ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 10, 2003
1:03 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative John Coghill
Representative Jim Holm
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 2
"An Act relating to the statute of limitations for certain civil actions; and providing for an effective date."

- MOVED CSHB 2(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 83
"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 114
"An Act relating to the issuance of a search warrant."

- BILL HEARING POSTPONED TO 3/12

PREVIOUS ACTION

BILL: HB 2
SHORT TITLE:CIVIL STATUTE OF LIMITATIONS/SEX OFFENSES
SPONSOR(S): REPRESENTATIVE(S)MEYER

Jrn-Date	Jrn-Page		Action
01/21/03	0030	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0030	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0030	(H)	JUD, FIN
01/21/03	0030	(H)	REFERRED TO JUDICIARY
03/10/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 83
SHORT TITLE:REVISED UNIFORM ARBITRATION ACT
SPONSOR(S): REPRESENTATIVE(S)BERKOWITZ

Jrn-Date	Jrn-Page		Action
02/07/03	0148	(H)	READ THE FIRST TIME - REFERRALS
02/07/03	0148	(H)	JUD
02/07/03	0148	(H)	REFERRED TO JUDICIARY
02/10/03	0174	(H)	COSPONSOR(S): MOSES
03/07/03		(H)	JUD AT 1:00 PM CAPITOL 120
03/07/03		(H)	Meeting Postponed to 03/10/03
03/10/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE KEVIN MEYER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 2.

PAM FINLEY, Revisor of Statutes
Legislative Legal and Research Division
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 2, spoke as the revisor of statutes.

REPRESENTATIVE ETHAN BERKOWITZ
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 83.

ARTHUR H. PETERSON, Commissioner
National Conference of Commissioners on Uniform State Laws (NCCUSL)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 83.

MICHAEL L. LESSMEIER, Attorney at Law
Lessmeier & Winters; Lobbyist
for State Farm Insurance Company ("State Farm")
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 83 relayed a concern with the bill.

ROBERT W. LANDAU, Attorney at Law
Arbitrator, Mediator and Hearing Officer
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 83.

FRANCIS J. PAVETTI, Chair
Revised Uniform Arbitration Act (RUAA) Drafting Committee
National Conference of Commissioners on Uniform State Laws (NCCUSL)
New London, Connecticut
POSITION STATEMENT: Assisted with the presentation of HB 83.

ACTION NARRATIVE

TAPE 03-18, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:03 p.m. Representatives McGuire, Holm, Samuels, and Gruenberg were present at the call to order. Representatives Anderson, Coghill, and Gara arrived as the meeting was in progress.

HB 2 - CIVIL STATUTE OF LIMITATIONS/SEX OFFENSES

Number 0041

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 2, "An Act relating to the statute of limitations for certain civil actions; and providing for an effective date."

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, speaking as the sponsor of HB 2, explained that HB 2 is simply a [housekeeping measure] that would clean up some of the impacts of an amendment to HB 210, which was passed during the 22nd legislature. House Bill 2 clarifies which misdemeanors and felonies involving sexual assault and sexual abuse of a minor will have a three-year statute of limitations, and which will

have no statute of limitations at all. He informed the committee that HB 210 originally would have dropped the statute of limitations on felony sexual assault crimes and on [felony] sexual abuse of a minor crimes. However, he added, there was an amendment on the House floor to include all civil actions [pertaining to these crimes] as well. In theory, this sounded good, he remarked, but [there were unintended consequences]. He pointed out that under HB 210, there is no definition of felony sexual abuse of a minor and felony sexual assault was not defined by reference to any particular sections in law. Therefore, it was uncertain which felonies wouldn't fall under the statute of limitations. Furthermore, the amendment to HB 210 didn't address misdemeanor sexual abuse and [misdemeanor] sexual assault; the civil statute of limitations for those misdemeanors automatically dropped to two years, which is the [statute of limitation] for torts in general. The crimes that were inadvertently changed to have a two-year statute of limitation were misdemeanor sexual assault, misdemeanor sexual abuse of a minor, incest, felony indecent exposure, and unlawful exploitation of a minor. Prior to the floor amendment to HB 210, all of the aforementioned crimes had three-year statute of limitations.

