

Major Changes To Pennsylvania Arbitration Law To Take Effect July 1, 2019

By RAYMOND P. PEPE,¹ Dauphin County and
STEPHEN G. YUSEM,² Montgomery County
Members of the Pennsylvania Bar



TABLE OF CONTENTS

| | | | |
|----------------------------------|----|---------------------------------|----|
| INTRODUCTION | 58 | REMEDIES, ATTORNEY FEES AND | |
| APPLICABILITY AND EFFECTIVE | | COSTS | 66 |
| DATE | 60 | JUDICIAL ENFORCEMENT OF | |
| INITIATION OF ARBITRATION | 60 | PREAWARD RULINGS | 66 |
| DETERMINING ARBITRABILITY | 61 | AWARDS | 67 |
| IMPARTIALITY OF ARBITRATORS | 62 | ATTORNEY FEES IN CONTESTED | |
| IMMUNITY OF ARBITRATORS | 63 | JUDICIAL PROCEEDINGS | 68 |
| CONSOLIDATION OF PROCEEDINGS . | 63 | REVIEW OF ARBITRATION AWARDS | |
| PROVISIONAL REMEDIES | 64 | INVOLVING STATE AGENCIES AND | |
| DISCOVERY | 64 | POLITICAL SUBDIVISIONS | 68 |
| THE ARBITRATION PROCESS AND | | MODIFICATIONS AND WAIVERS | 69 |
| SUMMARY DISPOSITIONS | 65 | CONCLUSION | 70 |

ABSTRACT

Effective July 1, 2019, Pennsylvania will join 20 other states and the District of Columbia that have modernized their laws governing voluntary arbitration agreements by implementing the Revised Uniform Arbitration Act (“RUAA”) promulgated by the Uniform Law Commission (“ULC”). The RUAA replaces the original version of the Uniform Arbitration Act (“UAA”) adopted by the ULC in 1955 and which has provided Pennsylvania’s “statutory arbitration” rules since 1980. The Pennsylvania version of the RUAA (“PA RUAA”) varies somewhat from the text of the RUAA as adopted by the ULC to better conform the ULC’s recommendations to Pennsylvania’s needs and circumstances.

The PA RUAA will apply to all arbitration agreements subject to Pennsylvania law executed on or after July 1, 2019, and will eliminate for purposes of new arbitration agreements Pennsylvania’s so-called “common law” arbitration rules

1. Raymond P. Pepe, raymond.pepe@KLGates.com, is Of Counsel to the law firm K&L Gates, LLP, Harrisburg, PA. He is the Legislative Liaison Member of the Pennsylvania Delegation to the Uniform Law Commission and has been a Pennsylvania representative on the Commission since 1983 under successive appointments made by Governors Thornburgh, Casey and Ridge and the President Pro Tempore of the PA Senate.

2. Stephen G. Yusem, syusem@syusem.com, is an arbitrator and mediator in Blue Bell, PA. He is a former chairman of the PBA Alternative Dispute Resolution Committee and is the 2015 recipient of its Sir Francis Bacon Dispute Resolution Award. A fellow of both the College of Commercial Arbitrators and the Chartered Institute of Arbitrators, he is an adjunct professor of law (dispute resolution) at the Cornell University Law School.

which currently apply unless the terms of an arbitration agreement expressly state that the agreement is to be governed by the PA UAA's statutory arbitration procedures. Additionally, parties to arbitration agreements entered into prior to July 1, 2019, may elect to be governed by the new law.

