should be adopted in California and which provisions of the California Arbitration Act should be retained. See Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2004). The Commission circulated Prof. Alford's report for comment and posted it to the Commission's website.

The comments on Prof. Alford's report were mixed. Some organizations expressed support for studying the RUAA as proposed, but several consumer-oriented groups voiced strong objections. See Memorandum 2005-13.

At a meeting in early 2005, the Commission considered Prof. Alford's report, the comments, a staff memorandum discussing the comments, and testimony on behalf of several organizations. It was clear from the testimony and comments that the area is controversial and thus might be difficult for the Commission to effectively study. The Commission directed the staff to convene a half-day meeting with stakeholders to explore whether there are areas of the law relating to contractual arbitration that the Commission could productively study, without getting entangled in intense stakeholder disputes. The Commission also concluded that "it would not be productive for the Commission to pursue anything that would dampen the protections that have been developed under case law for particular kinds of arbitrations." Minutes (March 2005), p. 4.

To ensure good participation, the staff delayed the stakeholder meeting until after the Legislature recessed and the Governor acted on the bills sent to him for approval.

MEETING ATTENDEES AND PROCEDURE

The stakeholder meeting was held on January 5, 2006, in Sacramento. All invitees were given an opportunity to submit written comments before the meeting, and to respond to comments submitted by other invitees. To keep the meeting manageable and foster productive discussion, invitees were informed in advance that participation was limited to one person per stakeholder organization. The following people attended the meeting:

Prof. Roger Alford, Pepperdine Law School
Heather Anderson, Administrative Office of the Courts
Saul Bercovitch, State Bar of California
Donne Brownsey, JAMS

JoAnn Bettencourt, Securities Industry Association
Barbara Gaal, California Law Revision Commission
Gail Hillebrand, Consumers Union
John Horn, National Arbitration Forum
Dwight James, American Arbitration Association
James Madison, California Dispute Resolution Council
Nancy Peverini, Consumer Attorneys of California ("CAOC")
Kim Stone, Civil Justice Association of California ("CJAC")

Gordon Ownby, a CJAC board member and General Counsel of the Cooperative of American Physicians, Inc., also attended the meeting but offered to refrain from comment on being informed of the limitation to one person per stakeholder organization. As it turned out, there was ample time for all persons present to express their views at the meeting, including Mr. Ownby.

The following people were invited but did not attend the meeting:

Kevin Baker, Counsel, Assembly Judiciary Committee
Albert Balingit, Department of Consumer Affairs
Jamie Court, Foundation for Taxpayer and Consumer Rights
Richard Holober, Consumer Federation of California
Cliff Palefsky, California Employment Lawyers Association ("CELA")
Frederick Pownall, National Association of Securities Dealers; New York Stock Exchange
Gene Wong, Chief Counsel, Senate Judiciary Committee
Prof. Maureen Weston, Pepperdine Law School

Although CELA and the Consumer Federation of California did not send anyone to attend the meeting, they did submit written comments. See Exhibit pp. 3, 8.

At the start of the meeting, the participants introduced themselves, said who they represented, and briefly described their backgrounds. The staff then presented background information on the Commission (structure and duties, types of projects, normal study process, success rate, workload, and resources) and its study of contractual arbitration. The staff also explained that the purpose of the meeting was to try to identify areas of contractual arbitration in which the Commission could work productively. The staff assured the participants that the goal was not to reach any substantive decision regarding arbitration. The staff further explained that the Commission would not decide what to do about its arbitration study until its February meeting.

INITIAL POSITION OF EACH PARTICIPANT

After the introductory remarks, each participant was given an opportunity to speak about:

- Should the Commission should go forward with its study of contractual arbitration?
- If so, what area(s) should the Commission study?
- If not, why should the Commission discontinue the study? Should the Commission resume the study at a later time?

At that time, the participants expressed the following views:

No Specific Suggestions and No Position on Whether the Commission Should Study Contractual Arbitration

Heather Anderson of the Administrative Office of the Courts stated that the Judicial Council takes no position on the Commission's study of contractual arbitration. Likewise, Saul Bercovitch said that the State Bar of California and State Bar groups he staffs are neutral on whether the Commission should proceed with its study. He explained that the State Bar Committee on Alternative Dispute Resolution would be happy to examine any concrete, noncontroversial proposal the Commission is able to develop, but the group recognizes that political controversy surrounds virtually all matters relating to alternative dispute resolution.

Similarly, Donne Brownsey stated that JAMS neither favors nor opposes having the Commission study contractual arbitration. Joanne Bettencourt took the same position on behalf of the Securities Industry Association, but expressed her personal view that it probably is better to deal with arbitration issues in the Legislature. Dwight James of the American Arbitration Association said his organization had no agenda with regard to the Commission study, no ax to grind, and no issue to suggest for Commission consideration.

Specific Suggestions But No Position on Whether the Commission Should Study Contractual Arbitration

A few participants offered specific ideas regarding improvement of arbitration law.

