# The Revised Uniform Arbitration Act at 15

## The New Jersey Story

*By Laura A. Kaster*


The National Conference of Commissioners on Uniform State Laws was established to provide states with "well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[1] In August 2000, 15 years ago, it finalized work on the Revised Uniform Arbitration Act (RUAA). The act was adopted in New Jersey as the NJAA in 2003, N.J.S.A. 2A: 23B-1 et seq. Indeed, 18 states and the District of Columbia have chosen to adopt it, so it is now controlling arbitration law in Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and West Virginia. The RUAA is also currently under consideration in Massachusetts and Pennsylvania.[2] As a neutral and a teacher of ADR in New Jersey, I am familiar with the New Jersey developments, which serve here as a case study.

Normally, state law develops in 50 separate laboratories, and the varied experiments and experiences serve to influence the forward progress of the law as a whole. The RUAA, however, has not provided a hotbed of experimentation and influence on the broader development of arbitration law for several reasons. First, there has been ongoing confusion in the state courts as to the role of federal law. As a corollary to that problem, the force of the RUAA (in New Jersey the NJAA) has been undermined by the broad preemptive effect of the Federal Arbitration Act (FAA) for matters that deal with interstate commerce. The result is that the development of federal law has overshadowed the development of state arbitration law.[3] In addition, in New Jersey, for example, most of the lawyers who draft arbitration clauses are unfamiliar with the legal requirements for selecting the RUAA as the operative arbitration law of the agreement (as opposed to the state substantive law selected in a choice-of-law provision) and therefore simply do not select the NJAA as the operable arbitration law. The upshot is that federal rather than state law develops and is looked upon as more critical to arbitration law.

The work of the National Conference of Commissioners on Uniform State Laws was extraordinary. It was scholarly, thoughtful, and pragmatic, incorporating many legal developments, addressing gaps in the Uniform Arbitration Act, and resolving problems that had arisen under the FAA. It anticipated many issues that have subsequently been addressed by the rules of arbitration providers such as JAMS, the American Arbitration Association, and the CPR Institute with respect to domestic arbitration. Because it was such a thorough process, subsequent thinking on the issues addressed has been influenced by the work that went into the RUAA.[4]

### What the RUAA Got Right

Although a detailed catalogue of RUAA improvements and alterations cannot be undertaken here, some of the act's many innovations are worth noting. The RUAA:

- Clarifies what forum (arbitrator or court) decides arbitrability of a dispute and by what criteria[5]
- Provides authority to consolidate arbitrations[6]
- Addresses whether arbitrators can be required to testify in other proceedings[7]

- Establishes the discretion of arbitrators to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process[8]
- Provides for court enforcement of pre-award rulings by the arbitrator[9]
- Defines arbitration remedies to include provisions for attorney's fees, punitive damages, and other exemplary relief[10]
- Specifies that particular sections of RUAA are not waivable or may not be restricted unreasonably (to ensure fundamental fairness, particularly in contract-of-adhesion situations)[11]
- Provides for enforcing subpoenas to witnesses who reside in states other than the arbitration state[12]
- In New Jersey, permits the parties to agree to expand the scope of judicial review of an arbitration award.[13]

Before the New Jersey Arbitration Act was adopted, when these issues emerged, there were no clear answers. They had to be addressed by case law, rules, or both. In other words, the RUAA's innovations anticipated a great deal of the landscape of arbitration case law over the last 15 years and provided a sound resolution for each of the practical problems that stood in the way of an efficient process.

## How the RUAA's Reach and Power Have Been Undercut

The preemptive effect of the FAA has meant that the law developed to address arbitration has been predominantly federal. This may in part be the legacy of the general state hostility to arbitration that gave rise to the need for the FAA and the RUAA in the first place. In addition, confusion about the FAA, which is applicable in state courts to interstate matters defined broadly by the Commerce Clause and does not create an independent basis for federal jurisdiction,[14] has contributed to the RUAA's limited impact.

For the RUAA to apply, the parties must specify that it applies. Inclusion of a state general choice-of-law provision is not sufficient. In *Mastrobuono v. Shearson Lehman Hutton,*[15] the Supreme Court held that a choice-of-law provision will dictate the applicable substantive law but not the procedural law of arbitration.[16] In *Preston v. Ferrar,*[17] the Supreme Court permitted the choice of American Arbitration Association rules to govern arbitration procedure despite a choice-of-law provision specifying California law, which it held applied only to substantive law. Nevertheless, the decisions in *Volt Information Sciences v. Bd. of Trustees of Leland Stanford Jr. Univ,*[18] and *Preston* suggest that a clear specification of state arbitration law will be respected.

Because drafting dispute resolution provisions during deal-making is often seen as boilerplate (and necessarily anticipating some failure in the contractual relationship), dispute resolution provisions are often among the last to be written. At that eleventh hour, not many transactional practitioners attend closely to this choice or evaluate the specific advantages of selecting state arbitration law to govern their agreements. In fact, if practitioners consulted their litigating or arbitrating partners in advance and developed a checklist of issues and drafting choices, they would distinguish their practice and give their clients a definite advantage.

