WHAT MICHIGAN ATTORNEYS AND ARBITRATORS MUST KNOW ABOUT THE NEW REVISED UNIFORM ARBITRATION ACT

By Mary A. Bedikian

On December 14, 2012, Governor Rick Snyder signed into law Senate Bill 903.[1] Known as the Revised Uniform Arbitration Act (revised act), the statute takes effect July 1, 2013.

The revised act effectively repeals Michigan's private arbitration statute that has been in place for more than a half century. Considered bare-bones, the repealed arbitration statute[2] contains major procedural gaps that make it difficult for parties in arbitration to achieve predictability. These procedural voids were addressed by courts on a case-by-case basis, adding to the unpredictability of arbitration. Despite the increased complexities of disputes submitted to arbitration, statutory reform remained off the legislative radar.

Eventually, a confluence of forces within the legal profession and the business community created pressure for change. In August 2000, the National Conference of Commissioners on Uniform

Fast Facts

With the passage of the Revised Uniform Arbitration Act (revised act), Michigan becomes the 14th state to modernize arbitration law and practice.

The revised act represents the most sweeping reform of Michigan arbitration law in more than 50 years.

The revised act brings Michigan into the twenty-first century by conforming arbitration practice to arbitration law and industry trends.

State Laws first adopted a Uniform Arbitration Act.[3] The overarching goal of the National Conference in codifying arbitral jurisprudence was to design a statute that would preserve arbitration's efficiencies while recognizing modern-day trends. The uniform law served as the blueprint for Michigan's adoption of the revised act in 2012. With its passage, Michigan becomes the 14th state (including the District of Columbia) to adopt a statute that modernizes the use of arbitration. This article highlights the unique features of Michigan's revised act and how it effectively changes the landscape of arbitration law.

Top 10 Revisions of the Revised Act

Although the revisions of the revised act encompass the entire spectrum of arbitration procedures (see the table on page 44), the most important changes are summarized below.

Electronic Records—Section 1

The original Uniform Arbitration Act was adopted at a time when virtually all commerce was conducted through paper transactions. The revised act recognizes the integration of technology in commercial transactions by explicitly authorizing e-records. Section 1 defines a record to include information "stored in an electronic or other medium and is retrievable in perceivable form."[4] The definition encompasses e-filings of arbitration demands, hearing evidence, and arbitration awards.

Non-waivability—Section 4

One major attribute of arbitration is the ability of parties to craft agreements to suit their specific needs. This attribute often butts heads with fundamental fairness. The inherent tension between party autonomy and fundamental fairness is addressed in Section 4, which permits parties to waive or vary certain provisions while proscribing waiver in other circumstances. Under the revised act, parties cannot vary the terms of the arbitration agreement if the result will constitute a violation of law. Section 4(2) specifically states that *before a dispute arises,* parties cannot waive or vary provisions involving requests for judicial relief (Section 5(1)), enforceability of the agreement to arbitrate (Section 6(1)), provisional remedies (Section 8), subpoena power (Section 17(1)), jurisdiction (Section 26), and appeals (Section 28).[5] The balancing rod appears in Section 4(3), which contains provisions that parties may not waive at all during arbitration. These include but are not limited to the right to compel or stay arbitration (Section 7), the right to move to confirm or vacate an award (Section 22 and Section 23 respectively), and the immunity rights of arbitrators and sponsoring organizations of arbitrations (Section 14).[6]

Determinations of Arbitrability—Section 6

Historically, questions of arbitrability have produced a prolific amount of jurisprudence. The questions establish which disputes may be submitted to arbitration (substantive arbitrability). As a practical matter, a ruling of inarbitrability limits a party's right to engage in arbitration. Courts have taken the position that questions of substantive arbitrability—those that go to the actual making of the contract—are questions for the courts, not arbitrators. Although this judicial directive is clear, what may be less clear is whether a dispute presents a question of substantive arbitrability or procedural arbitrability. Procedural arbitrability encompasses ancillary issues relating to the making of the contract that are reserved for arbitrators, not courts, to decide. Among the federal circuits, bright-line tests of jurisdiction have proven fairly malleable. Section 6 addresses the jurisdictional problem by carving out distinct roles for courts and arbitrators. Under this section, courts will determine whether an agreement to arbitrate exists.[7] An arbitrator, however, will determine procedural issues of arbitrability such as timeliness, notice, laches, and estoppel. This bifurcation of function not only follows Supreme Court precedent under the Federal Arbitration Act,[8] but also recognizes the unique qualification of arbitrators to rule on procedural issues that grow out of a substantive controversy without encroaching on the authority of the courts to decide jurisdiction.