John Horn, Western Regional Director of the National Arbitration Forum, pointed out that there is no statutory definition of "consumer" for purposes of the reporting requirements that apply to a private arbitration company with regard to consumer arbitrations. He said that the lack of such a definition creates

difficulty for a private arbitration company trying to comply with the requirements. He also observed that failure to comply with the requirements can be invoked as grounds for vacating an arbitration award. Consequently, the statutory requirements need to be clear and unambiguous. According to Mr. Horn, however, a recent study by the California Dispute Resolution Institute ("CDRI") found that reports vary considerably and are not useful. See CDRI, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure, (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_Aug_6.pdf. Mr. Horn urged that the requirements be revised to make them useful.

Mr. Horn also made some other points in written comments submitted before the stakeholder meeting, but he did not pursue any of those points at the meeting. See Exhibit p. 2. After hearing the views of other participants, he reiterated the need for clarification of the special reporting requirements applicable to consumer arbitrations. But he said that NAF has no preference regarding the proper forum for that work.

On behalf of the California Dispute Resolution Council ("CDRC"), James Madison submitted a letter before the stakeholder meeting in which he suggested several potential areas for study. Like Mr. Horn, he suggested clarifying the reporting requirements that apply to a private arbitration company with regard to consumer arbitrations. Exhibit p. 5. Mr. Madison also suggested examining the following areas:

- Arbitrator immunity.
- Participation of out-of-state counsel in an arbitration held in California.
- Timetable for disqualification of an arbitrator based on a supplemental conflict-of-interest disclosure.
- Definition of "neutral arbitrator" in Code of Civil Procedure Section 1280(d).
- RUAA.

Exhibit pp. 4-6.

At the stakeholder meeting, Mr. Madison made clear that CDRC was not advocating for or against a Commission study of contractual arbitration. He explained that if the Commission decides to go forward with its study, CDRC is available to assist in the study and would like the Commission to examine the ideas discussed in his written comments.

Mr. Madison also said that he considers the California Arbitration Act to be ahead of the RUAA in most respects. He suggested, however, that some aspects of the RUAA might be worth adopting here. In particular, he mentioned the RUAA's treatment of electronic filing and other new technology.

Prof. Alford expressed similar sentiments about the RUAA. He believes that California is "ahead of the game" with regard to consumer arbitrations. Thus, his report for the Commission proposes to retain California's special provisions for consumer arbitration, except the arbitrator disclosure provisions (which he considers excessively demanding). In his view, a lot of the RUAA is general cleanup. He said he has no opinion on whether the Commission would be the best forum for consideration of the RUAA, but he thinks the RUAA should be considered for adoption in some form in California. His impression is that the RUAA has not been very controversial in the states that have adopted it. He suggested talking with people who are familiar with what happened in the legislative process in those states.

Opposition to a Commission Study of Contractual Arbitration

Several participants expressed firm opposition to having the Commission study contractual arbitration.

On behalf of CAOC, Nancy Peverini commented that the area is controversial. Due to the Commission's limited staff and budget, CAOC does not think the Commission is the appropriate body to study the area. Rather, CAOC believes that the Legislature and the Judicial Council (which adopted the current Ethics Standards for Neutral Arbitrators pursuant to statutory directive) are more appropriate forums for debate over arbitration issues. In particular, Ms. Peverini pointed out that CAOC strongly opposes predispute binding arbitration in the consumer context. CAOC has taken that battle to the Legislature.

Gail Hillebrand of Consumers Union expressed similar views. Although she has deep respect for the Commission's work, she thinks the Commission does best when stakeholders agree that a problem exists and agree on the nature of the problem. With regard to arbitration, the stakeholders do not agree on these points.

Ms. Hillebrand also said that the area is highly controversial and it would be hard to carve out a narrower subset of less controversial issues. She predicted that if the Commission attempted to do this, stakeholders would respond by saying "The real problem is X," or "The real problem is Y," or "The real problem is Z."

Ms. Hillebrand further noted that the Commission is well-suited to updating a statute that has been static and needs to be revised to reflect modern conditions. The California Arbitration Act does not fall into that category; the Legislature has extensively tinkered with it over the years.

In short, Consumers Union takes the position that studying arbitration would not be the best use of the Commission's time. If the Commission proceeds with such a study, Consumers Union urges that

- The Commission needs a background study on *consumer* arbitration.
- There should be no dampening of the protections that have been developed under case law *or statute* for particular kinds of arbitrations.
- The existing arbitrator disclosure standards are very important and should not be weakened.

In written comments, two other consumer groups also stated that the Commission should not study contractual arbitration. Richard Holober of the Consumer Federation of California wrote:

> We are opposed to the CLRC study and to Professor Alford's recommendations. We believe that the legislature is the proper forum for these deliberations.

Exhibit p. 3; see also Memorandum 2005-13, Exhibit p. 7. Similarly, Cliff Palefsky of CELA wrote:

> [W]e do not think it will be a worthwhile endeavor to study minor fixes to the CAA. Indeed, California's act is the most developed in the country. All of the real problems will only be fixed by dealing with the issues of voluntariness and adhesion contracts which are the major contested issues we will not reach consensus on.

Exhibit p. 8.

These views are not unique to consumer groups. At the stakeholder meeting, Kim Stone of CJAC noted that her organization strongly supports predispute arbitration clauses and often is at war with CAOC over arbitration issues. With regard to whether the Commission should study arbitration, however, CJAC agrees with CAOC that such a study is inadvisable. CJAC would prefer to fight over arbitration in the Legislature, without a preliminary battle before the Commission.

