

Uniform Arbitration Act; Mediation or Arbitration of Trust Instruments; HB 2571

HB 2571 repeals the Uniform Arbitration Act (UAA) and replaces it with the Uniform Arbitration Act of 2000 (or Revised Uniform Arbitration Act [RUAA]). The bill also enacts law relating to arbitration or mediation of trust instruments in the Uniform Trust Code.

Uniform Arbitration Act

[*Note:* Some provisions of the RUAA are substantially similar to those of the UAA, although they may have been restructured. Such provisions are noted throughout this summary, and headings containing only provisions that are substantially similar to those currently in the UAA are denoted with a “**”.]

Definitions

The RUAA defines “arbitration organization,” “arbitrator,” “court,” “knowledge,” “person,” and “record.” (The UAA defines only “court.”)

Notice

The RUAA outlines notice requirements, including taking action reasonably necessary to inform another person in ordinary course, regardless of the other person acquiring knowledge, actual notice, and receipt of notice.

Applicability

The RUAA applies only to arbitration agreements made on or after July 1, 2018. It does not apply to actions or proceedings commenced or rights accrued before that date. The UAA continues to govern arbitration agreements made before that date unless all parties to the agreement or proceeding agree in the record that the RUAA should apply.

Waiver

A party may waive or the parties may vary the effect of the requirements of the RUAA, except with regard to applicability, motions to enforce an arbitration agreement, immunity, pre-award ruling, various court rulings and procedures, uniformity, and electronic signature compliance.

Additionally, before a controversy arises subject to an arbitration agreement, a party may not waive or agree to vary the effect of the requirements of provisions regarding judicial relief, enforceability, provisional remedies, subpoenas, depositions, court jurisdiction, or appeal; agree to unreasonably restrict the right to notice of the initiation of a proceeding or disclosure of facts by a neutral arbitrator; or waive the right to representation by a lawyer, except for employers and labor organizations in a labor arbitration.

*Judicial Relief and Notice***

The RUAA requires application for judicial relief be made by motion and heard in the manner provided by law or rule of court. Notice of an initial motion is to be served in the manner for service of summons in a civil action (unless a civil action involving the arbitration agreement is pending), and subsequent motions are to be served in the manner provided for serving motions in pending cases. (The UAA contains a substantially similar provision.)

Agreement and Enforceability

The RUAA provides that an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties is valid, enforceable, and irrevocable, except upon a ground that exists in law or equity for the revocation of a contract. (The UAA contains a substantially similar provision.)

A court decides whether an agreement exists or a controversy is subject to an agreement, an arbitrator decides whether a condition precedent has been fulfilled and whether a contract containing a valid agreement is enforceable, and an arbitration proceeding may continue pending final resolution by a court of a challenge to the existence of or whether a controversy is subject to an agreement.

*Motion to Enforce Arbitration Agreement***

The RUAA provides that a person may file a motion showing an arbitration agreement and alleging that another person refuses to arbitrate under the agreement. If the refusing party does not appear or does not oppose the motion, the court is required to order arbitration. If the refusing party opposes the motion, the court is required to summarily decide the issue and order arbitration unless it finds no enforceable arbitration agreement.

A person may file a motion alleging an arbitration has been initiated or threatened without an arbitration agreement. A court is required to summarily decide this issue and order the parties to arbitrate if it finds there is an enforceable agreement. A court may not order arbitration if it finds there is no enforceable agreement.

The court is not allowed to refuse to order arbitration because the claim lacks merit or grounds for the claim have not been established.

The above motions must be made in the court in which a proceeding involving a claim referable to arbitration under an alleged arbitration agreement is pending, if such exists. Otherwise, the motion may be made in any court allowable under the venue provisions of the RUAA.

If a party moves the court to order arbitration, the court is required to stay any judicial proceeding involving a claim alleged to be subject to the arbitration until the court decides the motion.

If the court orders arbitration, the court is required to stay a judicial proceeding involving a claim subject to the arbitration. If the claim is severable, the court may limit the stay to that claim. (The UAA contains substantially similar provisions.)