Arbitration advocates should note that under certain provider rules (the American Arbitration Association, for example) the arbitrator may make the initial determination on substantive arbitrability.[9] This result is consistent with Section 4 of the revised act, which does not prevent waiver of the rule that only courts decide substantive arbitrability.[10]

Provisional Remedies—Section 8

A challenging area of arbitration has been the ability of parties to get interim relief when necessary to preserve the status quo. Most arbitration agreements do not include provisions authorizing arbitrators to grant such relief. Even where authority is explicit, arbitrators generally are reluctant to exercise such authority. Consequently, parties must resort to the courts for provisional relief. Some courts, however, have taken exception to this role,

Comparing Michigan's Revised Act and Arbitration Statute

Note: The original version of the Revised Uniform Arbitration Act includes Section 32 [Repeal], which is not part of SB 903. This is because Michigan tie-barred its passage to SB 901 and SB 902, which repealed whatever arbitration provisions were necessary to effect adoption of the revised act.

Revised Uniform Arbitration Act	Michigan Arbitration Statute
§ 1 Definitions	No provision
§ 2 Notice	No provision
§ 3 Exclusions Under the Act	§ 600.5001(3)—the act does not apply to collective bargaining agreements § 600.5001(5)—the act does not apply to title disputes
§ 4 Waiver Requirements	No provision
§ 5 Application for Judicial Relief	No provision
§ 6 Validity of Arbitration Agreements	§ 600.5001(2)
§ 7 Motions to Compel or Stay Arbitration	§ 600.5011
§ 8 Provisional Remedies	No provision
§ 9 Initiation of Arbitration	No provision
§ 10 Consolidation of Proceedings	No provision
§ 11 Appointing Arbitrators	§ 600.5015
§ 12 Disclosure of Arbitrator	No provision
§ 13 Action by Majority	No provision
§ 14 Arbitral Immunity	No provision
§ 15 Arbitration Process	§ 600.5021
§ 16 Representation by Lawyer	No provision
§ 17 Witnesses; Subpoenas; Depositions; Discovery	No provision
§ 18 Judicial Enforcement of Pre-Award Ruling	No provision
§ 19 Award	No provision
§ 20 Change of Award by Arbitrator	No provision
§ 21 Remedies; Fees/ Expenses of Arbitration	No provision
§ 22 Confirmation of Award	§ 600.5033
§ 23 Vacating Award	No provision
§ 24 Modification or Correction of Award	§ 600.5033
§ 25 Judgment on the Award and Attorneys' Fees	§ 600.5025
§ 26 Jurisdiction	No provision
§ 27 Venue	§ 600.5031
§ 28 Appeals	No provision; MCR 3.602
§ 29 Uniformity of Application and Construction	§ 600.5035
§ 30 Electronic Signatures	No provision
§ 31 Effective Date	No provision
§ 33 Savings Clause	No provision

concluding that the propriety of injunctive relief, for example, unnecessarily injects the court into the merits of issues more appropriately left to the discretion of the arbitrator.[11] Section 8(2)(a) resolves this problem. The revised act now provides that after an arbitrator is appointed:

> [t]he arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding…to the same extent and under the same conditions as if the controversy were the subject of a civil action.[12]

A court may also grant provisional relief after the arbitrator is appointed if the arbitrator cannot act timely or refuses to act.[13] Before appointment of the arbitrator, Section 8 authorizes a party to seek provisional relief in court. A court may grant such relief if the moving party meets the legal standard of good cause.[14]

Initiation of Arbitration—Section 9

This provision rectifies a major deficiency in Michigan's original arbitration statute by specifying notice requirements for the initiation of arbitration proceedings. Unless parties have provided for a reasonable means of notice in their arbitration agreement, Section 9 requires that they use either certified or registered mail with a return-receipt request and that the receipt is obtained.[15] The term "obtained" is intended to mean that the receipt was returned regardless of whether the recipient actually signed it. Section 9(1) explicitly requires that all parties be given notice of the impending arbitration, not just the party against whom the arbitration claim is filed. This is more likely to occur in construction arbitration, where multiple parties are the norm. Finally, Section 9(1) includes a "content requirement," meaning the initiating party must provide enough information with respect to the claim

and the remedy to put the responding parties on notice. The content requirement is not coexistent with the code-pleading requirements of litigation.