The PA RUAA will make changes and additions to prior law involving (1) the applicability of common law or statutory arbitration procedures; (2) the initiation of arbitration proceedings; (3) notice; (4) how determinations are made that controversies are subject to arbitration; (5) the disclosure of facts affecting the

Act 55 of 2018 will apply to arbitration agreements executed on or after July 1, 2019, and replace Pennsylvania's "statutory" and "common law" arbitration rules.

impartiality of arbitrators; (6) the qualifications of neutral arbitrators; (7) the immunity of arbitrators and arbitration organizations from civil liability; (8) the consolidation of proceedings; (9) provisional remedies; (10) discovery; (11) the arbitration process and the summary disposition of claims; (12) the location of hearings involving consumer transactions; (13) remedies that may be awarded by an arbitrator; (14) enforcement of preaward rulings; (15) notice of awards; (16) change of awards by arbitrators; (17) vacating awards; (18) judicial modification or correction of awards; (19) the award of attorney fees and litigation expenses in judicial proceedings to confirm, modify or

correct awards; (20) standards for the review of arbitration awards involving state agencies and political subdivisions; and (21) the ability of parties to modify or waive its provisions. The language of the PA RUAA also replaces requirements for writings contained in the PA UAA with requirements for the use of "records" in order to facilitate electronic commerce in a manner consistent with the Uniform Electronic Transactions Act and federal law.

INTRODUCTION

There is irony in the term, "alternative dispute resolution," as the three processes comprising that term, negotiation, mediation and arbitration, serve to resolve far more disputes than litigation. It would be more accurate to refer to litigation as the alternative to those dispute resolution processes. In fact, as a matter of professional ethics, lawyers would be well advised to inform clients that litigation is only one of four processes available to resolve disputes. All lawyers are continually engaged in negotiation and generally understand mediation and litigation, but relatively few are familiar with the procedural and substantive components of arbitration law.

In 1925, arbitration became an important component of American jurisprudence with the enactment of the Federal Arbitration Act ("FAA"), which provides that a written agreement to arbitrate a dispute is valid, enforceable and irrevocable, subject only to grounds that exist for the revocation of any contract.³ The FAA converted the judiciary from being adverse to arbitration to embracing it. For several decades, most arbitration cases were commercial in nature, but after World War II, arbitration became a popular means of resolving labor issues as well as a wide variety of other controversies. The U.S. Supreme Court's 1942 decision in *Wickard v. Filburn*,⁴ relied

3. 9 U.S.C. §2.

4. *Wickard, Secretary of Agriculture v. Filburn*, 317 US 111 (1942).

on the Commerce Clause to bring within the orbit of the FAA any transaction having an economic effect on interstate commerce.

In 1967, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,⁵ the Court expressed its strong support for arbitration by holding that arbitrators have jurisdiction to decide their own jurisdiction. The Court went so far as to hold that an arbitration clause is deemed to be severable from the remainder of the contract, so that the clause is effective even when the underlying contract is defective.

Accordingly, in *Southland Corporation v. Keating* (1984),⁶ the Court held that a challenge to the validity of a contract, but not to the arbitration clause itself, is a matter for the arbitrator, not the courts, to decide. *Southland* held that the FAA, which addresses primarily procedural issues, is nevertheless a substantive statute, and that notwithstanding that it provides for petitioning federal courts, it nevertheless applies to both federal and state court proceedings. *Doctor's Associates, Inc. v. Casarotto* (1996)⁷ held that the FAA preempts those state statutes that purport to invalidate arbitration agreements which, under state law, apply to arbitration but not to other agreements. Once again, the Court signaled its support of a public policy favoring arbitration as a viable alternative to litigation.

In 1955, thirty years after the FAA was enacted, the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission ("ULC"), promulgated the Uniform Arbitration Act ("UAA") which became law in every state except New York. The Pennsylvania version of the UAA ("PA UAA"), enacted in 1958, is unique, as it is divided into two subchapters. Subchapter A, 42 Pa.C.S.A. §§7302-7320, is denominated as "statutory arbitration" and enacts the UAA with minor modifications, while Subchapter B, 42 Pa.C.S.A. §7341, is designated as common law arbitration, notwithstanding the fact that it is statutory. Under the PA UAA, where a contract provides for arbitration without specifying whether it is to be administered under Subchapter A or Subchapter B, as often occurs, the default is to common law arbitration under Subchapter B.⁸