After hearing from each participant, the group discussed in greater detail each of the specific ideas that had been raised.

Reporting Requirements for Private Arbitration Company that Administers or Is Involved in Consumer Arbitration (Code Civ. Proc. § 1281.96)

Both Mr. Horn (representing NAF) and Mr. Madison (representing CDRC) suggested clarification of the reporting requirements that apply to a private arbitration company with regard to consumer arbitrations. The statute in question is Code of Civil Procedure Section 1281.96, which provides:

> 1281.96. (a) Except as provided in paragraph (2) of subdivision (b), any private arbitration company that administers or is otherwise involved in, a consumer arbitration, shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:
>
> (1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.
>
> (2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000).
>
> (3) Whether the consumer or nonconsumer party was the prevailing party.
>
> (4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.
>
> (5) Whether the consumer party was represented by an attorney.
>
> (6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.
>
> (7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.
>
> (8) The amount of the claim, the amount of the award, and any other relief granted, if any.
>
> (9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

> (b) (1) If the information required by subdivision (a) is provided by the private arbitration company in a computer-searchable format at the company's Internet Web site and may be downloaded without any fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the Internet, the company shall provide that information without charge to any person who requests the information on paper.
>
> (2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code, and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.
>
> (c) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.
>
> (d) No private arbitration company shall have any liability for collecting, publishing, or distributing the information required by this section.

These statutory reporting requirements for a private arbitration company with regard to consumer arbitrations supplement the conflict-of-interest disclosure rules for a neutral arbitrator that were recently approved by the Judicial Council (Division VI of the Appendix to the California Rules of Court: *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*).

Although the conflict-of-interest disclosure rules for a neutral arbitrator include definitions of "consumer party" and "consumer arbitration" (see Standard 2), Section 1281.96 includes no such definitions. Section 1281.96 is also unclear as to when an arbitration falls within the reporting requirements: Is an arbitration reportable as soon as it is commenced, or only upon completion? Mr. Horn of NAF noted that these ambiguities are the basis of lawsuits.

Ms. Brownsey agreed that clarification of the reporting requirements is desirable. She pointed out, however, that the reporting requirements are very controversial. She recalled that there was a "big fight" when Assemblymember Ellen Corbett carried the bill to establish the requirements (AB 2656, 2002 Cal. Stat. ch. 1158, § 1).

Ms. Hillebrand of Consumers Union said it might be possible to resolve in the Legislature who constitutes a consumer for purposes of Section 1281.96 and when an arbitration must be reported pursuant to the provision. But she does not think those issues are suited to the Commission's study process.

Ms. Gaal asked whether Consumers Union's general opposition to a Commission study of contractual arbitration would extend to clarification of Section 1281.96. Ms. Hillebrand indicated that it would. Ms. Peverini (representing CAOC) and Ms. Stone (representing CJAC) likewise expressed opposition to having the Commission study Section 1281.96. The consensus of the stakeholder group was that the topic is too controversial for the Commission to effectively study.

Arbitrator Immunity

Arbitrator immunity is the first topic Mr. Madison raised in his written comments on behalf of CDRC. See Exhibit p. 4. At present, California has no statute making an arbitrator immune from liability for handling an arbitration. But California used to have such a statute.

Under former Section 1280.1, an arbitrator had "the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract." 1985 Cal. Stat. ch. 709, § 1. That provision was enacted in response to a court decision concerning the extent to which the common law makes an arbitrator immune from liability. Specifically, in *Baar v. Tigerman*, 140 Cal. App. 3d 979, 982, 189 Cal. Rptr. 834 (1983), the court held that common law arbitral immunity "covers only the arbitrator's quasi-judicial actions, not failure to render an award." Section 1280.1 was enacted to eliminate that restriction on arbitral immunity. *See, e.g., American Arbitration Ass'n v. Superior Court*, 8 Cal. App. 4th 1131, 1133, 10 Cal. Rptr. 2d 899 (1992).

However, Section 1280.1 was subject to a sunset clause, which was extended twice but not a third time. The statute was repealed by its own terms on January 1, 1997. An effort to reenact the statute the following year was unsuccessful. See SB 19 (Lockyer), as amended in Assembly, July 28, 1997. Common law immunity apparently still exists, protecting an arbitrator from being sued by a disgruntled litigant seeking to hold the arbitrator liable for rendering an adverse decision. *See, e.g., Stasz v. Schwab*, 12 Cal. App. 4th 420, 17 Cal. Rptr. 3d 116 (2004).

Ms. Gaal's recollection was that the concept of statutory immunity was controversial when the Legislature last considered it in 1997. Ms. Peverini from CAOC confirmed this and cautioned that the topic is controversial with a capital "C".

The rest of the stakeholder group emphatically agreed. Again, the consensus was that the topic is too controversial for the Commission to effectively study.

Participation of Out-of-State Counsel in an Arbitration Held in California

Another topic Mr. Madison mentioned in his letter on behalf of CDRC was participation of out-of-state counsel in an arbitration held in California. Exhibit p. 4. This became a hot topic in 1998, when the California Supreme Court issued a decision holding that under some circumstances it is unauthorized practice of law for an out-of-state attorney to participate in an arbitration held in California. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998). In response to that decision, Code of Civil Procedure Section 1282.4 was amended to permit an out-of-state attorney to represent a party in an arbitration conducted in California so long as certain conditions are met. 1998 Cal. Stat. ch. 915, § 1.