Consolidation—Section 10

Multiple parties in arbitration are rarely signatories to a single arbitration agreement. As a result, cases involving multiple parties proceed in litigation and arbitration, increasing the prospect of inconsistent outcomes. Federal and state courts have been reluctant to direct consolidation, even when efficiencies may result, because they do not want to undermine the consensual nature of arbitration. The revised act remedies the inefficiency of forum bifurcation by permitting parties to petition for consolidation of separate arbitration proceedings. Section 10(1)(a) allows the court to order consolidation in whole or in part if (1) the claims arise "in substantial part from the same transaction or series of related transactions"; (2) a common issue of law or fact exists, creating the possibility of conflicting decisions; or (3) the "[p]rejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation."[16] However, Section 10(3) specifically precludes consolidation if the parties have explicitly provided against it in their arbitration agreement.

Disclosure—Section 12

The linchpin of the arbitral process is the impartiality and independence of the arbitrator. Because courts have given arbitration a presumption of validity, it is all the more important that parties are assured of independent, impartial decision making. Section 12 of the revised act creates an *affirmative duty* to disclose conflicts of interest and resolves common-law ambiguities by adopting a reasonable-person standard against which disclosures will be measured. What types of interests or relationships should be disclosed? Section 12 requires that arbitrators disclose to all parties to the agreement any known facts likely to affect impartiality including existing or past relationships with parties, representatives, counsel, witnesses, and all other arbitrators to the proceedings.[17] While this does not include a duty to disclose *de minimis* interests or relationships, there may be such a duty under various provider rules. The duty to disclose is continuing, which means arbitrators must be vigilant in disclosing information after their initial conflicts check up to the time in which an award is rendered. A failure to disclose required information under this section has severe consequences. The revised act states:

> An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party *is presumed to act with evident partiality* under section 23(1)(b).[18]

This provision heightens the possibility of court review and award vacatur.

> One prolific and divisive issue the revised act leaves open is the suitability of mandatory arbitration—a variant of private arbitration in which traditional notions of consent are noticeably absent.

Arbitral Immunity—Section 14

The general purpose of immunity is to encourage qualified individuals to serve as arbitrators. Section 14 of the revised act codifies caselaw that provides both arbitrators and sponsoring organizations immunity from civil liability.[19] Section 14 also promotes 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.

Under Section 14, arbitral immunity may be pierced for strong public-policy reasons. These include claims against arbitrators for corruption, fraud, partiality, other undue means, or other misconduct that represents grounds to vacate an award under Section 23.[20]

Discovery—Section 17

The operative premise in arbitration is that discovery is limited and of deliberate design to protect the efficiencies of process. However, the growing complexity of disputes submitted to arbitration has diminished the viability of this premise. The revised act recognizes that parties in arbitration may require a mechanism by which discovery can occur, without compromising the goals of arbitration. Section 17 authorizes arbitrators to order prehearing discovery 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."[21] Section 17(7) allows parties to secure necessary information in an arbitration involving persons located outside the state. Currently, enforcing a subpoena or a discovery-related order requires two separate legal actions. This section provides for a single enforcement action in the state where the arbitration occurs.

The revised act is a testament to the reality that arbitration, long a favored process of the courts, will hold its central place within the alternative dispute resolution continuum.

