

## 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/.](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/.](http://www.nccusl.org/Update/))

### **Opposition**

The Consumer Law Section opposes adoption of the RUAA as proposed. The Section believes that the RUAA, for instance, may have a negative effect on obtaining statutory attorney fees and on consumer due process rights. The written comments of the Consumer Law Section are attached as Exhibit A.

The Family Law Section supports the RUAA, based on the presumption that the RUAA does not impact, affect, or supplant the Domestic Relations Arbitration Act (DRAA). If the RUAA has an impact on the DRAA, the Family Law Section opposes adoption of the RUAA. The written comments of the Family Law Section are attached as Exhibit B.

### **Prior Action by Representative Assembly**

Referred to Special Issues Subcommittee.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

# WHY THE STATE BAR OF MICHIGAN SHOULD ENDORSE THE REVISED UNIFORM ARBITRATION ACT

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PREPARED FOR THE SPECIAL ISSUES COMMITTEE OF THE REPRESENTATIVE ASSEMBLY OF THE STATE  
BAR OF MICHIGAN

BY MARY A. BEDIKIAN<sup>1</sup>

## Executive Summary

The Revised Uniform Arbitration Act ["RUAA"], drafted and approved by the Uniform Law Commission ["ULC"], was formally approved by the House of Delegates of the American Bar Association in August 2000. The RUAA has been endorsed by the American Arbitration Association (national ADR service provider), the National Academy of Arbitrators (group of prominent arbitrators), Jams/Endispute (national ADR service provider), the National Arbitration Forum (national ADR service provider), and the Association for Conflict Resolution (formerly, the Society of Professional in Dispute Resolution).

The objective of the RUAA is to modernize the Uniform Arbitration Act ["UAA"], which provides for the enforceability of executory agreements to arbitrate. The UAA, approved by the ULC in 1955, has been adopted, in whole or in part, by virtually every state in the Union, including Michigan [1961].<sup>2</sup>

The RUAA enhances the UAA by including important procedural protections not part of the UAA regulatory scheme. The key protections, described more fully in the summary of changes, include notice requirements for initiating arbitration, validating the use of electronic records and contracts consistent with federal law, bifurcating the role of courts and arbitrators in determining arbitrability, enabling courts to direct consolidation of proceedings in the interest of justice, strengthening the arbitral disclosure process by requiring arbitrators to disclose known financial interests or personal relationships that could affect impartiality, permitting limited forms of discovery, and specifying requirements for awards of punitive damages.

To date, the RUAA has been enacted in 11 states.<sup>3</sup>

## Summary of the RUAA

The original UAA, which is patterned after the Federal Arbitration Act ["FAA"] adopted by the United States Congress in 1925, is considered a "bare-bones" statute. Neither the UAA nor the FAA has been modified since adoption, despite the evolution and greater embrace of arbitration, both on the state and federal levels. Gaps have been filled in by case law, which

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<sup>1</sup> Mary A. Bedikian is Professor of Law in Residence and Director of the ADR Program at Michigan State University College of Law. She is the former District Vice-President of the American Arbitration Association [1975 - 2003] and the former Chair of the ADR Section, State Bar of Michigan [1994].

<sup>2</sup> MCLA §§ 600.5001 *et seq.*; MSA §§ 27A.5001 *et seq.*; MCR 3.602.

<sup>3</sup> The states include: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, and Utah.

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provides an interesting patchwork of jurisprudence, complicated by lack of uniformity across state lines. Thus, the goal of the Drafting Committee was to design a statute that would preserve the efficiencies of arbitration, incorporate the pertinent law [e.g., disclosures, discovery, immunity, judicial review], and facilitate the use of arbitration by offering uniformity and predictability.

*Note:* The Drafting Committee did not take a position on the use of mandatory [as a condition of doing business] arbitration agreements.