Provisional Remedies

Before an arbitrator is appointed and is authorized and able to act, the court, upon motion by a party and good cause shown, may enter an order for provisional remedies as it is under a civil action. After appointment of an arbitrator, the arbitrator is allowed to issue orders for provisional remedies as it is under a civil action, and a party is allowed to move the court for a provisional remedy only if urgent and the arbitrator cannot act timely, or the arbitrator cannot provide an adequate remedy. Right to arbitration may not be waived by a party making a motion for provisional remedies.

Initiation of Arbitration

The RUAA specifies the notice required to initiate an arbitration proceeding. Appearance at the arbitration hearing waives any objection to lack of or insufficiency of notice unless an objection is raised before the beginning of the hearing.

Consolidation of Arbitration Proceedings

Unless the agreement prohibits consolidation, a court is allowed to consolidate separate arbitration proceedings (or specific claims within separate proceedings), upon motion of a party, if:

- The agreements or proceedings are between the same persons or one of them is a party to a separate agreement or proceeding with a third person;
- The claims subject to the agreements arise in substantial part from the same transaction or transactions;
- The existence of a common issue of law or fact creates the possibility of conflicting decisions; and
- Prejudice 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.

Appointment of Arbitrator

The RUAA requires the agreed method of appointment of an arbitrator to be followed, unless it fails. If there is no agreement, the agreed method fails, or the appointed arbitrator fails, the court, upon motion of a party, appoints the arbitrator, and such arbitrator has the powers of an arbitrator designated in the agreement or appointed pursuant to the agreed method. (The UAA contains a substantially similar provision.)

An individual with an interest in the arbitration outcome or a relationship with a party may not serve as a neutral arbitrator.

Disclosures by Arbitrator

The RUAA requires an individual requested to serve as an arbitrator to disclose any known facts that a reasonable person would consider likely to affect impartiality, including financial or personal interest in the arbitration outcome or existing or past relationships with certain persons involved in the arbitration. An arbitrator has a continuing obligation to disclose such facts, and the RUAA includes procedures for objection and vacating of awards based on the existence of or failure to disclose such facts.

*Majority Required***

Where there are multiple arbitrators, the RUAA requires all arbitrators to conduct the arbitration hearing and a majority to exercise the powers of an arbitrator. (The UAA contains substantially similar provisions.)

Immunity

The RUAA provides the same immunity for an arbitration organization as that of a judge of a Kansas court acting in a judicial capacity. Such immunity is not lost due to an arbitrator's failure to make disclosures required under the RUAA.

An arbitrator or arbitration organization is not competent to testify and may not be required to produce records in a judicial, administrative, or similar proceeding to the same extent as a Kansas judge, except as necessary to determine the claim of an arbitrator or arbitration organization against a party to the arbitration proceeding, or on a hearing to vacate an award based on arbitrator misconduct, corruption, or fraud, if a *prima facie* ground exists.

An arbitrator, arbitration organization, or representative of such organization is entitled to attorney fees and other reasonable expenses of litigation in a civil action against them, arising from their services, if a person seeks to compel testimony or production of records from them and the court determines they are immune or not competent to testify under the above provisions.

Authority of Arbitrator; Procedure; Hearing

The arbitrator may conduct arbitration as the arbitrator considers appropriate for a fair and expeditious disposition, and the arbitrator's authority includes the power to hold conferences with the parties before the hearing and determine the admissibility, relevance, materiality, and weight of any evidence.

The arbitrator may decide a request for summary disposition upon agreement of all parties, or upon request of one party, if all parties have notice and a reasonable opportunity to respond.

The RUAA sets forth requirements for hearing, including notice, objection and waiver of objection, postponement, decision, timeliness, and rights of parties at the hearing. (The UAA contains substantially similar provisions.)

If an arbitrator ceases or is unable to act during a proceeding, the RUAA requires a replacement be appointed to continue the proceeding and resolve the controversy.

*Attorney Representation***

A party to an arbitration proceeding may be represented by a lawyer. (The UAA contains a substantially similar provision.)