REPRESENTATIVE MEYER informed the committee that HB 2 also deals with unlawful exploitation of a minor, which is a class B felony. The intent is to include class B felonies with those crimes that don't have a statute of limitations. He reiterated that his intent is to make all misdemeanor sexual assault crimes [and misdemeanor sexual abuse of a minor crimes] have a three-year statute of limitations. Therefore, HB 2 has a retroactive clause.

CHAIR McGUIRE asked if any cases that would have been covered by HB 210 have occurred since that bill passed.

REPRESENTATIVE MEYER said he didn't know. However, he didn't believe that there's a lot of civil action regarding sexual assault cases and sexual abuse of a minor cases. He reiterated the desire to have the unlimited statute of limitations in case someone wanted to take action 20-30 years from now. He explained that his focus is on the criminal side because with DNA evidence, one can now prove something that happened 20-25 years ago.

Number 0459

PAM FINLEY, Revisor of Statutes, Legislative Legal and Research Division, Legislative Affairs Agency, explained that she became involved with this matter because last year the revisor's bill proposed a slightly different fix to HB 210. However, it was clear that the legislature wasn't comfortable with the ramifications of that format and thus the fix has been introduced as separate legislation - HB 2.

MS. FINLEY said that normally an amendment such as the one adopted for HB 210 wouldn't be problematic. However, this area of [law] is intertwined with other areas and thus this one change had a ripple effect. For everything but the felony sexual abuse of minor and felony sexual assault, the statute of limitations on the civil side went from three years to two years, which was an unintended [consequence of the amendment made to HB 210]. Section 2 of HB 2 undoes the aforementioned, and places unlawful exploitation of a minor into the no-statute-of-limitations category. Section 3 is essentially a technical amendment. She explained that the statute of limitations for the crime of sexual abuse of a minor doesn't begin until the minor turns 18 years old. For some cases, there are more rules when the minor is under 16 years of age. Ms. Finley pointed out that claims brought under AS 09.55.650 include things that no longer have a statute of limitations. She turned to the retroactivity section and relayed that generally, statute of limitations are considered procedural matters and thus can be changed retroactively. She offered her belief that this retroactivity should be acceptable. However, since the Alaska Supreme Court hasn't spoken on this matter yet, the language "to the extent permitted by the constitution" is included.

Number 0712

REPRESENTATIVE GRUENBERG recalled from his prior time in the legislature that there was a policy against inserting phrases beginning with "Notwithstanding other provisions of law". He inquired as to why that language is now being used. He said, "It's always notwithstanding everything else; you can put that in every single clause."

MS. FINLEY expressed the hope that such language isn't used in every single clause because then there would be dueling "Notwithstanding" clauses, which she understood to be the point Representative Gruenberg was raising.

REPRESENTATIVE GRUENBERG recommended eliminating the aforementioned language from [Sections 1 and 2] because it is clear [without the language].

MS. FINLEY informed the committee that the "Notwithstanding" in Section 1 was the result of the floor amendment [to HB 210]. Therefore, when Section 2 was drafted it duplicated the language in Section 1. Ms. Finley said that she didn't believe it would be a problem to eliminate the "Notwithstanding" language from Section 1 and 2.

Number 0840

REPRESENTATIVE GRUENBERG turned to the retroactivity provision, and remarked that it is necessary because without it, there may be some causes of action that may have been extinguished.

MS. FINLEY agreed.

REPRESENTATIVE GRUENBERG directed attention to the language, "To the extent permitted by the state and federal constitutions" on page 2, line 24. He asked if that is tautological and always the case.

MS. FINLEY agreed that it's always the case. However, that language was included to indicate that there may be some retroactive applications that are valid and some that aren't and the intent is to preserve those that are [valid].

REPRESENTATIVE GRUENBERG asked whether [the language] is really necessary. Wouldn't a court simply interpret it that way?

MS. FINLEY said the [language was included] in order to clarify the intent. In further response to Representative Gruenberg, Ms. Finley explained that all retroactive legislation is immediately effective. Without an immediate effective date, the legislation would be retroactive but wouldn't be retroactive until 90 days out.