The following are considered the most important provisions of the RUAA:

**Electronic Records (Section 1):** The UAA was adopted at a time when virtually all commerce was conducted through paper transactions. The RUAA provides for the use of electronic records, contracts and signatures consistent with recent technological advancements and federal law.

**Initiating Arbitration (Section 2):** The UAA is silent on how to initiate arbitration. The RUAA fills this gap by specifying notice requirements to adverse parties in arbitration.

**Non-waivability of Provisions (Section 4):** The RUAA recognizes that party autonomy may be trumped by the need to maintain some basic level of fairness. Section 4 embodies the freedom of contract notion up to the point where varying arbitration terms may result in a violation of applicable law. For example, Section 4 identifies provisions that parties may not waive at all, at any time during the proceeding. These include the right to compel or stay arbitration, the right to move to confirm or vacate an award, and the immunity rights of arbitrators and sponsoring organizations of arbitrations.

**Determinations of Arbitrability (Section 6):** The UAA is silent on how the question of who decides arbitrability and by what criteria. Section 6 makes clear that courts will determine whether or not an agreement to arbitrate exists. An arbitrator, however, will determine procedural issues of arbitrability, such as timeliness, and whether conditions precedents to filing have been met. This bifurcation of function is consistent with the legal principles enunciated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 35 (1967); and reaffirmed in *Buckeye Check Cashing v. Cardegna*, 126 S.Ct. 1204 (2006).

**Consolidations (Section 10):** Current law is schizophrenic on the subject of when separate arbitrations involving the same transaction may be consolidated. Federal courts generally will not order consolidation. Section 10 of the RUAA provides a mechanism for consolidation if a party is not prejudiced by the outcome, and the consolidation reduces time and expense for the parties. A separate provision precludes consolidation if the parties explicitly provided against it in their arbitration agreement.

**Arbitral Disclosure (Section 12):** The RUAA provides specific disclosure obligations requiring arbitrators to disclose known financial interests or personal relationships that could affect their impartiality. An arbitrator's failure to a known material interest or relationship may be used to establish "evident partiality," a ground on which a court may vacate the award.

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**Arbitral Immunity (Section 14):** The general purpose of immunity is to encourage qualified individuals to serve as arbitrators. Section 14 of the RUAA codifies case law that provides both arbitrators and sponsoring organizations immunity from civil liability, tantamount to a judge. [Exceptions are those pertaining to arbitrator fraud or corruption]. Section 14 also solidifies arbitral immunity by requiring a court to award to arbitrators and arbitration organizations attorneys' fees and reasonable litigation expenses against any person unsuccessful in litigation.

**Arbitration Process (Section 15):** This section preserves the parties' right to fashion arbitration to best suit their circumstances. However, a new provision in this section authorizes arbitrators to decide matters based on a "*request for summary disposition.*" Parties may preclude a case from being dismissed on summary disposition grounds by an explicit provision in their agreement.

**Discovery (Section 17):** The RUAA recognizes that parties in arbitration may require some form of evidence to advance their case. Section 17 authorizes arbitrators to order pre-hearing discovery but to do so only when "*appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.*" Section 17 also facilitates the process of securing necessary information in an arbitration involving persons located outside the state by providing for a single enforcement action, in the state where the arbitration occurred.

**Change of Award by Arbitrators (Section 20):** The RUAA permits parties to seek clarification [in case of ambiguity or technical/computational error] directly with the arbitrator, rather than having to petition a court to re-instate the arbitrator's authority for this purpose.

**Remedies (Section 21):** Section 21 retains the general proposition that arbitrators may award broad forms of relief. Such broad forms may exceed the type of relief a court grants. However, under the RUAA, limits are placed on the arbitrators' remedial power to award attorneys' fees and punitive damages. With respect to punitive damages, RUAA places further constraints on arbitrators. An award of punitive damages may be made only where the evidence at the arbitration hearing meets the legal standard that otherwise would apply to the claim. As an additional safeguard, the arbitrator must specify in the award the basis in law and fact supporting a punitive damages award, and to state such an award separately from other grants in the award.