Parties who have found themselves engaged in common law arbitration are often surprised to find that their rights are far more limited than in statutory arbitration. Subchapter B does not grant parties the right to counsel, does not require arbitrator disclosures of conflicts of interest, does not grant the right to be heard or to present evidence and does not even require a written arbitration award. Moreover, the only grounds to modify or vacate a common law arbitration award are the denial of a fair hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.⁹

On the other hand, Subchapter A, statutory arbitration, permits a party to petition to vacate an award on essentially the same grounds as the FAA, namely, evident partiality, corruption, arbitrator misconduct, exceeding powers, refusal to postpone upon good cause or refusing to hear material evidence.¹⁰ In 2008, the U.S. Supreme Court held that those statutory grounds for vacatur are exclusive.¹¹ The Third Circuit recently avoided the question of whether an award could be vacated for "manifest disregard" of the law, but noted that if that non-statutory ground for vacatur is still available, the award must "fly in the face of clearly established legal precedent."¹²

5. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395 (1967).

6. *Southland Corporation v. Keating*, 465 US 1 (1984).

7. *Doctor's Associates, Inc. v. Casarotto*, 517 US 681 (1996).

8. 42 Pa.C.S.A. §7302(a).

9. 42 Pa.C.S.A. §7341.

10. 42 Pa.C.S.A. §7314(a).

11. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

12. *Whitehead v. The Pullman Group, LLC*, 811 F.3d 116, 120 (3d Cir. 2016).

In 2000, the ULC promulgated the Revised Uniform Arbitration Act (“RUAA”). Like the UAA, the RUAA continues the core policy of authorizing parties to agree to resolve disputes by means of pre-dispute arbitration agreements but addresses a substantial number of procedural and substantive issues not covered by the UAA. On June 28, 2018, Pennsylvania joined 20 other states and the District of Columbia which have updated their arbitration laws by substantially enacting the RUAA.¹³

As described below, the Pennsylvania version of the RUAA (“PA RUAA”), which contains several minor modifications of the provisions of the RUAA as adopted by the ULC, will make substantial changes and additions to the PA UAA.

APPLICABILITY AND EFFECTIVE DATE

Currently, except for arbitration agreements to which the Commonwealth of Pennsylvania is a party and arbitration agreements involving political subdivisions and employees, so-called “common law” arbitration procedures apply unless an agreement to arbitrate expressly provides for arbitration under the statutory arbitration provisions of the PA UAA. Pennsylvania law describes the arbitration rules provided by the PA UAA as “statutory arbitration.”¹⁴

Common law arbitration procedures govern only proceedings to compel or stay arbitration, the appointment of arbitrators by a court, issuance of subpoenas by arbitrators and the use of depositions for witnesses who cannot be served with a subpoena or attend a hearing, the manner in which applications may be made to a court, the jurisdiction of Pennsylvania courts over arbitration proceedings, venue, appeals from court orders and the confirmation of arbitration awards and entry of judgments.¹⁵

The PA RUAA will apply to all arbitration agreements executed on or after July 1, 2019, and upon the agreement of all parties to an arbitration agreement or proceeding, to arbitration agreements executed prior to July 1, 2019.¹⁶ These provisions of the PA RUAA differ from the RUAA as adopted by the ULC which, after a one year transition period, applies to arbitration agreements entered into prior to the act’s effective date.

For arbitration agreements executed prior to the July 1, 2019, for which the parties do not elect to be governed by the PA RUAA, the PA UAA’s statutory arbitration requirements will continue to apply, including the provisions of the PA UAA which apply common law arbitration rules if an agreement does not specify the PA UAA.¹⁷

INITIATION OF ARBITRATION

The PA RUAA will establish procedures not covered by the PA UAA for the initiation of arbitration. Notice must be given in writing or by an electronic record describing the nature of the controversy and the remedy sought. Notice must be given to all parties to the arbitration agreement and not only to the party against which a claim is filed.¹⁸

13. The PA RUAA was adopted by the Act of June 28, 2018 (P.L. 381, No. 55). The RUAA has also been enacted into law by Alaska, Arkansas, Arizona, Colorado, Connecticut, Florida, Hawaii, Kansas, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and West Virginia. See: <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736>.