REPRESENTATIVE GRUENBERG said he wasn't sure that logically that follows. When the laws become effective and it's retroactive, it means that one can't file a lawsuit for 90 days. As a matter of policy, Representative Gruenberg said, he has a problem with making things retroactive.

MS. FINLEY informed the committee that the drafting manual specifies that for retroactive legislation, [the drafter] should try to use an immediate effective date.

CHAIR McGUIRE referred to a memorandum from Mike Ford, Attorney, Legislative Legal and Research Services, that was drafted on another matter. That memorandum addressed retroactivity by specifying, "The modern view appears to be that retroactive enactments of the legislature will be upheld against a due process challenge if the legislation is rationally related to a legitimate government purpose."

MS. FINLEY relayed her belief that the immediate effective date for the retroactive clause is necessary in order to have things happen as quickly as possible. She informed the committee of the ARCO Alaska, Inc. v. State, 824 P.2d 708 (Alaska 1992) case in which the effective date failed, but the courts still upheld the retroactivity clause.

CHAIR McGUIRE again referred to Mr. Ford's memorandum and pointed out that it specifies that passage of retroactivity serves as an immediate effective date upon passage.

Number 1134

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 1, to remove the "Notwithstanding" clauses from Sections 1 and 2 on page 1, lines 6 and 13.

REPRESENTATIVE GARA asked if Ms. Finley feels that the legislation as written needs to be changed in order to accomplish its purpose.

MS. FINLEY answered that keeping the "Notwithstanding" language doesn't do any harm. However, she said she also didn't believe that there would be a great deal of harm in eliminating the "Notwithstanding" language because the courts will always take the specific statute over the general statute.

REPRESENTATIVE GRUENBERG interjected to say that it had been a policy to not use such language unless necessary.

CHAIR McGUIRE noted that were no objections to Conceptual Amendment 1. Therefore, Conceptual Amendment 1 was adopted.

Number 1219

REPRESENTATIVE GRUENBERG moved to report HB 2, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 2(JUD) was reported from the House Judiciary Standing Committee.

HB 83 - REVISED UNIFORM ARBITRATION ACT

Number 1243

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 83, "An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

Number 1272

REPRESENTATIVE ETHAN BERKOWITZ, Alaska State Legislature, Sponsor, remarked that although HB 83 is a long bill, it is a simple one. He went on to say:

> In 1925 the federal government put forward the Federal Arbitration Act [FAA], which enshrined the concept that people could arbitrate. It used to be somewhat suspect in common law that people could go to a third party to help resolve some of the their disputes. And in 1955 the Uniform Arbitration Act [UAA] was promulgated and eventually adopted by ... 49 of the states; Alaska adopted it in 1968. And that set forth some of the parameters and some of the ways in which arbitration can come to exist. Well, as is inevitably the case with laws, as ... people use them and practice with them, some deficiencies appeared - some "change needs" became obvious - and in the year 2000, the Revised Uniform Arbitration Act [RUAA] was drafted by the folks that make [the] uniform rules that are supposed to apply across the states.
>
> What this bill is, is the Revised Uniform Arbitration Act. It incorporates the thoughts of many people across the country and many Alaskans. In fact, today, the chair of the RUAA, the Revised Uniform Arbitration Act, Mr. Francis Pavetti, is available to testify, as are ... an Alaskan member of the committee, Mr. Art Peterson; in your file you'll see a letter from

> another member, Mr. Grant Callow; and Mr. Bob Landau is also apparently available to testify on the subject. What this does, what the 2000 RUAA does, as opposed to the 1955 Uniform Arbitration Act, [is that] there's five new areas that it ... fleshes out, and there's eight areas where it revises it. They're fairly simple. I'm not the expert in it. I'm merely the shepherd here. I would encourage you, as you have questions, I can answer some of them, but you do have some national experts available to address this subject matter.

REPRESENTATIVE BERKOWITZ, in response to questions, relayed that HB 83 does not repeal the UAA; instead, if HB 83 passes, both the UAA and the RUAA [will be in effect].