The Michigan ADR Section Council specifically approved the following language on punitive damages, to substitute for the RUAA language:

"21(a) An arbitrator may not award punitive damages or other exemplary relief unless such an 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.



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“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.

## Conclusion

The RUAA does not depart from the foundational provisions of the UAA or the FAA. Rather, it includes provisions that were previously addressed by arbitrators or courts on a case-by-case basis, resulting in process inefficiencies, increased costs, and disparate results. The RUAA is a qualitatively improved statute that will offer arbitration participants enhanced predictability and, over time, increase the national uniformity of state arbitration legislation.

# Revised Uniform Arbitration Act

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The Consumer Law Section Council of the State Bar of Michigan has unanimously voted to oppose the adoption of the Revised Uniform Arbitration Act [RUAA] as it is. Perhaps modifying it and tie-barring it with other legislation, such as model laws proposed by the National Consumer Law Center (see [http://www.nclc.org/issues/model/legal\\_rights.shtml#rights](http://www.nclc.org/issues/model/legal_rights.shtml#rights) ) would suffice, but that is beyond the scope of what must be decided now. Adopting the RUAA as it is would be a decided mistake.

In fact, for the Bar to support this legislation would, in our opinion, violate Administrative Order 2004-01, which limits the ideological positions the Bar as a whole can take to

- (A) the regulation and discipline of attorneys;
- (B) the improvement of the functioning of the courts;
- (C) the availability of legal services to society;
- (D) the regulation of attorney trust accounts; and
- (E) the regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Without major modification, adoption of the RUAA would decrease the availability of legal services to society, detract from the functioning of courts, harm the financial interests of attorneys, and compromise the integrity of adjudication. How, then, could the State Bar lawfully support it? We note that sections, as voluntary entities, are not subject to these restrictions.

Changes to arbitration laws in Michigan are rare events. The state enacted an arbitration statute in 1961 and has made only a few changes in the past forty-nine years. The last change was made in 1982. Thus, if the statutory scheme were to be replaced with an alternative, it behooves us to do it right, because the legislature is not likely to address the issue again soon. The Revised Uniform Arbitration Act does not address many of the issues that are critical in improving arbitration and should not be adopted as is, especially without accompanying legislation.

Consider the Mission Statement of the State Bar of Michigan:

The State Bar shall aid in improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession in this State.

Without major modifications, the RUAA fails on two of these major points:

- It detracts from the administration of justice because consumers and employees forced into arbitration have fewer due process rights and less information than they would in court.
- It is directly opposed to the interests of the legal profession because mandatory attorney awards become merely something that arbitrators may

approve and in general lessens the opportunities for persons to have legal counsel on important matters.

Many of the changes proposed in the RUAA are reasonable. Some are truly modernizations, as its proponents state, such as references to electronic records, although, as in our court rules, there should be protection for persons who are not accustomed to electronic media. The act does make some steps in the direction of fairness but not nearly far enough. The minimal protections in the act might well suffice for sophisticated businesses and other persons who voluntarily agree to arbitration, but fail to protect consumers, franchisees, and employees, who often do not recognize that they are committed to mandatory, binding arbitration or what the implications are. An extreme example is nursing home admission contracts. These contracts are generally signed quickly, under extreme duress, often by a person suffering from delirium if not dementia.

The United States Supreme Court's reinterpretation of the Federal Arbitration Act sixty years after it was enacted has led to a rapid increase of arbitration and corresponding decrease in opportunities to have disputes heard in court in consumer and employment matters, where mandatory arbitration clauses are slipped into contracts. We realize that state laws cannot change a matter that is subject to federal preemption, but state laws can address fundamental issues of fairness, which are not adequately addressed in the RUAA.