14. 42 Pa.C.S.A. §7302. The PA UAA differs from the version of the UAA adopted by the ULC which applied its procedures to all arbitration agreements executed on or after the effective date of the UAA.

15. 42 Pa.C.S.A. §7342.

16. 42 Pa.C.S.A. §7321.4(a) & (b)(1).

17. 42 Pa.C.S.A. §§7304 & 7321.4(b)(2).

18. 42 Pa.C.S.A. §7321.10(a). In this article, we use the terms “party” and “person” interchangeably. See 42 Pa.C.S.A. §7321.2 (definition of “person”).

Notice of the initiation of arbitration may be given in the manner agreed to by the parties or, in the absence of agreement, must be given by certified or registered mail, return receipt requested, or by service authorized for the commencement of a civil action.¹⁹ The requirement to “obtain” notice of delivery of a mailed notice does not include a requirement to obtain a signed receipt of delivery by the party to whom a notice is sent.²⁰

A court may vacate an arbitration award for failure to give proper notice of the initiation of an arbitration proceeding that substantially prejudices the right of a party.²¹ However, a party that appears at an arbitration hearing waives the right to object to a lack of notice unless a limited appearance is made to object to lack of proper notice.²²

Similar to the PA UAA, the PA RUAA contains numerous requirements for arbitrators and parties to give notice without specifying the manner in which notice must be given.²³ When notice requirements are not accompanied by specific notice procedures, the PA RUAA provides that a party may give notice by taking action that is reasonably necessary to inform another party in the ordinary course whether or not the other party acquires knowledge of the notice.²⁴ A person has notice if the person has knowledge of the notice, has received the notice, or it comes to a person’s attention, and is deemed to receive notice when it is delivered to a person’s place of business or residence or another location held out by the person as a place for the delivery of such communications.²⁵

The PA RUAA’s notice requirements are consistent with Article 1 of the Uniform Commercial Code and are intended to allow parties to use new systems of notice that are technologically feasible.²⁶ Notice requirements may be modified or waived by the terms of an arbitration agreement or by agreement among the parties.²⁷

DETERMINING ARBITRABILITY

The PA UAA, like the FAA, does not address the questions of whether arbitrators or courts determine whether an agreement to arbitrate exists; whether a controversy is subject to an agreement to arbitrate; whether conditions precedent to arbitrability have been satisfied; or whether a contract containing a valid arbitration agreement is enforceable.

Consistent with case law,²⁸ the PA RUAA provides that, unless the terms of an arbitration agreement provide otherwise, the court decides whether an agreement to arbitrate exists and the scope of an agreement to arbitrate, and the arbitrator de-

19. 42 Pa.C.S.A. §7321.10(b).

20. Paragraph 3 of the ULC Comment to §9 of the RUAA.

21. 42 Pa.C.S.A. §7321.24(a)(6).

22. 42 Pa.C.S.A. §7321.10(b) and Paragraph 6 of the ULC Official Comment to §9 of the RUAA.

23. 42 Pa.C.S.A. §§7321.16(a) & (b) (notice of requests for summary disposition); 7321.20(a) (notice of untimely delivery of an award); 7321.21(b) (notice regarding request for change of an award); 7321.23 (notice of award); 7321.24(b) (notice to vacate an award); and 7321.25(b) (notice to modify or correct an award).

24. 42 Pa.C.S.A. §7321.3(a).

25. 42 Pa.C.S.A. §7321.3(b) & (c).

26. 13 Pa.C.S.A. §1202. *Also see* Paragraph 1 of the ULC Comment to §2 of the RUAA.

27. 42 Pa.C.S.A. §7321.5(a).

