

ORIGINAL

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS HEARING
ON HOUSE BILL 2438

DELAWARE COUNTY COURTHOUSE
ROOM 110
MEDIA, PENNSYLVANIA

TUESDAY, JULY 11, 2000, 9:12 A.M.

BEFORE:

HON. DANIEL CLARK, CHAIRMAN
HON. LITA COHEN
HON. PETE DALEY

ALSO PRESENT:

MIKE RISH
SUSAN GOOD

SHERRI A. REITANO
REPORTER-NOTARY PUBLIC



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I N D E X

WITNESS

PAGE

John W. Nilon, Jr.

7

Jack Holfelder

12

1 CHAIRMAN CLARK: Let's go ahead and
2 convene the Judiciary Committee Subcommittee on
3 Courts hearing which was scheduled for today here
4 in the Delaware County Courthouse. I want to
5 thank everyone for attending and their
6 hospitality.

7 And the purpose of the hearing as
8 advertised was to receive public testimony on
9 House Bill 2438. That Bill was introduced and
10 sponsored by Representative Cohen.

11 And I believe first of all what we
12 will do is let the Members and staff introduce
13 themselves for the record. And if Ms. Cohen would
14 like to provide us with an introduction to the
15 Bill, that would be fine. And then we will
16 follow-up with the testimony.

17 REPRESENTATIVE COHEN: Thank you,
18 Mr. Chairman. I'm Lita Cohen and I'm a
19 Representative from the 148th district in
20 Montgomery County. I'm the prime sponsor of this
21 legislation, International Commercial Arbitration.

22 I certainly want to thank the
23 Pennsylvania Bar Association for calling this
24 matter to my attention.

25 Two years ago I was the prime sponsor

1 of a continuity of contracts piece of legislation
2 which is now signed into law by Governor Ridge and
3 is law in Pennsylvania. That was called to my
4 attention by my daughter who was taking an MBA in
5 Fordum and found that when the European countries
6 that are members of the European community and now
7 are trading in Euro dollars, when individual
8 countries' currencies no longer exist and everyone
9 goes to the Euro dollar, there would -- if we did
10 not adopt that Bill and every state had to adopt,
11 there would be no continuity of contracts and
12 contracts would be impossible to perform.

13 We have the same kind of situation
14 here in that we are now in a global economy. We
15 are all doing business around the world. And we
16 have to find ways to do business and resolve our
17 conflicts so that international trade and trade
18 among countries can proceed efficiently,
19 effectively, and without any glitches because
20 there is no law dealing with this.

21 The Pennsylvania Bar Association, as
22 I mentioned, brought to my attention the fact that
23 the United Nations Commission on international
24 trade law was established by the General Assembly
25 of the United Nations in order to recognize the

1 disparities in national law governing
2 international trade created obstacles to the flow
3 of trade.

4 And that is exactly what we don't
5 want to have. We want to make the flow of trade
6 easy in this world of a global economy. We have a
7 Model Law which is really the vehicle by which the
8 United Nations could play a more active role in
9 reducing and removing these obstacles to trade.

10 The law, House Bill 2438, is based
11 upon the Model Law drawn up by the United Nations.
12 It has been adopted by California, Connecticut,
13 Oregon, and Texas here in the United States and
14 about ten other countries throughout the world.

15 The adoption of this international
16 commercial arbitration statute will supplement
17 state arbitration laws as well as the federal
18 arbitration statute. The current arbitration
19 statutes in the Commonwealth do little to address
20 the needs of international businesses.

21 And so what this Model Law will do
22 will address all of the procedures to conduct
23 international arbitration. And I certainly would
24 urge that the whole House adopt this Bill and that
25 it becomes law in order to allow Pennsylvanians to

1 do business with other countries and resolve their
2 disputes easily.

3 CHAIRMAN CLARK: Okay. Thank you
4 very much.

5 REPRESENTATIVE COHEN: By the way,
6 thank you, Mr. Chairman, for holding these
7 hearings.

8 CHAIRMAN CLARK: You're quite
9 welcome. You're quite welcome. The first
10 individual to provide testimony before the
11 Committee will be John W. Nilon, Jr., Esquire.
12 And, Mr. Nilon, you can introduce yourself and
13 your firm. And I believe we have copies of your
14 testimony which we will follow.