Subpoenas; Depositions; Testimony; Discovery

The arbitrator may issue subpoenas for witnesses, records, and other evidence and may administer oaths. A subpoena is served as in a civil action and is enforced in the same manner by the court, upon motion. (The UAA contains a substantially similar provision.)

The arbitrator may permit deposition of a witness for use as evidence at the hearing, under conditions determined by the arbitrator. (The UAA contains a substantially similar provision.)

The arbitrator may permit discovery as appropriate, taking into account the needs of the parties and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective. If discovery is permitted, the arbitrator may order a party to comply with discovery-related orders, issue subpoenas, and take action against a noncomplying party to the extent a court may do so in a civil action.

The arbitrator may issue a protective order to prevent disclosure of certain protected information to the extent a court may do so in a civil action.

Laws compelling testimony and providing for witness fees in civil actions apply to the proceeding. (The UAA contains a substantially similar provision.)

The court may enforce subpoenas or discovery orders upon conditions determined by the court to make the proceeding fair, expeditious, and cost effective. Subpoenas and discovery orders issued by an arbitrator in another state are required to be served and enforced in the manner they are served and enforced in a civil action in Kansas.

Pre-award Ruling

If an arbitrator makes a pre-award ruling in favor of a party, that party may request the ruling be incorporated into the award. A prevailing party may move the court for an expedited order to confirm the award, and the court is required to summarily decide the motion. The court is required to confirm the award unless the court vacates, modifies, or corrects the award.

Record and Timing of Award

The arbitrator is required to make a signed or otherwise authenticated record of an award and provide notice of the award (including a copy) to each party. The arbitrator is required to make an award within the time specified by the agreement or, if not specified, within the time ordered by the court. The time for award may be extended, within or after the time specified or ordered, by the court or by the parties in a record. (The UAA contains substantially similar provisions.)

An objection that an award was not timely made is waived unless the party gave notice of the objection before receiving notice of the award.

Modification or Correction of Award by Arbitrator

An arbitrator may modify or correct an award, upon motion by a party within 20 days of receiving notice of the award, on the grounds of miscalculation or mistake or of imperfection in a matter of form not affecting the merits, because the arbitrator has not made a final and definite award upon a submitted claim, or to clarify an award. Notice of objection to such motion must be given within ten days of receiving notice of the motion. If a motion to the court is pending for confirmation, vacation, or modification or correction of an award, the court may submit the claim to the arbitrator to consider whether to modify or correct the award for the same reasons as those listed above. A modified or corrected award is subject to the same requirements and court proceedings as other awards. (With the exception of the provisions allowing modification or correction when an arbitrator has not made a final and definite award, the UAA contains substantially similar provisions.)

Punitive Damages; Exemplary Relief; Fees; Remedies

An arbitrator is allowed to award punitive damages or other exemplary relief if such award is authorized in a civil action and the evidence justifies the award. If such damages or relief are awarded, the arbitrator is required to state such damages or relief separately and specify in the award the facts justifying and law allowing such award.

An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if authorized in a civil action or agreed to by the parties. (The UAA specifically excludes attorney fees from the "other expenses" that may be included in an award.)

Other than the above remedies, an arbitrator is allowed to order such remedies as the arbitrator considers just and appropriate.

The fact such remedy could not or would not be granted by the court cannot be grounds for refusing to confirm an award or for vacating an award. (The UAA contains a substantially similar provision.)

The arbitrator's expenses and fees, together with other expenses, are required to be paid as provided in the award. (The UAA contains a substantially similar provision.)

*Confirming Order***

After receiving notice of an award, a party may move the court to confirm the award. The court is required to issue a confirming order unless the award is modified, corrected, or vacated. (The UAA contains a substantially similar provision.)

Motion to Vacate

A court is required to vacate an award, upon motion by a party, if:

- The award was procured by corruption, fraud, or other undue means;
- There was evident partiality by a neutral arbitrator, corruption by an arbitrator, or misconduct by an arbitrator;
- An arbitrator refused to postpone the hearing upon sufficient cause, consider material evidence, or otherwise conducted the hearing to substantially prejudice the rights of a party;
- The arbitrator exceeded the arbitrator's powers;
- There was no agreement to arbitrate and an objection was raised before the arbitration hearing; or
- The arbitration was conducted without proper notice of initiation and the rights of a party were substantially prejudiced.