28. *See e.g., InterDigital Communications Corp. v. Federal Ins. Co.*, 392 F.Supp.2d 707 (E.D. Pa. 2005), reconsideration denied 403 F.Supp.2d 391 (2005); *Ross Development Co. v. Advanced Bldg. Development, Inc.*, 803 A.2d 194 (Pa.Super. 2002); *Sew Clean Drycleaners and Launderers, Inc. v. Dress for Success Cleaners, Inc.*, 903 A.2d 1254 (Pa.Super. 2006); *Vertical Resources, Inc. v. Bramlett*, 837 A.2d 1193 (Pa.Super. 2003); *Sanitary Sewer Authority of Borough of Shickshinny v. Dial Associates Const. Group, Inc.*, 532 A.2d 862 (Pa.Super. 1987).

cides whether conditions precedent to arbitration have been fulfilled and whether a contract containing a valid arbitration agreement exists.²⁹

The PA RUAA also clarifies that in determining the validity and enforceability of an agreement to arbitrate, a court may consider any grounds that exist at law or in equity for the revocation of a contract, including fraud, duress, coercion, unconscionability or the imposition by a contract of adhesion of any requirement that unreasonably favors the party that imposed the provision, except as prohibited by federal law.³⁰

IMPARTIALITY OF ARBITRATORS

The PA UAA lacks any requirement for arbitrators to disclose facts likely to affect their impartiality or for arbitrators to act in a neutral and impartial manner.

The PA RUAA requires that an arbitrator, prior to accepting appointment and after making reasonable inquiry, disclose to all parties and to other appointed arbitrators any known fact that a reasonable person would consider as likely to affect impartiality. Required disclosures include personal or financial interests in the outcome of a proceeding and any existing or past relationship with parties, their counsel or representatives, any witnesses, and other appointed arbitrators.³¹

The requirement to make “reasonable inquiry” may require law firm attorneys to check with other firm attorneys to determine if the appointment would create a conflict of interest.

The legislation also imposes a continuing duty to disclose facts that an arbitrator learns after accepting an appointment to the same extent as required prior to the acceptance of an appointment.³²

A person may not serve as an arbitrator required to be neutral if a judge in the same circumstances would be subject to recusal under the Canons of Judicial Conduct.³³

If an arbitrator makes a required disclosure of facts, a timely objection to the arbitrator’s service may provide grounds to vacate an arbitration award for “evident partiality.”³⁴ Likewise, if an arbitrator fails to disclose a required fact, this may become grounds for vacatur.³⁵

In determining whether the failure to make required disclosures provides grounds to vacate an award, an arbitrator appointed as a neutral is presumed to act with evident partiality if the arbitrator fails to disclose a known, direct and material interest in the outcome of the arbitration proceeding, or a known, existing and substantial relationship with a party.³⁶

To the extent that an arbitration agreement establishes procedures for challenging selection of arbitrators, including through the incorporation of arbitration orga-

29. 42 Pa.C.S.A. §§7321.5, 7321.7(b) & (c).

30. 42 Pa.C.S.A. §7321.7(e). Comparable provisions are not included in the version of the RUAA adopted by the ULC, but these requirements are consistent with the Official Comments that accompany the text of the RUAA as approved by the Commission.

31. 42 Pa.C.S.A. §7321.13(a).

32. 42 Pa.C.S.A. §7321.13(b).

33. 42 Pa.C.S.A. §7321.12(b). This requirement modifies section 11(b) of the Uniform Act as approved by the ULC which provides that an individual with a known, direct and material interest in the outcome of the arbitration proceeding or with a known, existing and substantial relationship with a party may not serve as a neutral arbitrator.

34. 42 Pa.C.S.A. §§7321.13(c) & 7321.24(a)(2).

35. 4a PA.C.S.A. §§7321.13(d) & 7321.24(a)(2).