Number 1436

ARTHUR H. PETERSON, Commissioner, National Conference of Commissioners on Uniform State Laws (NCCUSL), after noting that he is an attorney currently practicing with the Juneau law firm of Dillon & Findley, PC, relayed that he would be speaking as an NCCUSL commissioner for Alaska. He stated his support of HB 83, adding that the Alaska delegation to the NCCUSL has reviewed the RUAA and was present at the NCCUSL's annual meeting at which the RUAA was promulgated/adopted. "We supported it then, and we support now," he remarked. He explained that the RUAA addresses a number of "updating features," areas of arbitration that haven't been addressed in the past but that need to be. It resolves issues that have arisen through the arbitration process and any subsequent litigation. "It takes care of a number of problems; smoothes things out; makes arbitration more available; tries to resolve some federal-state issues, and generally makes arbitration, as an alternative to litigation, easier and better.

MR. PETERSON, as background, offered that the NCCUSL, which drafted the RUAA, is an organization that is approximately 108 years old, and that Alaska has been a member of the NCCUSL since 1913 and has been a beneficiary of approximately 65-70 uniform Acts - or revised versions of those Acts - promulgated by the NCCUSL. "So, we've been a major contributor and a major beneficiary of the NCCUSL," he added, noting that the NCCUSL has produced the Uniform Commercial Code, which governs virtually all commercial activities throughout the U.S.; the Uniform Probate Code, which Alaska has enacted; and many other uniform Acts pertaining to issues for which uniformity among the states is desirable.

Number 1600

MICHAEL L. LESSMEIER, Attorney at Law, Lessmeier & Winters; Lobbyist for State Farm Insurance Company ("State Farm"), relayed that he has a concern regarding proposed Sec. 09.43.330(b) and (c), found on page 3 of HB 83. He said that upon reading this language, it seems that the issue of who decides whether there is an agreement to arbitrate is unclear. Subsection (b) says that the court shall decide, which is the way it is under existing law and, he opined, is the way it should be. Subsection (c) refers to "a condition precedent to arbitrability" and "whether a contract containing a valid agreement to arbitrate is enforceable". He said that it seems as though there is a conflict over this issue, adding that if the purpose of HB 83 is to prevent litigation and make arbitration easier, then this issue should be resolved.

Number 1701

ROBERT W. LANDAU, Attorney at Law; Arbitrator, Mediator and Hearing Officer, after remarking that he has not been involved in drafting the RUAA, said that issues of substantive arbitrability, which means whether or not an issue should even be before an arbitrator, have generally been handled by the court. In contrast, issues of procedural arbitrability - which have to do with the timeliness of a request for arbitration or other types of procedural objections in arbitration - are normally handled by an arbitrator. He said that arbitration has proven to be a very fair and cost effective alternative to going to court; it is an alternative that is increasingly being used as the courts become more expensive and time consuming. He went on to say:

> The State of Alaska has long had a strong public policy favoring arbitration of disputes, and, in fact, we've had a number of Alaska Supreme Court decisions recognizing arbitration as a good way to resolve disputes out of court, and in general the courts have been very deferential to the awards made by arbitrators. I'm here to give you my standpoint as a practicing arbitrator, and, in general, I welcome the [terms] of the revised Act. I think the revised Act provides a clearer and more detailed procedural framework for handling arbitration cases without making the process too legalistic. And, in addition, the revised Act gives the parties and arbitrators some

additional tools to make arbitration a more efficient process and at the same time protect against what's been called "trial by surprise."

In many arbitrations, the first time the parties meet with the arbitrator is at the hearing itself, and there's very little in the way of prehearing process. And what this revised Act tries to do is allow for some methods of prehearing procedure so that the hearing process is not so much of a surprise to any party. Some of the tools that are provided under the revised Act include such things as: preliminary conferences with the arbitrator; discovery and exchange of information between the parties; and the ability to make dispositive motions in appropriate cases and avoid the need for having a hearing altogether.

Number 1881

MR. LANDAU concluded:

And the final point I would make is that the Revised Uniform Arbitration Act is consistent with the arbitration rules of some of the leading private arbitration organizations such as the American Arbitration Association, which has endorsed the revised Act. And I won't go through the many professional organizations that support it, but it is a useful device for those of us that practice in this field. It will make arbitration fairer, more efficient, and more useful to parties with or without lawyers. And so for those reasons I support ... House Bill 83, and I urge the committee to approve it.