15 MR. NILON: Thank you very much,
16 Mr. Chairman. First of all, let me add my thanks
17 to the thanks of Representative Cohen to you and
18 your Committee for convening these hearings. Let
19 me thank you specifically, Representative Cohen,
20 for sponsoring our legislation.

21 MS. GOOD: Before you start, we have
22 to move to 110 and that is right down the hall.
23 I apologize.

24 (Break.)

25 CHAIRMAN CLARK: I think we will move

1 this hearing forward again. Why don't we have --
2 why don't you introduce yourselves for the record?

3 MR. RISH: I'm Mike Rish, staff for
4 Representative Blaum.

5 REPRESENTATIVE DALEY: I'm
6 Representative Daley from Washington and Fayette
7 Counties.

8 MS. GOOD: Susan Good, analyst for
9 the Judiciary Committee.

10 CHAIRMAN CLARK: John, you may
11 continue.

12 MR. NILON: Thank you very much.
13 Again, thank you, Representative Clark, for
14 intervening these hearings and thank you again,
15 Representative Cohen, for sponsoring this
16 legislation.

17 As you know, I'm Co-Chairman of the
18 Pennsylvania Bar Association Alternative Dispute
19 Resolution Committee.

20 Our committee strongly supports the
21 enactment of House Bill No. 2438 which provides
22 for adoption by the Commonwealth of Pennsylvania
23 of the UNCITRAL Model Law on commercial
24 arbitration.

25 Adoption of House Bill No. 2438 will

1 bring the legal framework of the Commonwealth into
2 harmony with the emerging global framework which
3 facilitates the enforceability of international
4 agreements, to arbitrate international commercial
5 disputes and enforceability of resulting awards.

6 Passage of House Bill 2438 will
7 strengthen the role to be played in international
8 trade and investment by Pennsylvania economic
9 interests and hence their activities in the global
10 pattern emerging in foreign trade and investment
11 activities.

12 United States -- the United Nations
13 Commission on International Trade Law stationed in
14 Vienna has in recent years recognized the growing
15 need to harmonize and make more uniform the
16 national laws on international trade and
17 investment of countries of the world.

18 This has been particularly true
19 regarding the laws governing the resolution of
20 foreign trade disputes by international
21 arbitration.

22 It was not until 1958 after the
23 United Nations promulgated the convention on the
24 recognition and enforcement of foreign arbitration
25 awards that ratification of that convention

1 brought about the possibility of effective
2 international trade to the global legal word and
3 resulted in an increase of international trade and
4 foreign investment.

5 The UNCITRAL Model Law on
6 International Commercial Arbitration upon which
7 this proposed legislation is based is designed to
8 assist states in reforming and modernizing their
9 laws on arbitration procedures as to take into
10 account the particular features and needs of
11 international commercial arbitration.

12 The Model Law was adopted by UNCITRAL
13 in 1985 and has been enacted into law in a large
14 number of jurisdictions from both developed and
15 developing countries.

16 As was pointed out by Representative
17 Cohen in her remarks, the Model Law has been
18 enacted in many countries. My notes indicate more
19 than 20 around the world including Great Britain,
20 Northern Ireland, Scotland, Canada, and Mexico,
21 all of which are major trading partners of the
22 Commonwealth of Pennsylvania.

23 And again as pointed out by
24 Representative Cohen between the United States,
25 the Model Law has been adopted by California,

1 Connecticut, Oregon, and Texas.

2 The Pennsylvania Bar Association
3 House of Delegates on May 7th of 1999 voted in
4 favor of recommending the adoption of the UNCITRAL
5 Model Law on International Commercial Arbitration
6 statute to the Commonwealth of Pennsylvania.

7 I am submitting to this Honorable
8 Committee for inclusion in the record
9 correspondence dated July 7th, 2000, which I
10 solicited from Charles R. Norberg, Director
11 General Emeritus of the InterAmerican Arbitration
12 Commission, indicating his strong support for the
13 enactment of House Bill No. 2438.

14 Director General Emeritus Norberg
15 points out that the Organization of the American
16 States, the OAS, has been aided and assisted in
17 their programs to revise existing dispute
18 settlement laws and procedures by grants made by
19 the World Bank and aid from the United States of
20 America.

21 Adoption by Pennsylvania -- by the
22 Pennsylvania House of Representatives of House
23 Bill No. 2438 would be consistent with these
24 initiatives.