The New Jersey state courts have not been as receptive to arbitration as the NJAA anticipated. Most recently, in *Atalese,*[19] the Supreme Court of New Jersey held that to be valid, an arbitration provision must specify that it is a waiver of the right to trial or jury. The *Atalese* decision contradicts controlling FAA case law. For example, in 1996 the Supreme Court invalidated a Montana statute that required notice that a contract is subject to arbitration to appear on the first page of the contract in a specified format.[20] If the *Atalese* decision stands, any arbitration clause that includes an affirmative selection of New Jersey arbitration law would be invalidated in its entirety unless

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it included language specifying that it is a waiver of the right to trial.[21]

The RUAA in New Jersey is actually more flexible, more clearly defined, and more responsive to some of the expressed needs of the user community than the FAA. For example, the NJAA provides for easier process and defined interim remedies. In addition, although under the FAA[22] and many other states' RUAA provisions[23] the parties cannot obtain a judicial appeal of arbitration, under the NJAA they can, and they can also specify the standard of review.[24] This judicial appeal option (as well as the provider options for arbitral review) could address the risks some general counsel have expressed about having an outlier award in a very large case. A careful clause drafter could provide for court review of arbitral awards above a specified dollar value or those providing for specified injunctive relief. Although the appellate option would import many of the costs of litigation by imposing the need for a record, a transcript, and findings of fact and law,[25] it would protect against a runaway panel for the most significant matters.

The RUAA was an important development in the law that provides a valuable resource for resolving the repetitive issues that arise in arbitral administration. Practitioners and scholars should give it careful examination and not permit its insights to fade. Mining its solutions and re-educating the bench and the bar on its value are well worth the effort. ■

## Endnotes

1 Uniform Law Commission, National Conference of Commissioners on Uniform State Laws, 2015 http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC.

2 Uniform Law Commission, National Conference of Commissioners on Uniform State Laws, *Arbitration Act 2000,* http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000).

3 *See* Terry L. Trantina, *What Law Applies to an Agreement to Arbitrate*, 22 A.B.A. Disp. Resol. Mag. 29-31 (Fall 2015) (discussing the interplay of federal arbitration law and state arbitration law).

4 In New Jersey, the RUAA is the New Jersey Arbitration Act, N.J. Stat. § 2A: 23B-1 et seq.

5 N.J. Stat. § 2A: 23B-6.

6 N.J. Stat. § 2A:23B-10.

7 N.J. Stat. § 2A:23B-14(2)e.

8 N.J. Stat. § 2A:23B-17.

9 N.J. Stat. § 2A:23B-18.

10 N.J. Stat. § 2A:23B-21.

11 N.J. Stat. § 2A:23B-4.

12 N.J. Stat. § 23B-17f.

13 N.J. Stat. § 2A: 23B-4c.

14 Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25, n. 32 (1983); *see, e.g.,* 9 U.S.C. § 4 (providing for action by a federal district court "which, save for such [arbitration] agreement, would have jurisdiction under title 28").

15 Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63-64 (1995).

16 *See also*, Trantina, *supra* note 4, at 29.

17 Preston v. Ferrer, 552 U.S. 346 (2008).

18 Volt Inf. Sciences v. Stanford Univ., 489 U.S. 468 (1989).

19 Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014).

20 Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

21 *Atalese* would not survive under the analysis in the recent Supreme Court decision in *DIRECTV, Inc. v. Imburgia,* 577 U.S. __ (December 14, 2015 No.14-462), where Justice Stephen Breyer, writing for the majority, quoted the FAA 9 U.S.C. § 2, as mandating that any state rule invalidating a contract would have to apply to the revocation of any contract.

22 Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

23 Stephen Wills Murphy, *Judicial Review of Arbitration Awards Under State Law*, 96 Va. L. Rev. 887-937 (2010).

24 N.J. Stat. § 2A: 23B-4(c). *See also* Minkowitz v. Israel, 433 N.J. Super. 111, 132 (2013) (Further, "parties may agree to a broader review than provided for by the default provisions in the ... Act." Citing, *Fawzy v Fawzy*, 199 N.J. 456, 482n 5 (2009). Their agreement must "accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon.") This New Jersey exception derives from a concurrence authored by Chief Justice Robert Wilentz in *Perini Corp. v. Greater Bay Hotel & Casino, Inc.,* 129 N.J. 479 (1992).

25 Imposing a broader standard of review in child custody arbitration, the New Jersey Supreme Court noted that "when parties in a dissolution proceeding agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, *N.J. Stat. §* 2A: 23B–1 to –32. However, in respect of child-custody and parenting-time issues only, a record of all documentary evidence shall be kept; all testimony shall be recorded verbatim; and the arbitrator shall state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interests standard. It is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial. Any arbitration award regarding child-custody and parenting-time issues that results from procedures other than those that we have mandated will be subject to vacation upon motion." *Fawzy,* 199 N.J. at 480-81.