REPRESENTATIVE GRUENBERG relayed that he is presently before the Alaska Supreme Court in a fee arbitration case involving his law firm, and, as a result, he's had recent experience in the Alaska Superior Court with the present UAA as it relates to the "fee arb" provision, which is a rule in the Alaska Bar Association rules allowing clients to "fee arb" if they have a controversy over the amounts charged. He went on to say:

So I'm quite familiar ... [with] how ... the present Act works. I'm looking particularly at a couple of sections that we have dealt with in court. ... There are some differences between the current sections

> involving getting what's called confirmation of the award - ... the arbitrator makes an award and then you have to go to court to get your judgment, and they'll normally confirm the award unless you either get it vacated or modified - and we're looking in the bill at pages 12 and 13 ... , and in ... [AS 09.43.120 and AS 09.43.130] of the current [statute] which is going to be supplanted by this, ultimately. And what I'm wondering ... is, I see there are a number of differences between the current Act and revised Act in those particular sections, which are the sections that ... the court concerns itself with.

REPRESENTATIVE GRUENBERG asked that, at some point, someone address those differences, in particular, as well as the other differences between the UAA and the RUAA.

Number 2015

FRANCIS J. PAVETTI, Chair, Revised Uniform Arbitration Act (RUAA) Drafting Committee, National Conference of Commissioners on Uniform State Laws (NCCUSL), in response, after noting that he is not familiar with Alaska's statute specifically, said that the UAA, which was approved by the NCCUSL in 1956, and the RUAA are essentially the same. He mentioned that there is a provision in the RUAA that requires arbitrators to disclose any conflicting interests or relationships, and a provision pertaining to evident partiality. Elaborating on that last point, he said:

> We make a distinction as to evident partiality by an arbitrator appointed as a neutral arbitrator. And we have distinguished there because party arbitrators are a ... somewhat common practice whereby each party appoints a party arbitrator to appoint a neutral arbitrator. And we've only made this evident partiality section apply to neutral arbitrators because, in most cases, [from] all that we have heard and all that I know about arbitration, party arbitrators do communicate with their parties and do have some degree of partiality because they're appointed by them, and it's really the neutral arbitrator who is the final determiner. So, that's the only difference that I know of, is that clarification as to evident partiality we find in neutral arbitrators.

REPRESENTATIVE GRUENBERG said that he's noticed approximately three or four differences. He read from AS 09.43.120, which in part says: "the court shall vacate an award if ... (2) there was evident partiality by an arbitrator appointed as a neutral ...." He then read from HB 83, page 12, lines 16-17: "evident partiality by an arbitrator appointed as a neutral arbitrator. Therefore, he surmised, the only change is the second use of the word "arbitrator". According to his understanding, he remarked, the term "neutral" used as a noun, rather than as an adjective, is a little broader. He asked why the term "neutral arbitrator" was not used in the original language.

MR. PAVETTI said that the reason it was not used is because the Act itself made no distinction between neutral arbitrators and party arbitrators, adding that "you really have to go back to ... Section 12" of the UAA, in which failure to disclose a conflict creates a presumption of evident partiality. "So, to that extent, the distinction comes into play because ... the feeling is that an award should not be vacated because a party arbitrator was ... partial," he remarked.

Number 2209

REPRESENTATIVE GRUENBERG, referring to AS 09.43.120 and page 12 of HB 83, lines 19-20, remarked that the former reads, "misconduct prejudicing the rights of a party", whereas the latter reads, "misconduct by an arbitrator prejudicing the rights of a party". He observed that in criminal cases, "you can have misconduct by a party or by a counsel for a party that would vitiate - or void - the proceedings." He relayed that his concern is that only misconduct by an arbitrator could cause vacation of the award. He opined that it is possible for a party to so disrupt the proceedings that they could be corrupted in the legal sense. He remarked that he preferred the language that just said "misconduct" versus "misconduct by an arbitrator".

MR. PAVETTI remarked that the latter wording, in the RUAA, is not a change from the language in the UAA.