25 The United Nations Commission on

1 International Trade Law has also offered to assist
2 this Committee and the Commonwealth House of
3 Representatives in its consideration of adoption
4 of the UNCITRAL Model Law on International
5 Commercial Arbitration.

6 And we are submitting also for the
7 record the most recent documentation available
8 from UNCITRAL concerning the Model Law and its
9 adoption in other jurisdiction.

10 The UNCITRAL, by its legal officers,
11 has also offered to make available for our
12 consultation and consultation of this Committee
13 various experts on international law to assure
14 coordination by this Committee with similar
15 initiatives in other jurisdictions throughout the
16 world.

17 Again, my sincere thank you to this
18 Committee for consideration of House Bill No.
19 2438. And again I wish to express my gratitude to
20 the Committee and that of the Pennsylvania Bar
21 Association Alternative Dispute Resolution for
22 their efforts and the efforts of the Honorable
23 Lita Cohen for bringing this statute before the
24 Committee. Thank you.

25 CHAIRMAN CLARK: Okay. I thank you.

1 I think before we ask any questions, we'll go
2 ahead and have Jack Holfelder who is the executive
3 director of the Delaware County Chamber of
4 Commerce provide us with his testimony. And then,
5 Jack, are you going to add anything for us?

6 MR. GARDNER: No, not today. I'm
7 here to learn.

8 CHAIRMAN CLARK: All right. You're
9 here to learn. Then we'll pick up questions and
10 let whoever wants to answer or can answer can
11 answer that.

12 MR. HOLFELDER: Chairman, Members,
13 thank you for having us here today. We certainly
14 appreciate the opportunity. And listening to
15 Representative Cohen earlier on, you can learn
16 things from your kids.

17 Actually, it has been a learning year
18 for myself from several of my children but one who
19 is studying international law at the University in
20 Geneva this summer who is trying to understand the
21 difference between the Euro dollar and the
22 American dollar. So it is -- you can learn things
23 from your kids.

24 My testimony will be short but I hope
25 important. I want to address the small business

1 aspects of this legislation. The Delaware County
2 Chamber of Commerce represents over 3,000
3 businesses in and around Delaware County. I'm
4 here today to support the passage of HB 2438,
5 International Commercial Arbitration.

6 Recently, the Government Affairs
7 Council of the Delaware County Chamber of
8 Commerce unanimously voted to support the passage
9 of HB 2438.

10 Our committee and our Board
11 recognizes the great opportunity to increase
12 business through international trade.

13 And 90 percent of our members are
14 small businesses employing a hundred or less
15 employees. They don't have the resources some of
16 the much larger corporations have to develop
17 international business and deal with problems that
18 sometimes arise during international commerce.

19 The more barriers to successful
20 international trade that we can remove or soften
21 will help provide the impetus for small businesses
22 to look into international trade and to expand or
23 start their businesses.

24 Passage of HB 2438 will help provide
25 a more timely and cost effective way to address

1 commerce dispute resolution through arbitration.
2 And we certainly encourage your active support for
3 HB 2438.

4 I guess just in a nutshell is small
5 business -- over the years we've been trying to
6 encourage small businesses to get more involved in
7 international trade.

8 It is certainly a way to expand
9 business in Pennsylvania and there are numerous
10 barriers not to mention sometimes language or just
11 transmission of dollars payment.

12 And if you -- the more barriers we
13 can bring down especially in the area of where you
14 do have the dispute, it certainly would be more
15 beneficial for small business since they don't
16 have the resources of some of the major
17 corporations. Thank you.

18 CHAIRMAN CLARK: Representative
19 Cohen.

20 REPRESENTATIVE COHEN: Thank you,
21 Mr. Chairman. I have one question for Mr. Nilon
22 which I think just for the record we should have
23 this discussion.

24 And that is, why do each of the
25 states have to adopt this legislation as opposed

1 to the Congress of the United States, the federal
2 government, adopting this law for the benefit of
3 all 50 states?

4 MR. NILON: I think the Congress of
5 the United States could do that and I think there
6 have been some initiatives in the Congress of the
7 United States.

8 But to date the political
9 determination has been that those states who are
10 active in trade should be the guardians of their
11 own laws.

