REVISED UNIFORM ARBITRATION ACT

Issue

Should the State Bar of Michigan support for adoption in Michigan the Revised Uniform Arbitration Act (RUAA) as drafted by the National Conference of Commissioners on Uniform State Laws (ULC) and supported with amendment by the Alternative Dispute Resolution Section of the State Bar of Michigan?

Synopsis

This act revises the Uniform Arbitration Act of 1956, adopted in 49 jurisdictions. The primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.

The RUAA is approved by the American Bar Association; endorsed by the American Arbitration Association, National Academy of Arbitrators, and National Arbitration Forum. It has been adopted in Alaska, Colorado, District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. (Found online at http://www.nccusl.org/Update/.)

The Alternative Dispute Resolution Section of the State Bar of Michigan support the RUAA as revised by the Uniform Law Commissioners in 2000 with the following amendment:

> Amend Section 21 of the RUAA as follows: 21(a) An arbitrator may not award punitive damages or other exemplary relief unless such award is authorized by statute in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim. 21(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the statutory and factual basis justifying and authorizing the award and state separately the amount of punitive damages or other exemplary relief.

The ULC accepts the amendment.

Background

The full text of the Revised Uniform Arbitration Act is online at http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf.

The following information is provided by the ULC:

The Uniform Law Commissioners promulgated the original Uniform Arbitration Act in 1955. It is the law in 49 jurisdictions, and the Federal Arbitration Act contains many similar provisions. In short, the Uniform Act is the fundamental substance of the law governing agreements to arbitrate in the law of the United States, currently.

The 1955 Uniform Arbitration Act does two fundamental things. First, it reverses the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there is an actual dispute. After a real dispute arises, the parties have always been able to agree to arbitrate. It is agreeing to arbitrate in anticipation of any possible disputes that the common law prohibited. Second, the 1955 Uniform Arbitration Act provides some basic procedures for the conduct of an arbitration. The Uniform Act does not mandate arbitration of any dispute. Its function is to let persons determine whether or not they want to use arbitration by agreement.

Arbitration is the original "alternative dispute resolution" or "ADR" mechanism made legitimate under American law. It is alternative to a judicial proceeding to resolve a dispute. Arbitration has traditionally been a means of resolving disputes when issues are specialized and technical. These kinds of disputes require specialist resolution and there is no desire for damage awards like those awarded by a court of law. A typical example is an arbitration that allocates costs of defects in a building project between architects, contractors and property owners. Arbitrators are chosen by the parties with construction expertise to determine responsibility for defects. The arbitration is conducted quickly. It is free of the constraints of court-room procedure, and may be tailored to adducing evidence for the specific kind of dispute. The parties all have a strong desire to avoid litigation and are normally satisfied with the results of arbitration. Construction disputes have been regularly resolved by arbitration for a long period of time.

However, provisions calling for arbitration occur in all kinds of contracts as the burgeoning caseload has slowed the civil justice process in the courts and as the costs of lawsuits have risen dramatically. As the arbitration process has been more utilized for resolving disputes that have traditionally been resolved by litigation, it has become clear that the limited procedural provisions of the Uniform Arbitration Act are no longer adequate. For that reason, the ULC has now promulgated a next generation state arbitration act, the 2000 Uniform Arbitration Act.

The 2000 Uniform Arbitration Act continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. It deals with procedural issues not addressed in the 1955 Act. The effect should be more efficient and fair arbitrations as an alternative to litigation than is the case under the 1955 Act. The 1955 Act was a great advance in American law. The objective of the 2000 Act is to make the contribution of the 1955 Act even greater.

The 2000 Uniform Act has been drafted, also, against the significant and preemptive presence of the Federal Arbitration Act. The federal act applies to arbitration provisions in private contracts. The Federal Arbitration Act encourages arbitration as an alternative to litigation. Therefore, any state law that limits the availability of arbitration risks failure as a matter of federal preemption. Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Act is drafted to avoid preemption.

It is impossible to cover all the provisions in this important revision of a seminal uniform act. Suffice it to say that the revisions are an effort to provide more certainty in arbitration

proceedings, to deal with preemption problems and to answer issues raised in the case law since 1955. There are many new provisions.

The 2000 Uniform Arbitration Act expressly provides that it is a default act. Most of its provisions may be varied or waived by contract. There are certain provisions that may not be waived or varied. These include the basic rule that an agreement to submit a dispute to arbitration is valid; the rules that govern disclosure of facts by a neutral arbitrator; the rules guaranteeing enforcement or appeal of the act, an arbitration agreement or an arbitration decision in a court; or, the standards for vacating an award. Declaring the default nature of the act is important because parties to an agreement may choose between federal or state law to govern their arbitration, notwithstanding the preemptive effect of federal law. Also, restrictions on waiving or varying certain statutory requirements are important to protect parties to these agreements.

The 2000 Uniform Act specifically allows a court to order provisional remedies during the course of an arbitration before an arbitrator is selected. The 1955 Uniform Act has no such provision. This prevents parties from delaying the selection of an arbitrator in order to delay proceedings and dissipate the effect of an arbitration award. An arbitrator, when selected, also has an express power to order provisional remedies, a power not expressly given in the 1955 Uniform Act. An arbitrator has the same powers as a court has in a judicial proceeding.

The 2000 Uniform Act allows consolidation of separate arbitration proceedings, a matter that was never contemplated in the 1955 Uniform Act. The existence of multiple parties, multiple agreements and complex litigation has made the issue of consolidation of arbitration actions very important. Courts have varied over consolidation. The 2000 Uniform Act expressly allows and governs consolidation.