36. 42 Pa.C.S.A. §7321.13(e).

nization procedures, substantial compliance with the agreed upon procedures is a condition precedent to a motion to vacate an award.³⁷

IMMUNITY OF ARBITRATORS

While Pennsylvania case law generally regards arbitrators as quasi-judicial officers who should be afforded the same immunity as judges, the PA UAA fails to recognize this principle.³⁸ The PA RUAA clarifies that an arbitrator or arbitration organization is immune from civil liability to the same extent as a judge acting in a judicial capacity.³⁹

The PA RUAA also provides that an arbitrator is not competent to testify and may not be required to produce records, as to any statement, conduct, decision or ruling occurring during an arbitration proceeding to the same extent as a judge acting in a judicial capacity.⁴⁰ However, an arbitrator may testify or produce records or be compelled to do so to the extent necessary to determine a claim of the arbitrator or arbitration organization against a party to an arbitration proceeding or on a motion to vacate an award if there is prima facie evidence to support a claim the award was procured by corruption, fraud or other undue means, or that there was evident partiality by a neutral arbitrator, or corruption by an arbitrator, or misconduct prejudicing the rights of a party to an arbitration proceeding.⁴¹

The PA RUAA does not grant arbitrators or arbitration organizations immunity from criminal liability or from being compelled to testify in criminal proceedings.⁴²

The immunities provided to arbitrators are not lost by the failure of arbitrators to make required disclosures regarding facts that may affect their impartiality.⁴³ Instead, the appropriate remedy for the failure to make disclosures is a motion to vacate the arbitration award.⁴⁴

If a person commences a civil action against an arbitrator or arbitrator organization or seeks to compel testimony or the production of records by an arbitrator or arbitration organization, the court may award the prevailing party reasonable attorney fees and expenses.⁴⁵

CONSOLIDATION OF PROCEEDINGS

The PA RUAA contains new provisions that allow a court to consolidate separate arbitration proceedings.

Upon the motion of an arbitration party, a court may order consolidation if (1) there are separate arbitration agreements or proceedings involving the same persons, or if one of the persons is a party to an arbitration agreement with a third person; (2) the claims subject to arbitration arise in substantial part from the same transaction or series of related transactions; (3) the existence of a common issue of

37. 42 Pa.C.S.A. §7321.13(f).

38. *Wark & Co. v. Twelfth & Sansom Corp.*, 378 Pa. 578, 583 (1954) (“There is no authority which sanctions an inquisition of arbitrators for the purpose of determining the processes by which they arrived at an award. An arbitrator who is a quasi-judicial officer should not be called upon to give reasons for his decision. Were the rule otherwise, the judgment of the court would be substituted in the place of the arbitrators’ award, and arbitration instead of being a substitute for legal process and procedure would become but the first step in the course of litigation.”)

39. 42 Pa.C.S.A. §7321.15(a).

40. 42 Pa.C.S.A. §7321.15(d).

41. 42 Pa.C.S.A. §§7321.15(d)(1) & (2); 7321.24(a)(1) & (2).

42. Paragraphs 5 and 8 of ULC Comments to §14 of the RUAA.

43. 42 Pa.C.S.A. §7321.15(c).

44. Paragraph 4 of ULC Comment to §14 of the RUAA.

45. 42 Pa.C.S.A. §7321.15(e).

law or fact creates the possibility of conflicting decisions in separate proceedings; and (4) prejudice 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.⁴⁶

A court may order consolidation with respect to some claims and allow other claims to be resolved in separate arbitration proceedings.⁴⁷ However, a court may not order consolidation if prohibited by the terms of an arbitration agreement.⁴⁸

The decision of a court to grant or deny consolidation is not designated by the PA RUAA as an appealable order because allowing review of such orders would result in delays to arbitration proceedings.⁴⁹

PROVISIONAL REMEDIES

Under the PA UAA, it is unclear whether courts may issue orders to protect the effectiveness of arbitration proceedings, whether arbitrators may grant provisional remedies and awards and whether courts may enforce provisional orders issued by arbitrators.