A motion to vacate must be filed within 90 days after receiving notice of the award unless the movant alleges corruption, fraud, or undue means, in which case the motion must be filed within 90 days after the ground is known or would have been known by exercise of reasonable care.

Upon vacating an award on grounds other than no agreement, the court may order a rehearing. If the grounds are corruption, fraud, or undue means or partiality, corruption or misconduct by the arbitrator, a rehearing must be conducted before a new arbitrator. If the award is vacated on any other grounds listed, the rehearing must be before the same arbitrator or successor. The rehearing decision is required to be issued within the same time limits as provided for an award.

If the court denies a motion to vacate, shall confirm the award unless a motion to modify or correct the award is pending.

(The UAA contains substantially similar provisions, except for the grounds based on conducting arbitration without proper notice of initiation of arbitration.)

*Modification or Correction by Court ***

A court shall modify or correct an award, upon motion made within 90 days after the movant receives notice of the award, if:

- There was evident mathematical miscalculation or evident mistake in the description of a person, thing, or property;
- An award was made on a claim not submitted and the award may be corrected without affecting the merits of the decision on the submitted claims; or
- The award is imperfect in form not affecting the merits of the decision on the claim.

If such motion is granted, the court must modify or correct and then confirm the award. Otherwise, unless a motion to vacate is pending, the court must confirm the award.

A motion to modify or correct may be joined with a motion to vacate.

(The UAA contains substantially similar provisions.)

Entry of Judgment; Costs; Fees

The court is required to enter a judgment in conformity with its order confirming, vacating without directing a rehearing, or modifying or correcting an award, and such judgment may be recorded, docketed, and enforced as a judgment in a civil action.

The court may allow reasonable costs of the motion and proceedings, and, upon application by a prevailing party to a contested motion for order confirming an award, motion to vacate, or motion to modify or correct an award, may add reasonable attorney fees and other reasonable expenses of litigation.

(The UAA contains substantially similar provisions, except it did not specifically permit attorney fees.)

*Jurisdiction***

A Kansas court having jurisdiction over the controversy and parties may enforce an arbitration agreement, and an agreement providing for arbitration in Kansas confers exclusive jurisdiction on the court to enter judgment on an award under the RUAA. (The UAA contains a substantially similar provision.)

*Venue***

A motion for judicial relief must be made in the court of the county in which the arbitration agreement specifies the arbitration hearing is to be held or the county in which the hearing was

held. Otherwise, the motion may be made in the court of the county in which an adverse party resides or has a place of business; if none, the motion may be made in the court of any Kansas county. Subsequent motions must be made in the court hearing the initial motion unless the court directs otherwise. (The UAA contains a substantially similar provision.)

*Appeal***

An appeal is in the same form as from an order or judgment in a civil action, and may be taken from a final judgment or from an order:

- Denying a motion to compel arbitration;
- Granting a motion to stay arbitration;
- Confirming or denying confirmation of an award;
- Modifying or correcting an award; or
- Vacating an award without directing a rehearing.

(The UAA contains a substantially similar provision.)

*Uniformity***

The RUAA directs that consideration be given to the uniformity of law between enacting states in applying and construing the act. (The UAA contains a similar provision.)

Electronic Signatures

The RUAA states its provisions conform to the requirements of the Electronic Signatures in Global and National Commerce Act.

Applicability to Other Statutory Sections

The Overhead Power Line Accident Prevention Act and a statute regarding assistive devices for major life activities are amended to update references from the UAA to the RUAA.

Arbitration or Mediation of Trust Instruments

The bill provides a trust instrument requiring the mediation or arbitration of disputes involving beneficiaries, fiduciaries, or persons granted non-fiduciary powers under the trust be enforceable. An exception to this enforceability applies when the dispute is related to the validity of the trust, unless all interested persons consent to arbitration or mediation of the dispute.