The 1955 Uniform Act allows an award to be vacated because of an arbitrator's partiality - lack of neutrality. It does not specifically require disclosure of any interest that may give rise to a question of neutrality. The 2000 Uniform Act specifically addresses disclosure of known facts that give rise to questions of neutrality. Such facts include a financial or personal interest in the outcome of the arbitration proceeding or an existing or past relationship with a party. The lack of disclosure, itself, may be a ground for vacating an award, and there is a presumption of partiality when non-disclosure occurs. Upon disclosure, a party has the opportunity to object to the appointment of an arbitrator intended to be neutral. If there is no objection, that may affect the ability to raise partiality as a ground for vacating an award. These provisions provide substantial express protection to parties to an arbitration proceeding that simply are not a part of the 1955 Uniform Act.

A crucial issue in arbitrations is the express immunity of arbitrators from civil liability. It is not an issue addressed in the 1955 Uniform Act, but is important to impartial and fair proceedings. An arbitrator who expects or fears a lawsuit simply because of a decision, cannot be counted upon to act fairly or competently. The 2000 Uniform Act provides arbitrators with immunity from civil liability "to the same extent as a judge of a court of this State acting in a judicial capacity."

An arbitrator under the 2000 Uniform Act may conduct the arbitration in such manner as the arbitrator considers appropriate to the fair and expeditious disposition of the proceeding.

This express authority does not appear in the 1955 Uniform Act. The 1955 Uniform Act provides for subpoena of witnesses, and for depositions. Under the 2000 Uniform Act, an arbitrator also has the express power to make summary dispositions of claims or issues under appropriate procedures, to hold pre-arbitration proceeding meetings or to use any other discovery process (any process that adduces relevant evidence for the proceeding) applicable to resolution of the dispute. These provisions put arbitrators on the same level as judges in a judicial proceeding with respect to discovery of evidence.

The 2000 Uniform Act expressly permits an arbitrator to give punitive damages or other exemplary relief, "if such an award is authorized by law in a civil action involving the same claim." Attorney's fees may be awarded under the same standard. The 1955 Uniform Act does not expressly address either issue, but the case law has established the power to award punitive damages in most jurisdictions. The Federal Arbitration Act decisions, also, provide for punitive damages and some states have amended the 1955 Uniform Act to include attorney's fees. These new provisions put arbitrators on the same footing as judges in a court of law, and reflect the expansion of arbitration into disputes traditionally resolved in courts of law.

These are some highlights of the revision to the Uniform Arbitration Act in 2000. The number of disputes in arbitration grows yearly. The 2000 Uniform Arbitration Act responds to this growth with better and more complete arbitration procedures. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. This important advance in the law of arbitration should be enacted in all states as soon as feasible. (Found online at http://www.nccusl.org/Update/.)

Why States Should Adopt the Uniform Arbitration Act (2000)

The Uniform Arbitration Act, promulgated in 1955 and the law in 49 jurisdictions, has been revised. Over the years, provisions for arbitration have been utilized in all kinds of contracts, often for resolving disputes that have traditionally been resolved by litigation. To address developments such as this, the Uniform Law Commissioners have promulgated the 2000 Uniform Arbitration Act.

The new 2000 Uniform Arbitration Act continues the central policy of the 1955 act of authorizing agreements to arbitrate disputes before there is an actual dispute. The new act also goes further than the 1955 act. It deals with the procedural side of arbitration that has been greatly augmented to meet modern needs. In addition, the new act attempts to adjust the provisions of the 1955 act to avoid preemption by the Federal Arbitration Act.

The number of disputes in arbitration grows yearly. The 2000 Uniform Arbitration Act responds to this growth with better and more complete arbitration procedures and provisions, including the following:

> Provisional remedies. Before selection of an arbitrator, a court may order provisional remedies to protect the effectiveness of the arbitration. After an arbitrator is selected, the arbitrator has this express power.

Consolidation. An arbitrator may consolidate separate, but related, arbitration proceedings.

Default act. The act expressly becomes a default act, allowing many of its provisions to be waived or varied by contract. However, certain necessary provisions may not be waived or varied in order to protect the parties to the agreement.

Arbitrator disclosure. Before accepting appointment as an arbitrator, one must disclose any known facts that could affect his or her impartiality, such as financial or personal interests in the outcome. Lack of this required disclosure may be a ground for vacating an arbitration award.

Immunity of arbitrator. Arbitrators have express immunity from civil liability to the same extent a judge acting in his judicial capacity would be immune.

Express authority of arbitrators during arbitration proceedings. The act contains a number of provisions intended to place arbitrators on the same level as judges. Such provisions include giving an arbitrator the express authority to make summary dispositions of claims or issues, to use discovery processes as necessary, and to otherwise conduct proceedings as appropriate to aid in a fair and expeditious disposition of the proceedings.

Punitive damages/other relief. Arbitrators are expressly authorized to give punitive damages or other exemplary relief when appropriate. Also, attorney's fees may be awarded accordingly.

UNIFORMITY
The 2000 Uniform Arbitration Act continues the goal of the 1955 act to provide uniformity in law. The 2000 Uniform Arbitration Act also goes further in providing better and more complete arbitration procedures to meet modern needs. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. It is an important advance in the law of arbitration, which every state should adopt.
(Found online at http://www.nccusl.org/Update/.)

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 18, 2009

Should the State Bar of Michigan support for adoption in Michigan the Revised Uniform Arbitration Act (RUAA) as drafted by the National Conference of Commissioners on Uniform State Laws (ULC) and supported with amendment by the Alternative Dispute Resolution Section of the State Bar of Michigan?

(a) Yes

or

(b) No