But that version of Section 1282.4 had a sunset date of January 1, 2001. In 2000, the sunset date was extended to January 1, 2006. Last year, a bill was introduced to remove the sunset provision altogether. See AB 415 (Harman), as introduced. The bill proved controversial and eventually was amended to simply extend the sunset date until January 1, 2007. The bill was enacted in that form. 2005 Cal. Stat. ch. 607.

Thus, the issue of representation by out-of-state counsel remains unresolved. It has already proven controversial; Mr. Bercovitch of the State Bar explained that stakeholders disagree on who should bear the responsibility and cost of administering the pro hac vice approval process. Due to the impending sunset date, resolution of this matter has some urgency. Ms. Bettencourt disclosed that the Securities Industry Association probably will pursue the issue in the Legislature this year. Because the topic is controversial, requires quick resolution, and is already being addressed by others, the stakeholder group agreed that it is not an appropriate matter for the Commission to study.

Timetable for Disqualification of an Arbitrator Based on a Supplemental Conflict-of-Interest Disclosure

The next topic discussed was whether to establish a timetable for disqualification of an arbitrator based on a supplemental conflict-of-interest disclosure made during an arbitration. See Exhibit p. 5. Fortunately, Heather Anderson of the AOC was present for the discussion. Because she helped draft the *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, she was able to quickly point out that such a timetable already exists. See Standard 10(a)(3); see also Standard 10(a)(5). Consequently, there is no need to study this area.

Definition of "Neutral Arbitrator" (Code Civ. Proc. § 1280)

Mr. Madison's letter on behalf of CDRC identifies a problem with the definition of "neutral arbitrator" in Code of Civil Procedure Section 1280(d). Specifically,

> The definition of neutral arbitrator is limited to an arbitrator appointed by both parties to an arbitration. Arbitrators who are appointed by a single party are excluded from the definition, even if they agree to serve as neutrals, and, thus, for example, are not subject to the ethical standards for neutral arbitrators.

Exhibit p. 5. Mr. Madison suggested studying "whether arbitrators appointed by a single party should be included within the definition of neutral arbitrator if they agree to serve in a neutral capacity." *Id*.

Ms. Hillebrand of Consumers Union stated that the definition of "neutral arbitrator" does appear to contain a hole that should be plugged. She suggested addressing this narrow issue in a committee bill. She said there was no need for the Commission to be involved in this. The rest of the participants agreed with that assessment.

New Technology

Next, the stakeholder group discussed whether there is a need to update the California Arbitration Act to reflect new technology. Ms. Hillebrand commented that federal law on electronic signatures already applies to an arbitration contract. She referred in particular to "E-SIGN" — i.e., the Electronic Signature in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-7031). Ms. Hillebrand noted that E-SIGN was carefully structured to accommodate consumer contracts. See 15 U.S.C. §§ 7001, 7003-7006.

Prof. Alford cautioned that E-SIGN is only applicable to contracts that affect interstate commerce. Ms. Hillebrand pointed out, however, that in addition to E-SIGN there is California statutory law on the use of electronic signatures. See Code Civ. §§ 1633.1-1633.17. Because of these existing statutes, Ms. Hillebrand said she sees no need to update the California Arbitration Act to accommodate electronic signatures. The remainder of the group appeared to concur and could not identify any other aspect of new technology warranting revision of the Act.

Revised Uniform Arbitration Act

The stakeholder group then considered whether the Commission should study the RUAA, an idea that both Mr. Madison (representing CDRC) and Prof. Alford raised in their initial remarks.

Ms. Hillebrand referred to the staff memorandum discussing the comments on Prof. Alford's background study, which includes a list of subjects covered by the RUAA but not by the earlier Uniform Arbitration Act. See Memorandum 2005-13, pp. 5-6. She reminded the group that California law already addresses many of the subjects on the list, as noted in the staff memorandum. *Id*. at 6.

Ms. Peverini stated that CAOC opposes the idea of studying the RUAA. CAOC has already twice submitted comments to that effect. See Exhibit p. 7; Memorandum 2005-13, Exhibit p. 6. A representative of CAOC also testified to that position when the Commission considered the comments on Prof. Alford's background study.

Similarly, CJAC and Consumers Union oppose the idea of studying the RUAA. In addition, written comments from the Consumer Federation of California and CELA indicate that those organizations oppose such a study. Exhibit p. 3; Memorandum 2005-13, Exhibit pp. 3-5, 7.

It is clear that there would be much opposition if the Commission undertook a study of the RUAA. The consensus among the stakeholders was that the topic appears to be too controversial for the Commission to effectively study.

Discovery in Arbitration of a Personal Injury Dispute

After the discussion of the RUAA, Mr. Ownby raised another idea, which had not been mentioned previously. He pointed out that under the California Arbitration Act, disputants in a personal injury arbitration typically have greater rights to conduct discovery than disputants in other types of arbitrations. See Code Civ. Proc. §§ 1283.05(a), 1283.1; see also A Litigator's Guide to Effective Use of ADR in California, *Contractual Arbitration* § 9.69, p. 423 (CEB 2005). He wondered whether it might be possible to statutorily define what constitutes a personal injury arbitration within the meaning of the pertinent provisions.