Punitive Damages—Section 21

It is well established under the Federal Arbitration Act that arbitrators may award punitive damages.[22] However, not all federal authority is in accord. Although the data would suggest that arbitrators do not abuse their remedial powers, legitimate concerns remain that absent explicit limitations and standards, arbitral awards of punitive damages may increase in proportion to the number of statutory claims now subject to arbitration. Thus, under the revised act, limits are placed on the arbitrators' remedial power to grant punitive damages. Section 21 permits awards of punitive damages *only* if the evidence at the arbitration hearing meets the legal standard that otherwise would apply to the claim.[23] As an additional safeguard, this section instructs the arbitrator to specify in the award the basis in law and fact supporting a punitive damages award and to state it separately from other grants.[24] These special requirements are intended to ensure that punitive damage awards, however rare in arbitration, occur only when and if supported by the evidence.

What the Revised Act Does Not Address

One prolific and divisive issue the revised act leaves open is the suitability of mandatory arbitration—a variant of private arbitration in which traditional notions of consent are noticeably absent. The principal argument against mandatory arbitration is more accurately framed as an argument against adhesion arbitration agreements involving entities with superior economic strength. The Revised Uniform Arbitration Act Drafting Committee deliberately chose not to separately address adhesion contracts in the legislation. The committee's decision was predicated largely on United States Supreme Court jurisprudence, specifically *Gilmer v Interstate/Johnson Lane Corporation,*[25] in which the Court rejected the argument that adhesion [employment] arbitration agreements should not be enforced because parties operate at disparate levels of bargaining power.

Conclusion

Since Michigan first adopted the Uniform Arbitration Act in 1963, arbitration has enjoyed exponential growth. In passing the revised act, the Michigan legislature recognized that the Uniform Arbitration Act's regulatory scheme was no longer viable. The revised act, which effectively balances efficiencies, fairness, and party autonomy, is a testament to the reality that arbitration, long a favored process of the courts, will hold its central place within the alternative dispute resolution continuum. ■

Mary A. Bedikian is a professor of law in residence and director of the ADR program at Michigan State University College of Law. She is a former vice president of the American Arbitration Association (1975–2003) and former chair of the SBM Alternative Dispute Resolution Section (1994). She co-authored Michigan Pleading and Practice—ADR *(West). The author's white paper on the Revised Uniform Arbitration Act, which served as the basis of the legislation, is available at http://www.law.msu.edu/faculty_staff/bedikian/ADR.Section.Council.White.Paper.RUAA.pdf.*

ENDNOTES

1. 2012 PA 371, MCL 691.1681. The statute was tie-barred to Senate Bill 901 (2012 PA 369, amending the Condominium Act to require arbitration of disputes under the act to be conducted under the Revised Uniform Arbitration Act) and Senate Bill 902 (2012 PA 370, amending the Revised Judicature Act to limit the application of Chapter 50 and repeal its provisions on the effective date of Senate Bill 903).
2. MCL 600.5001 *et seq.*
3. The text of the Uniform Arbitration Act from the national conference, with commentary, is available at <http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf> (accessed March 31, 2013).
4. Act 371, § 1(2)(f).
5. *Id.* at § 4(2)(a).
6. *Id.* at § 4(3).
7. *Id.* at § 6(2).
8. See *First Options of Chicago, Inc v Kaplan,* 514 US 938; 115 S Ct 1920; 131 L Ed 2d 985 (1995).
9. AAA Commercial Arbitration Rules, Rule 7.
10. See Act 371, § 4.
11. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc v Hovey,* 726 F2d 1286 (CA 8, 1984).
12. Act 371, § 8(2)(a).
13. *Id.* at § 8(3).
14. *Id.* at § 8(1).
15. *Id.* at § 9(1).
16. *Id.* at § 10(1)(b) through (d).
17. *Id.* at § 12(1)(b).
18. *Id.* at § 12(5).
19. See *Corey v NYSE,* 691 F2d 1205, 1209 (CA 6, 1982); see also *Boraks v AAA,* 205 Mich App 149; 517 NW2d 711 (1994).
20. Act 371, § 14(4)(b).
21. *Id.* at § 17(3).
22. See *Mastrobuono v Shearson Lehman Hutton, Inc,* 514 US 52; 115 S Ct 1212; 131 L Ed 2d 76 (1995).
23. Act 371, § 21(1).
24. *Id.* at § 21(5).
25. *Gilmer v Interstate/Johnson Lane Corp,* 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991).