12 And the United States Congress has to
13 date deferred to the states to allow the states to
14 consider the adoption of the uniform law, not only
15 this uniform law but other uniform laws which have
16 been recommended -- drafted and recommended for
17 adoption by the United Nations Commission on
18 International Trade.

19 And a like situation would be like in
20 Canada where the separate states of Canada have
21 also been given the opportunity to consider and
22 adopt laws on their own as is the case in Great
23 Britain.

24 There has been separate adoption by
25 Great Britain, by Northern Ireland, and Scotland

1 whereas one statute could have been adopted by the
2 House of Commons. Through that legislative
3 process individual states have been allowed an
4 opportunity to conduct hearings and in some cases
5 adapt the law to particular circumstances.

6 Although the recommendation of the
7 United Nations is to leave the uniform law uniform
8 because one of its great attributes is the
9 uniformity. Some states which have considered it
10 have made slight changes to it.

11 REPRESENTATIVE COHEN: Thank you. I
12 have no further questions.

13 CHAIRMAN CLARK: If I might put this
14 in a nutshell is if we're dealing with a business
15 in Italy, we put in the contract our standard
16 clause that any disputes will be submitted to
17 arbitration under the United Nations rules and
18 arbitration section so to speak so that everyone
19 knows that if there is a problem, where they go to
20 have it resolved.

21 MR. NILON: That's one scenario.

22 CHAIRMAN CLARK: Okay.

23 MR. NILON: The other scenario would
24 be the contract which is really the form of just
25 simply a purchase order and an acceptance which

1 does not have dispute resolution procedures within
2 it and a dispute arises. The parties can then say
3 we agree without the benefit of an arbitration
4 provision but we will resolve it in arbitration
5 form.

6 And if you're dealing with one of the
7 member states such as Canada or Mexico which are
8 major, major trading partners, the law which they
9 have in effect is the same law which we have in
10 effect. So there is a uniformity which
11 facilitates the selection of the arbitrators,
12 conduct and proceedings.

13 CHAIRMAN CLARK: I can see where if a
14 small company in Delaware County wanted to enter
15 into a contract with someone in France and they
16 had their standard arbitration clause that you
17 need to go to Paris and do this or that or
18 whatever. They would say, gee, if there is a
19 problem here, I'm not going to go there because I
20 don't know the rules and don't know the people and
21 don't know the language. So I can see where that
22 would be helpful.

23 I also noticed in your testimony that
24 you talked about enforceability of awards. One of
25 the things is you can get an award for almost

1 anything but then trying to collect that or have
2 people make good on it from far away is something
3 else.

4 MR. NILON: Well, as a general
5 proposition, an arbitration award is more easily
6 enforced worldwide than the Order of Court of
7 common jurisdiction in a particular trading
8 company.

9 So if I have, for example, a judgment
10 against the French company which if -- no. If I
11 have obtained in France a judgment against an
12 American company, I now come to the United States
13 and enforce that against the assets of the
14 American company.

15 There is no very easy procedure by
16 which I can have that award enforced. There is a
17 dispute over exactly how it should be done.

18 There are some laws in effect but
19 generally speaking I have to re-file the complaint
20 and go through the issue of whether or not there
21 is an appropriate jurisdiction, appropriate
22 notice, whether it is contrary to public policy,
23 and other considerations.

24 Whereas an arbitration award based on
25 UN Convention which was adopted by the UN in 1958,

1 that is an enforceable award.

2 So an arbitration award really has
3 much more enforceability around the world in trade
4 contracts than does an award of a Court of common
5 jurisdiction.

6 CHAIRMAN CLARK: Representative
7 Daley.

8 REPRESENTATIVE DALEY: I find this
9 whole topic very interesting. Currently there
10 obviously are problems that have been experienced
11 between the company in Delaware County that
12 engages in business with someone from France. And
13 some of those horror stories would be what?

14 The fact that there can't be
15 enforceable awards? Is it the form question?
16 What are some of the issues?

17 MR. NILON: Expense, delay, and
18 enforceability are the three major problems.
19 Generally in a commercial context there is a
20 desire not only to resolve the dispute but to
21 preserve the relationship and to preserve the
22 relationship at a cost acceptable to the business.

23 Arbitration is designed to resolve
24 business disputes in an efficient, inexpensive way
25 as well as to preserve the relationship between

1 the parties.