The other members of the group quickly agreed that any effort to establish such a definition would be extremely controversial. They did not think it would be a good topic for the Commission to study.

STAKEHOLDER CONSENSUS

Having reviewed each of the specific ideas raised at the meeting, the participants reached consensus that at present there does not appear to be any area of contractual arbitration in which a Commission study is likely to be productive. As Mr. Madison put it, the question is whether proceeding with a study of one or more aspects of contractual arbitration would be an effective use of the Commission's limited resources. The group's answer was "no."

COMMISSION ACTION

Now that it has heard from the stakeholders, the Commission needs to decide whether to go forward with its study of arbitration. The staff recommends that the Commission **heed the advice of the stakeholders and end the study.** The Commission has too many other important projects on its plate to devote further resources to a study that has encountered strong opposition from its inception.

The controversial nature of arbitration law is underscored by the fate of last year's bills. Although much effort was spent debating a number of legislative proposals, only two minor reforms of the California Arbitration Act were enacted: the one-year extension of the sunset date in Section 1282.4 (representation by out-of-state counsel) and (2) the Commission's bill to correct a cross-reference to a discovery statute.

Staff has also discussed the Commission's study on several occasions with knowledgeable contacts within the Legislature. These contacts have cautioned us in the strongest possible way that a Commission study of this matter would be inadvisable.

If at some point in the future the Legislature needs the Commission's help with regard to arbitration law, it knows how to call for such assistance. Recent examples of Commission studies initiated by the Legislature include the ongoing studies of mechanics lien law, trial court restructuring, beneficiary deeds, and no contest clauses.

Meanwhile, Prof. Alford's report will stimulate scholarly debate and perhaps also debate in the Legislature. We have already been informed that preparation of a responsive analysis is underway.

Respectfully submitted,

Barbara Gaal
Staff Counsel

National Arbitration Forum®

COMMENTS TO CALIFORNIA LAW REVISION COMMITTEE REGARDING ARBITRATION IMPROVEMENTS FROM OTHER JURISDICTIONS

From
Professor Roger S. Haydock, Professor, William Mitchell College of Law and
Director, National Arbitration Forum
and
John R. Horn, Adjunct Professor Loyola Law School and
Director, National Arbitration Forum

The National Arbitration Forum (the Forum) is a leading provider of dispute resolution services including court-annexed ADR and public and private arbitration and mediation services. The Forum has offices in California, Minnesota, and New Jersey and over 1,500 experienced neutrals located in all the states and in 29 foreign countries. We are one of the largest ADR providers in America and in the world.

The NAF Code of Procedure governs many of the arbitrations we administer in California. This Code provides all parties with fair procedures and hearings, complies with statutory and case law legal mandates, and has been declared by the United States Supreme Court as a model of "fair cost and fee allocation." Our Arbitration Bill of Rights assures that all consumers receive their due process protections.

The former judges, experienced lawyers, and tenured law professors who serve as NAF neutrals operate under our Code of Ethics to ensure that they provide parties with impartial services devoid of conflicts of interest. The Forum selects neutrals with integrity and an outstanding reputation for professionalism.

It is critical that arbitrators meet standards of neutrality in the same way that administrative law judges and judicial judges are expected to comply with these standards. And it is essential that the National Arbitration Forum, in its role as an administrator, comply with requirements that are expected to be followed by administrative law clerks and judicial administrators.

A primary mission of the Forum is to provide fair, affordable arbitration to all parties, including individuals and consumers, and not just corporations and those with resources. Many Californians rely on the Forum to administer their arbitration cases, and many of these cases would be considered "consumer" cases as defined by CCP §1281.96.

Accordingly, the National Arbitration Forum has a particular interest in the continued development of arbitration in California. Like the Forum, California has been a leading proponent of the use of arbitration to resolve all types of legal disputes, and we offer our voice and expertise to the current discussion in an effort to develop reasonable, well-defined, and enforceable legislation.

15303 Ventura Blvd Suite 400 Sherman Oaks CA 91403-6618
Phone 818.986.8606 Fax 818.986.8609
WWW.ARBITRATION-FORUM.COM

The major topics that we would like to see addressed include the following:

1. ***Scope of Ethical Standards*** – The lengthy and over-comprehensive standards are burdensome and not completely understood by everyone in the arbitration community. Further, these standards have caused parties to be denied access to excellent neutral arbitrators and have unnecessarily increased the cost and time of arbitrations. Recent case law has shown that rather than creating a more informed public, the disclosure requirements instead encourage parties unhappy with the result of their award to engage in post-award discovery about the arbitrator in the hopes of uncovering a violation of the statute leading to vacatur of the award.

2. ***Scope of Disclosure Requirements*** – The required disclosures under CCP §1281 et seq. have also in many ways had the effect of making arbitration less available and more expensive for Californians. Much of the information to be disclosed cannot be reasonably obtained and regularly updated. There is no standard for disclosure and every provider does it differently. In fact, NAF is currently in litigation with the San Francisco District Attorney, seeking to gain clarification as to the scope and validity of §1281.96, both on its face and in the manner in which the DA's office was attempting to enforce it.