REPRESENTATIVE GRUENBERG surmised, then, that perhaps the current language in AS 09.43.120 is a result of changes made by the legislature in adopting the UAA.

REPRESENTATIVE BERKOWITZ suggested that Representative Gruenberg's concern is addressed by the language on page 12, lines 13-14, which reads, "the award was procured by corruption,

fraud, or other undue means". After acknowledging that the evolution of legislation can be critical [for] interpretations by subsequent courts, Representative Berkowitz pointed out that a fairly exhaustive 2002 Alaska Law Review article included in members' packets - titled "Is the Revised Uniform Arbitration Act a Good Fit For Alaska?" - addresses many of the issues being raised.

TAPE 03-18, SIDE B
Number 2381

MR. PAVETTI remarked that the UAA of 1956 tracked, pretty much, the language of the FAA, which was enacted by Congress in 1925. In the FAA, he noted, it refers to how the arbitrators are guilty of misconduct in refusing to postpone the hearing on sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced. He indicated that the NCCUSL simply tried to take that language, since it related solely to the acts of the arbitrator, and make it clearer.

REPRESENTATIVE GARA returned to the issue raised by Mr. Lessmeier, and asked Representative Berkowitz whether that particular language in HB 83 is the same language that is in the current UAA.

REPRESENTATIVE BERKOWITZ replied that it is the same language. He then paraphrased a portion of the commentary included in the UAA, pages 15-16, that read:

> Subsections (b) and (c) of Section 6 are intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

REPRESENTATIVE BERKOWITZ noted that this portion of the commentary is accompanied by "a whole paragraph of citations," and that this language [that is of concern to Mr. Lessmeier] is merely a restatement of existing law.

REPRESENTATIVE GRUENBERG, returning to the issue of grounds for vacating the award, referred to page 12 of HB 83, lines 26-28, which read, "(5) there was not an agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under AS 09.43.420(c) not later than the beginning of the arbitration hearing". He noted that [current AS 09.43.120(a)(5)] reads: "there was no arbitration agreement and the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the objection". He asked whether the additional wording of "not later than the beginning of the arbitration hearing" is intended to prevent someone from going through the process only to then ask for "a second bite of the apple."

MR. PAVETTI indicated that that is correct.

Number 2227

REPRESENTATIVE GRUENBERG asked whether the provision now located in AS 9.43.120(b) that reads, "The fact that the relief is such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award", has been eliminated from HB 83.

MR. LESSMEIER observed that that provision is located on page 11 of HB 83, lines 25-29, in proposed Sec. 09.43.480(c).

REPRESENTATIVE GARA said:

> The Uniform Arbitration Act [UAA] ... allows people to agree to arbitrate. The one problem I have sometimes with arbitration is that ... unsuspecting consumers will sign a 50-page document, and somewhere on the 48th page - buried in small print - is an agreement to arbitrate. And so the courts have always tussled with whether or not to enforce these things that are buried in the middle of ... 50-page contracts. So, ... as I look through this revision of the Uniform Arbitration Act, it doesn't really address that situation of whether or not an agreement to arbitrate is enforceable in those situations; ... in legal terms, I guess, they're contracts of adhesion. ... The way I read the Act, ... it doesn't address that situation at all, and I'm comfortable with that, but I want to make sure I didn't miss something. So, [is] the situation

> of the enforceability of arbitration agreements - when those agreements are contained in very large ... form contracts - ... addressed anywhere in this revision?

MR. PAVETTI relayed that many of the drafters of the RUAA would have liked to address that issue; however, under the doctrine of federal preemption, according to the U.S. Supreme Court decision in Doctor's Associates, Inc. v. Casarotto, a state's arbitration statute cannot treat an arbitration agreement any differently than any other kind of agreement. In other words, he added, special rules cannot be made for the validity of an arbitration agreement that don't apply to all other types of contracts or agreements. In both [the RUAA] and the FAA, from which the federal preemption doctrine emanates, there is a provision that says an agreement to arbitrate is valid and irrevocable except as provided for by law. Thus, because of federal preemption, the issue raised by Representative Gara could not be addressed via state statute, he remarked, adding that the only way to address that issue would be to amend the FAA.