The RUAA is not nearly as concerned with due process compared to courts. For example, actual notice is not required. Notice can be sent by "action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice." Section 2. The comments indicate that faxes and emails suffice, presumably even for a person who has an email account but doesn't know how to use it. This is hardly access to justice.

Court holdings produce records open to the public. Persons and their legal representatives can learn how courts are likely to rule and this guides behavior in general and legal strategy in particular if a dispute arises. This transparency is lacking with arbitration. Nothing in the RUAA requires information about previous results of arbitration to be available and it is usually not disclosed. A business that frequently engages in arbitration with a particular arbitration company can compile its own results. That guides the company in deciding which arbitrator to request, presumably not one who ruled for the other side. It also guides the company in determining the likely result of arbitration. Persons who are not likely to appear frequently before the arbitration company, such as employees, consumers, and franchisees, do not have that information.

There are various important concerns that are ignored in RUAA. For example, nothing requires disclosure of arbitration costs to consumers or employees.

The RUAA ignores the most common type of bias that may result. Parties that do not compile their own records have no basis to determine how an arbitrator has ruled in the past. The RUAA does have some sections about potential bias by an arbitrator, but it ignores the possibility that the private company offering its

services might be biased. These companies have to sell their product to businesses that select arbitration companies in their contracts. One obvious sales pitch is that the company is very sympathetic to the interests of the businesses that may specify them in contracts. This is not just a theoretical possibility.

The RUAA utterly fails to address the shocking abuses in arbitration that led to the consent order by the National Arbitration Forum with the Minnesota Attorney General. In part, there were financial and managerial intertwinings between the arbitration company and one of the major debt collection agencies that brought matters to the company. According to testimony by Stuart Rossman before the (federal) House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, on September 15, 2009:

The Attorney General's lawsuit was based on allegations of consumer fraud, deceptive trade practices and false statements in advertising. The AG alleged that the National Arbitration Forum represented to consumers and the public that it was independent and neutral, operated like an impartial court system, and was not affiliated with and did not take sides between the parties, when in fact, it was closely associated with owners of debt and advertised itself to corporations as a particularly favorable forum for collection actions. p. 4.

This particular arbitration company no longer exists, but the RUAA has not been amended to address bias by the company. There is nothing to prevent an analogous problem from recurring.

RUAA requires disclosures by the individual arbitrator and not the company itself. In fact, RUAA provides great immunity to the companies and to individual arbitrators who fail to comply with the disclosure requirements. A person who challenges the company may even have to pay the company's attorney fees.

**SECTION 14. IMMUNITY OF ARBITRATOR; COMPETENCY TO TESTIFY; ATTORNEY'S FEES AND COSTS.**

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the

arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a [motion] to vacate an award under Section 23(a)(1) or (2) if the [movant] establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

The act gives the same immunity that judges have without corresponding information and recusal mechanisms. It is particularly unreasonable to consider a sweeping change in the law that does not address the major problems that have arisen in recent history.

RUAA is directly opposed to the economic interests of attorney who take cases with fee-shifting provisions. Even if an award of attorney fees is mandatory according to a statute, RUAA gives the arbitrator discretion in awarding any fees:

**SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING.**

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

Any change in arbitration laws should include these greater protections at a minimum. Ideally, any change would include much of a set of model laws on arbitration proposed by the National Consumer Law Center, at the URL cited at the beginning of this document. The names of the laws are

Preservation of Legal Rights  
Limits on Arbitrations in Insurance Transactions  
Cost Disclosures in Arbitration Agreements  
Limits on Consumer Arbitration  
Regulation of Arbitration Service Providers

**Report on Public Policy Position**

**Name of section:**

Family Law Section

**Contact person:**

Kent Weichmann

**E-mail:**

[weichmann@earthlink.net](mailto:weichmann@earthlink.net)

**Regarding:**

Revised Uniform Arbitration Act

**Date position was adopted:**

February 6, 2010

**Process used to take the ideological position:**

Position adopted after discussion and vote at a scheduled meeting.