3. ***Delineation of "Consumer" Arbitration*** – It is our belief that arbitration is either contractual or ad hoc. Accordingly to carve out a class of contractual arbitration cases that require special treatment is arbitrary and violates the Federal Arbitration Act and case law precedent.

4. ***Passage of the RUAA*** - We believe this uniform act serves the interests of arbitration parties and participants and ought to be enacted.

5. ***Public/Private Partnership*** – Both the courts and the public acknowledge the viability and usefulness of arbitration in certain contexts. The National Arbitration Forum encourages the CLRC to consider expanding the role of the private sector as a vehicle for the execution of state sponsored dispute resolution programs. The private sector, in cooperation and with the support of the public sector, is best suited to resolve many types of legal disputes.

Thank you for the opportunity to submit our comments. We look forward to continuing this meaningful dialogue.

Respectfully submitted on behalf of the National Arbitration Forum,

John R. Horn

15303 Ventura Blvd Suite 400 Sherman Oaks CA 91403-6618
Phone 818.986.8606 Fax 818.986.8609
WWW.ARBITRATION-FORUM.COM

CONSUMER
FEDERATION
OF CALIFORNIA

CFC

PO Box 1340, Millbrae, CA 94030 Ph • (650) 589-3135 Fax • (650) 872-3150 Web • consumerfedofca.org

Richard Holober, Executive Director
(650) 589-3135
rholober@yahoo.com

December 5, 2005

Ms. Barbara Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

RE: Opposition to the CLRC study of contractual arbitration

Dear Ms. Gaal:

The Consumer Federation of California is pleased to submit these comments on the proposed CLRC review of contractual arbitration and the proposed 2004 recommendations to the Revised Uniform Arbitration Act prepared by Professor Roger Alford of Pepperdine University School of Law.

We are opposed to the CLRC study and to Professor Alford's recommendations. We believe that the legislature is the proper forum for these deliberations.

As a representative of consumer interests, the CFC does not share Professor Alford's sanguine view of arbitration of consumer disputes. We believe that arbitration can provide an effective dispute resolution mechanism only when the parties to the arbitration have equal resources and an equal interest in avoiding a less desirable alternative. As originally developed a century ago in labor-management relations, grievance arbitration was a method to avoid costly work stoppages. Since the union represented large numbers of workers and had equal occasion to invoke arbitration and to reject arbitrators that it perceived to be biased, there was a strong incentive for arbitrators to show no favoritism towards either side. Both sides had sufficient institutional resources, including access to professional representation, to make the strongest case before the arbitrator.

These features are absent in arbitration of consumer disputes. A consumer is often lacking the financial resources that are available to a business. A business is likely to have numerous cases that will end up in arbitration, while the business' customers are not likely to appear more than once. This imbalance in purchasing power for arbitration services can easily influence an arbitrator to favor the side that could provide future work opportunities. Consumers rarely have any choice but to accept such mandatory arbitration clauses. For many consumer goods and services, contracts that do not include mandatory pre-dispute arbitration agreements cannot be found. Given the inherent imbalance that exists between a consumer and a large corporation, such agreements are contracts of adhesion.

We urge your Commission to drop this anti-consumer undertaking. We appreciate your attention to these comments.

Sincerely,

Richard Holober
Executive Director

CDRC
CALIFORNIA DISPUTE RESOLUTION COUNCIL
The Voice of ADR in Sacramento

1150 Silverado Street
P. O. Box 177
La Jolla, CA 92037
(866) 216-CDRC
Fax: (858) 454-1021
www.cdrc.net

November 29, 2005

Barbara S. Gaal, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study of Contractual Arbitration

Dear Ms. Gaal:

This will supplement our letter of February 21, 2005 regarding the proposed study by the Law Revision Commission of contractual arbitration and recommend the following areas for study by the Commission.

Arbitral immunity: Former Code of Civil Procedure Section 1280.1, which provided expressly for arbitrator immunity, ceased to be effective on January 1, 1997, when it was allowed to "sunset." Although common law immunity for arbitrators appears to continue to exist, the Commission should study whether extending judicial immunity to arbitrators uniformly would be beneficial to the public. Such immunity already is conferred upon arbitrators in international arbitrations by Code of Civil Procedure Section 1297.119 and upon attorney fee dispute arbitrators by Business & Professions Code Section 6200(f).

Out of state lawyers: Lawyers admitted in jurisdictions other than California may be admitted pro haec vice to represent clients in arbitrations in California pursuant to Code of Civil Procedure Section 1282.4. However, this section will "sunset" on January 1, 2007. The CDRC believes California should by statute establish practical ground rules to facilitate the appearance in California of lawyers admitted in other jurisdictions, as is allowed in virtually all other states in the nation.