Number 2020

REPRESENTATIVE BERKOWITZ, to additionally address Representative Gara's question, referred to page 367 of the aforementioned Alaska Law Review article, and read from the following paragraph:

> Section 21 does give rise to concerns regarding adhesion contracts in the context of arbitration agreements between consumers and lenders, employers and employees, and medical providers and subscribers. The Drafting Committee chose to leave the issue of adhesion contracts and unconscionability to developing case law across the country. The Drafting Committee noted that a large number of organizations have developed "Due Process Protocols" to ensure procedural and substantive fairness in employment, consumer, and health care arbitrations.

MR. PAVETTI remarked that an important feature of the [RUAA] is the great amount of party autonomy that it provides for. In other words, he added, the RUAA is essentially a default Act, and the parties are free to fashion their arbitration agreement to suit their needs. He mentioned that Section 4 of the RUAA contains extensive waiver provisions, noting that with regard to the area of consumer protection, certain fundamental rights such

as the right to counsel and the right to move for "vacatory (ph) confirmation" were preserved against the "nonwaiver rule."

REPRESENTATIVE COGHILL remarked that he did not know how anybody could proceed through the arbitration system without the benefit of counsel.

REPRESENTATIVE GRUENBERG directed members' attention to page 2, lines 24-25, which pertains to waiver of an attorney by employers and labor organizations in a labor arbitration, and asked whether that means that "both have to do it, or that either one can do it."

MR. PAVETTI said, "Either one can do it." He added that it is pretty common in labor arbitrations for the shop steward to represent the employee; thus this provision would be consistent with longstanding practice.

Number 1807

MR. LESSMEIER reiterated his concern regarding proposed Sec. 09.43.330(b) and (c), remarking that the two subsections appear to conflict. What is substantive and what is procedural is not necessarily all that clear, he opined, noting that there has been a lot of litigation over the years regarding this issue.

MR. PAVETTI pointed out that the language in those subsections is part of existing law, and that there is a lot of case law that supports the rule as stated in that provision. He noted that this case law is included in the commentary section of the UAA, which is available on the NCCUSL's web site. He relayed that the purpose of including that specific language in the RUAA is to clarify it and make people aware of it without them having to go through a great deal of research.

CHAIR McGUIRE asked: Wouldn't it be clearer just to specify that those decisions that the court will have power over will be those that are substantive as opposed to those that are procedural?

MR. PAVETTI opined that the present wording is clear. He reiterated that there is a lot of case law to support it, adding that it is not a novel concept.

REPRESENTATIVE GRUENBERG, turning to page 3, lines 6-7, remarked that the question, as listed in proposed Sec. 09.43.330(b), of "whether ... a controversy is subject to an agreement to

arbitrate" is definitely a substantive question, not a procedural question. Turning then to lines 9-8 on page 3, in proposed Sec. 09.43.330(c), he opined that the words, "whether a contract containing a valid agreement to arbitrate is enforceable" is also a substantive question, not a procedural question. He added: "I don't think that we can say that the distinction is entirely substantive; ... it appears, from what you people are saying, that subsection (b), that everything the court decides is substantive, but you cannot say that everything the arbitrator decides is solely procedural."

Number 1581

REPRESENTATIVE BERKOWITZ said no, that that is not what his understanding is. He elaborated:

> Subsection (b) deals with the agreement to arbitrate. Subsection (c) is the conditions precedent. ... I realize that there are a number of issues that could be raised with pretty much any section of this bill. ... There's 77 pages of the [UAA] which talk about, ... in essence, the procedural history that led the ... [NCCUSL] to come up with the language that they chose. I'm merely here to present to the committee what the ... [NCCUSL has] chosen, and I think that there's a great deal of deference we ought to extend them because they have a vast amount of expertise in this subject.

REPRESENTATIVE GARA noted that in adopting the language that the [NCCUSL] has put together, the [NCCUSL's] analysis of that language is also being adopted.