2 If we have, in my judgment, a uniform
3 law which allows us a quick, easy, neutral
4 procedure to assure everyone has a fair hearing on
5 what we would call a level playing field, we think
6 that assists in preserving the relationship.

7 But if I have a dispute as a Delaware
8 County executive with someone in Canada and I file
9 a suit in the Court of Common Pleas of Delaware
10 County and attempt to obtain jurisdiction over the
11 Canadian business because one of their salesmen
12 came to visit me in the townhouse and I gave him
13 summons of process, the Canadian company is going
14 to think they have been given a very unfair deal,
15 that we're playing in our home court and it is not
16 a neutral forum.

17 But if we have this commercial forum
18 which has been selected by these neutral rules
19 promulgated by the United Nations with input from
20 around the world, I think it helps to preserve the
21 relationship and allows the dispute to be settled
22 in a much more expeditious way without appeal
23 which is another great advantage I failed to
24 mention.

25 REPRESENTATIVE DALEY: How many

1 states have adopted this uniform --

2 MR. NILON: In the United States four
3 states to date have adopted uniform laws.

4 REPRESENTATIVE DALEY: What states
5 are they?

6 MR. NILON: California, Connecticut,
7 Oregon, and Texas. And I understand something
8 along these lines is being considered in North
9 Carolina as well as Ohio.

10 REPRESENTATIVE DALEY: And I note
11 that Mexico and Canada either have or are in the
12 process.

13 MR. NILON: Yes, I have a schedule
14 which I received from the United Nations actually
15 yesterday which gives an absolute up to date of
16 all of the nations around the world and all of the
17 states around the world which have adopted the
18 statute with notations as to when and what, if
19 any, changes. So we have that.

20 We also have a very expensive
21 commentary from the legal department of the United
22 Nations which gives us chapter and verse of each
23 paragraph of the statute, the model statute on
24 which Representative Cohen's Bill is based, as
25 well as commentary on why each provision is or was

1 selected in an attempt to coordinate all of the
2 various legal regimes around the world.

3 REPRESENTATIVE DALEY: Just to
4 inquire as to a question that Representative Cohen
5 had raised concerning why states have the
6 authority or request to have the authority as
7 opposed to the federal government. I know that
8 our Committee had dealt with a Bill of mine
9 regarding entering into agreements with foreign
10 nations in terms of prisoners going back.

11 The US government has adopted a law
12 giving states the ability to opt in so to speak.
13 I'm assuming that may be the case here.

14 There may be federal law giving the
15 states the ability to opt into this sort of
16 agreement with other countries.

17 MR. NILON: The Federal Arbitration
18 Act. But what this statute provides is for
19 resolution of disputes within the Commonwealth of
20 Pennsylvania.

21 REPRESENTATIVE DALEY: Within the
22 Commonwealth of Pennsylvania.

23 MR. NILON: Within the Commonwealth
24 of Pennsylvania. So the jurisdiction of this
25 particular statute would be limited to disputes,

1 the resolution of which is determined in the
2 Commonwealth of Pennsylvania.

3 REPRESENTATIVE DALEY: Okay. That
4 makes sense.

5 MR. HOLFELDER: Just to add something
6 to that. When we counsel small businesses on
7 international trade, two of the most asked
8 questions that we get are number one, how do I get
9 paid; and what do I do if there is a problem.

10 They are the two major -- mostly
11 everything else can be handled through the
12 expertise of freight forwarders and people we have
13 on staff. A lot of those things can be all
14 handled for smaller businesses.

15 But those two issues of how do I get
16 paid and what do I do if there is a problem.
17 This certainly answers the one what do I do if
18 there is a problem.

19 CHAIRMAN CLARK: Any other additional
20 questions? Okay. I want to thank both of you for
21 providing us with your testimony. And if you have
22 extra copies --

23 MR. NILON: These copies are all for
24 the record.

25 CHAIRMAN CLARK: Okay. We'll submit

1 those for the record. And Susan will gather those
2 up and copy them for us.

3 MS. GOOD: Sure.

4 CHAIRMAN CLARK: We'll circulate
5 those and make those available to our members.

6 (The hearing concluded at 9:47 a.m.)

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I hereby certify that the proceedings
and evidence are contained fully and accurately in
the notes taken by me in the proceedings of the
above cause and that this copy is a correct
transcript of the same.



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