CDRC
CALIFORNIA DISPUTE RESOLUTION COUNCIL
The Voice of ADR in Sacramento

1150 Silverado Street
P. O. Box 177
La Jolla, CA 92037
(866) 216-CDRC
Fax: (858) 454-1021
www.cdrc.net

Arbitrator disqualification: Code of Civil Procedure Sections 1281.9 and 1281.91 provide for the disqualification of arbitrators at the outset of an arbitration based on arbitrator disclosure statements, including a timetable for waiving the effect of disclosures. The CDRC believes the Commission should study both requiring that disqualification be based on indications of possible bias and also adding a timetable for disqualification or waiver if an arbitrator makes supplemental disclosures during an arbitration.

Consumer arbitrations: Code of Civil Procedure Section 1281.96, which provides for the collection and publication of information regarding consumer arbitrations, has led to confusion about who must publish what about which arbitrations and when. The CDRC believes the Commission should study whether the requirements for collection of data could be clarified and simplified, while improving the reliability and usefulness of data that is published. The Commission may also want to study whether other special provisions should be made for arbitrations involving consumers and organizational entities.

Definition of neutral arbitrator: Under Code of Civil Procedure Section 1280, the definition of neutral arbitrator is limited to an arbitrator appointed by both parties to an arbitration. Arbitrators who are appointed by a single party are excluded from the definition, even if they agree to serve as neutrals, and, thus, for example, are not subject to the ethical standards for neutral arbitrators. The CDRC believes the Commission should study whether arbitrators appointed by a single party should be included within the definition of neutral arbitrator if they agree to serve in a neutral capacity.

CDRC
CALIFORNIA DISPUTE RESOLUTION COUNCIL
The Voice of ADR in Sacramento

1150 Silverado Street
P. O. Box 177
La Jolla, CA 92037
(866) 216-CDRC
Fax: (858) 454-1021
www.cdrc.net

Revised Uniform Arbitration Act: The CDRC believes that, given the state of development of California arbitration law, adoption of the Revised Uniform Arbitration Act in its entirety is neither necessary nor desirable. However, we recommend that the Commission continue its study of the RUAA with a view to determining whether adoption of any of its provisions or features would improve California arbitration law.

The CDRC appreciates the invitation to help the Commission study possible improvements in California arbitration law. We are considering whether to host a series of public dialogues in 2006 tentatively entitled "If You Could Improve Contractual Arbitration, What Would You Do?" We invite the Commission's collaboration in this undertaking, and we look forward to continuing to work with it on its study.

Sincerely,

James R. Madison
Chair, CDRC Public Policy Committee
750 Menlo Avenue, Suite 250
Menlo Park, CA 94025

cc: Richard Bayer, President 2005
John S. Blackman, President 2006
Don Fobian, President-Elect 2007
Richard Chernick
Donne Brownsey

CONSUMER ATTORNEYS OF CALIFORNIA

November 30, 2005

Barbara Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

RE: CAOC OPPOSITION TO THE CLRC STUDY OF CONTRACTUAL ARBITRATION

Dear Ms. Gaal:

On behalf of Consumer Attorneys of California, I write to express CAOC opposition to both the proposed CLRC review of contractual arbitration and the proposed 2004 recommendations to the Revised Uniform Arbitration Act prepared by Professor Roger Alford of Pepperdine University School of Law. We respectfully submit that the goal of reaching consensus on legislative reforms via a CLRC study in this area would be extremely difficult. Additionally, CAOC believes that the Legislature is the best forum for a productive discussion in this area.

Further, we add the following comments in response to Professor Alford's recommendations. In addition to substantive issues with many of the report's recommendations, we strongly oppose the statement that "Arbitration is generally viewed as an attractive alternative to litigation, affording parties with an economical, efficient, confidential, and neutral forum to resolve contractual disputes." This statement, as applied to consumer pre-dispute binding arbitrations, demonstrates a clear misunderstanding of arbitration in the consumer context. Such arbitrations are often more costly to consumers. While businesses may be free to contract for mandatory arbitration, forced pre-dispute binding arbitration agreements in consumer contracts are inherently unfair and should be prohibited. We strongly disagree with the broad pro-arbitration themes contained in the proposal and believe this misguided basis makes the proposal fundamentally flawed and incapable of being a model for substantive review.

Given the limited and valuable nature of CLRC resources, we urge you to reject this study in this area, including, but not limited to, review of Professor Alford's report. If you or a member of your staff would like to discuss this further, please contact us. Thank you for considering our comments.

Sincerely,

Nancy Peverini

Nancy Peverini
Legislative Counsel

Legislative Department
770 L Street • Suite 1200 • Sacramento • CA 95814 • Phone (916) 442-6902 • Fax (916) 442-7734
info@caoc.org • www.caoc.com

COMMENTS OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

From: Cliff Palefsky
Subject: Law Revision Comm'n stakeholder meeting
Date: December 2, 2005
To: Barbara Gaal

Hi Barbara,

Forgive me for sending this email but I am out of town. On behalf of CELA, we wanted to convey that we do not think it will be a worthwhile endeavor to study minor fixes to the CAA. Indeed, California's act is the most developed in the country. All of the real problems will only be fixed by dealing with the issues of voluntariness and adhesion contracts which are the major contested issues we will not reach consensus on.

Thanks so much for your efforts in this regard.