MR. LESSMEIER, in response to a question, relayed that rather than seeking a specific amendment to the language with which he has concerns, he merely wanted to highlight the issue. He opined that Representative Gruenberg "has hit the nail on the head," adding that he did not see the necessity of including in subsection (c) the phrase, "whether a contract containing a valid agreement to arbitrate is enforceable", since it clearly could be read as something substantive. He warned that there would be litigation over this issue.

MR. PAVETTI posited that that phrase "limits the arbitrator's function determining the condition precedent as having been fulfilled." He mentioned that this second clause of subsection (c) relates to the case of Prima Paint Corp. v. Flood & Conklin

Manufacturing Co., 388 U.S. 395 (1967), and suggested that members read the commentary specific to that language provided in the UAA.

The committee took an at-ease from 2:15 p.m. to 2:19 p.m.

CHAIR McGUIRE mentioned her intention to have staff provide members with copies of the current UAA and the case law that's been referenced. She relayed that Representative Berkowitz and Mr. Lessmeier would be working together to address Mr. Lessmeier's concern. She added, "It may be that we agree to disagree, but I'd like to have that ... [issue] worked out" before HB 83 goes to the House floor. She indicated that she intended to have another hearing on HB 83 on [3/12/03].

Number 1355

REPRESENTATIVE BERKOWITZ said, "Madam Chair, I just want to be clear that we're drawing a very narrow point of discussion here, to this one particular section."

CHAIR McGUIRE acknowledged that point.

REPRESENTATIVE GARA requested that if an amendment to HB 83 is forthcoming, that Mr. Pavetti review it.

CHAIR McGUIRE indicated agreement.

REPRESENTATIVE GRUENBERG, regarding the Prima Paint case, asked Mr. Pavetti, "What was the holding on that?"

MR. PAVETTI said,

> It involved what's called the "separability doctrine." ... The question was raised about an agreement obtained by fraud. ... The court held that in order to attack the arbitration agreement on the doctrine of fraud, it would have [to] be shown that the fraud related to the arbitration agreement itself and not merely to the entire contract. That is, if the contract were obtained by fraud, the arbitration agreement would still stand, unless it could be shown that the arbitration agreement portion of it was also obtained by fraud.

REPRESENTATIVE GRUENBERG surmised, then, that it was really an issue of relevance.

Mr. PAVETTI said yes, adding that it established the separability doctrine. He noted that although there is a minority opinion that disagrees, the second clause of subsection (c) is intended to set forth the rule of the Prima Paint case.

CHAIR McGUIRE said that to her recollection of the Prima Paint case, the argument, in addition to severability, relates to how far "you're going to be ... punitive with respect to fraud, and are you going to throw the whole thing out because you find that the ... underlying contract was entered into with some degree of fraud, are you going to throw out the arbitration portion of it as well." She remarked that although there are cases supporting the view that both aspects should be thrown out, there are cases that support allowing the arbitration clause to stand alone.

REPRESENTATIVE BERKOWITZ said that in the interests of "committee economy," he would be willing to strike [beginning on line 9 of page 3] the phrase, "and whether a contract containing a valid agreement to arbitrate is enforceable".

REPRESENTATIVE GRUENBERG expressed reluctance to do so.

REPRESENTATIVE GARA said that because he does not like the Prima Paint rule, he has come to the conclusion that that phrase should be deleted. He added:

> The Prima Paint rule is a rule that says if you enter into a fraudulent contract, the arbitration provision still applies, and I don't think that's a good idea. ... I think that the courts that have taken the contrary position - that says, if you've been defrauded into a contract, then the arbitration provision also shouldn't apply - I think are the right line of authority.

Number 1079

REPRESENTATIVE GARA made a motion to delete from page 3, lines 9-10, the phrase, "and whether a contract containing a valid agreement to arbitrate is enforceable".

MR. PAVETTI interjected to say that it is merely a policy decision whether Alaska follows Prima Paint, noting that there are a number of jurisdictions that have declined to do so.

Number 1012

CHAIR McGUIRE objected to Representative Gara's motion, indicating that she would prefer to take the issue up at the next hearing, after members have had a chance to review additional materials. After thanking Mr. Peterson and the NCCUSL for their work on this issue, she announced that HB 83 would be held over until [3/12/03].

ADJOURNMENT

Number 0910

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:29 p.m.