**Number of members in the decision-making body:**

21

**Number who voted in favor and opposed to the position:**

18 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

**Position:**

Support and Amend.

The Family Law Section supports the Revised Uniform Arbitration Act in principle, so long as it is amended to make it clear that the Domestic Relations Arbitration Act controls for domestic relations cases, and time deadlines in the RUAA are reconciled with the time deadlines in the DRAA.

**Explanation of the position, including any recommended amendments:**

The Revised Uniform Arbitration Act updates the Uniform Arbitration Act, which was drafted in the 1950's, to try to clarify the arbitration process and provide more protection to arbitration clients. Arbitration in domestic relations cases has been regulated by the Domestic Relations Arbitration Act, which contains a specific standard of review for child related issues. Although MCL 600.5070 states that the DRAA controls where there is a conflict, the RUAA introduces new provisions that are inconsistent with the DRAA, but do not specifically conflict. The RUAA is a substantial improvement over the UAA, but we need to reconcile its provisions with those of the DRAA.



## CIVIL PROCEDURE AND COURTS COMMITTEE

March 9, 2010

Elizabeth Moeble Johnson  
Chair, State Bar of Michigan Representative Assembly  
409 Plymouth Rd Ste 210  
Plymouth, MI 48170

RE: Revised Uniform Arbitration Act

Dear Ms Johnson:

I understand that at its spring meeting the Representative Assembly will be receiving an update regarding the revised uniform arbitration act, which has been recommended by the Alternative Dispute Resolution Section. The Civil Procedure and Courts Committee discussed the revised act at its February 27, 2010 meeting. While the Committee members did not agree on every point, a majority - the 12 members (of 18 total) who voted - supports the following statement:

While most Committee members do not think there have been serious problems under the current statute and implementing court rule, all agree that the revised act has a number of procedural improvements, filling in gaps in the former uniform act or incorporating case law developments. The provisions dealing with such subjects as consolidation of arbitration proceedings, disclosure requirements for arbitrators, immunity of arbitrators, authorizing provisional remedies, and fleshing out the arbitrator's authority in conducting proceedings, would be helpful. So all Committee members recommend that the Legislature give serious consideration to the revised act.

But there are some differences of views.

A slight majority of the Committee is concerned about use of arbitration in inappropriate circumstances. The majority thinks the Legislature should carefully evaluate whether certain classes of cases - especially those involving consumer related disputes - should be excluded from the statute or made subject to special provisions applicable to such cases. Other such cases might include health care and employment disputes. Attention should be paid to the potential problems presented by "pre-dispute" arbitration agreements, where unequal bargaining positions or varying sophistication of parties may lead to unfair results. As an alternative to legislative action, some of the revised act's provisions could be adopted by the Supreme Court as amendments of MCR 3.602, as the current statute authorizes the Court to adopt rules governing the conduct of arbitrations. See MCL 600.5021.

EXHIBIT C



## CIVIL PROCEDURE AND COURTS COMMITTEE

Elizabeth Mochle Johnson

March 9, 2010

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A significant minority of the Committee urges adoption of the revised act as proposed. There is no question that it contains significant procedural improvements over the former uniform act. The concerns expressed by the majority are equally applicable to the present statute, which expressly validates pre-dispute arbitration agreements. Each version includes the same provisions allowing the voiding of arbitration agreements on grounds that would permit revocation of contracts. MCL 600.5001(2); revised act section 6(a). Whether to exempt certain classes of cases is something that the Legislature might want to consider, but that is beyond the scope of the question before us at this point -- the relative merits of the current provisions and the revised uniform act.

I hope this information is useful. The Civil Procedure and Courts Committee would be happy to provide any further input that might be helpful to the State Bar's consideration of the revised act. If you have any questions, do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank J. Greco".

Frank J. Greco  
Chair, State Bar Civil Procedure and Courts Committee

cc: Elizabeth Lyon

EXHIBIT     C