Cliff Palefsky

November 30, 2005

Ms. Barbara Gaal
Staff Counsel
California Law Revision Commission
40000 Middlefield Road, Room D-1
Palo Alto, CA 94303

RE: Request for comments regarding contractual arbitration

Dear Ms. Gaal and the California Law Revision Commission:

During our Association's 25 years of experience in the Legislature and in the courts, we have become intensely convinced that arbitration as a form of alternative dispute resolution not only benefits plaintiffs and defendants alike but is critical to the successful performance of the civil justice system.

Contractual arbitration is an attractive alternative to litigation, affording parties an economic, efficient, and neutral forum, which is why our Association members use and appreciate it. We support contractual arbitration because it is a fair, accessible, affordable way for consumers and corporations to resolve disagreements among themselves and with one another.

The ability to freely contract to arbitrate future disputes is essential to arbitration's utility. For arbitration to be a viable alternative it must not be overly constrained by overly detailed regulations and procedures.

We have observed that opponents of contractual arbitration, who are unable to eliminate it outright, seek by harassment to diminish its usefulness by inflicting it with burdensome rules and limitations. Note, for example, the media account of a recent letter (attached) sent by a representative of the plaintiffs' lawyers' association to professional arbitrators.

California courts have provided sound guidelines for ensuring arbitration's fairness in both business and consumer contracts.

A recent Judicial Counsel survey found that the single biggest barrier to access to the courts for most respondents was the cost of legal

1201 K Street, Suite 1960, Sacramento, California 95814, 916-443-4900, facsimile 916-443-4306, *www.cjac.org*, e-mail *cjac@cjac.org*

representation. In that light, the best thing that can be done for consumers, taxpayers, and business people is to maintain unfettered the processes of fairly run arbitration and the freedom to agree to it by contract.

We look forward to working with the Law Revision Commission should it elect to proceed on this topic.

Sincerely,

John H. Sullivan
President

JHS:gs

Attachment

CAOC Puts Neutrals' Feet to Fire

Pam Smith
The Recorder
11-07-2005

Plaintiff lawyers want to get JAMS arbitrators in California on the record about whether they think mandatory arbitration clauses that prohibit consumer class actions should be enforced.

And in a letter last week, the attorneys strongly hinted that the answer will affect neutrals' bottom line.

The Consumer Attorneys of California and five other lawyer groups sent letters to more than 100 JAMS neutrals, demanding that they state whether they believe that such clauses violate the company's longstanding standards of fairness.

"In order to make an informed choice on using JAMS or its neutrals as providers, we want to know where each neutral stands on this issue," the plaintiff advocates wrote. The six organizations plan to report all responses on their Web sites. And anyone who doesn't answer will be presumed unwilling to stand against such class action prohibitions.

Melissa Anderson, communications manager for Irvine-based JAMS, said Friday that she could not comment on the letter because she had not seen it yet.

About a year ago, JAMS got cheers from the plaintiff bar when the ADR provider announced a new policy, saying that it would no longer enforce contract clauses that forbid consumer and employment class actions.

That got some corporate clients and their lawyers riled up — and at least one large client took its business elsewhere.

Four months later, JAMS reversed course. At the time, the company said that the legality of class action preclusion clauses have varied by jurisdiction, and that "JAMS and its arbitrators will always apply the law on a case-by-case basis in each jurisdiction."

Some plaintiff lawyers accused JAMS of caving under financial pressure. The company insisted its about-face was "not a business issue," saying the shift in position was necessary to avoid any perception that it was favoring the plaintiff bar.

Thomas Brandi, the CAOC's designated liaison on the issue, says that some in the plaintiff bar have heard privately from "several of the JAMS judges"

that they disagree with the ADR provider's current stance.

In their letter, the plaintiff lawyer groups point out that JAMS still has written standards for consumer arbitrations that say JAMS will only work with mandatory arbitration clauses that don't preclude "remedies that would otherwise be available to the consumer" under federal, state or local law.

The letter from the CAOC and other groups makes it clear that, in their eyes, "class action prohibitions" violate those standards. And they ask each neutral to sign a statement saying whether they agree with that assessment. "The absence of a response will be deemed a lack of commitment to enforcing JAMS' Minimum Standards," the letter says.

Alan Kaplinsky, a Philadelphia-based partner at defense firm Ballard Spahr Andrews & Ingersoll who vigorously fought the policy JAMS announced last November, called the plaintiff lawyers' letter "outrageous."

"I would compare it to anybody writing a letter to a judge out of the blue, asking a judge, 'If you were to get a case that would involve a particular issue, how would you decide it?' And your response or non-response would be published on our Web site. ... It's completely out of bounds."

And he contrasts it with the pressure that he and other attorneys put on JAMS to reverse its 2004 policy, pointing out that they dealt with JAMS as a body, "like if a court adopted a rule of procedure" and critics commented on it. "There's nothing wrong with that," he said.

Brandi, a San Francisco plaintiff lawyer, counters that the letters aren't pushing for a policy change, but for transparency.

He contrasts arbitration with the court system, where the proceedings are open and clients have leeway to avoid a judge with a peremptory challenge. "What we'll know as a result of this letter is, which judges are on the record saying they'll uphold the standards of fairness," he said.

The Consumer Attorneys Association of Los Angeles, San Francisco Trial Lawyers Association, Trial Lawyers for Public Justice, National Employment Lawyers Association and National Association of Consumer Advocates also signed onto the letter.