The PA RUAA provides that before an arbitrator is appointed and is authorized and able to act, a court may order provisional remedies to protect the effectiveness of the arbitration proceeding.⁵⁰ Thereafter, the arbitrator may modify provisional orders issued by the court and issue orders for provisional remedies and awards as necessary not only to protect the effectiveness of the arbitration proceeding, but also in any other manner necessary to promote the fair and expeditious resolution of a controversy.⁵¹ Both courts and arbitrators may issue provisional orders only under the same conditions that would apply if a controversy were subject to a civil action.

After an arbitrator is appointed, a party to an arbitration proceeding may also request the court to issue a provisional order if the matter is urgent and the arbitrator is not able to act in a timely manner or is not able to issue an order that provides an adequate remedy.⁵² The PA RUAA also clarifies that a court may enforce a provisional order issued by an arbitrator.⁵³

Examples of the types of provisional remedies that may be issued by the court or an arbitrator include temporary restraining orders to prevent a respondent from conveying or encumbering property, the issuance and discharge of writs of attachment and liens, preliminary injunctions to continue the status quo, and requirements for the posting of security.

DISCOVERY

The only provision of the PA UAA relating to discovery authorizes arbitrators to issue subpoenas for the attendance of witnesses and for the production of documents and other evidence.⁵⁴

The PA RUAA provides that an arbitrator may permit discovery as “is appropriate in the circumstances, taking into consideration the needs of the parties to the arbi-

46. 42 Pa.C.S.A. §7321.11(a).

47. 42 Pa.C.S.A. §7321.11(b).

48. 42 Pa.C.S.A. §7321.11(c).

49. 42 Pa.C.S.A. §7321.29(a) and ULC Comment 5 to §10 of the RUAA.

50. 42 Pa.C.S.A. §7321.9(a).

51. 42 Pa.C.S.A. §7321.9(b)(1).

52. 42 Pa.C.S.A. §7321.9(b)(2).

53. 42 Pa.C.S.A. §7321.19.

54. 42 Pa.C.S.A. §7309(a).

tration proceeding and other affected parties and the desirability of making the proceeding fair, expeditious and cost effective.”⁵⁵ The PA RUAA also authorizes an arbitrator to issue protective orders to prevent the disclosure of privileged and confidential information, trade secrets and other information to the same extent as a court in a civil action.⁵⁶

If a party fails to comply with discovery-related orders, an arbitrator may take action against the noncomplying party, and may issue subpoenas for the attendance of witnesses and the production of documents and other evidence at a discovery proceeding to the same extent as a court in a civil action.⁵⁷ All laws compelling a person to testify under subpoena apply to an arbitration proceeding as if the controversy were a civil action.⁵⁸

Orders issued by an arbitrator may be enforced by a court for the attendance of witnesses and the production of documents and other evidence within the Commonwealth in connection with an arbitration proceeding in Pennsylvania or in another state in the same manner as in civil actions.⁵⁹ These provisions clarify that the Uniform Interstate Depositions and Discovery Act applies to orders issued in arbitration proceedings.⁶⁰

THE ARBITRATION PROCESS AND SUMMARY DISPOSITIONS

The PA RUAA clarifies that arbitrators have the discretion to conduct arbitration proceedings in whatever manner they deem “appropriate for a fair and expeditious disposition” of claims, and may hold pre-hearing conferences to determine the admissibility, relevance, materiality and weight of evidence.⁶¹

Consistent with the broad discretion granted arbitrators to determine the process used in arbitration proceedings, the PA RUAA provides that an arbitrator may act on a party’s request for the summary disposition of a claim or issue if all interested parties agree or if all other parties receive notice of the request and are provided a reasonable opportunity to respond.⁶² The PA RUAA refers to a “request for summary disposition” rather than a motion for summary judgment or a motion to dismiss for failure to state a claim to clarify that arbitrators are not bound by the same rules of law and procedure as applicable to courts.⁶³

The PA RUAA also modifies provisions of the PA UAA regarding the conduct of arbitration hearings. The PA RUAA changes requirements of the PA UAA that an arbitrator “shall appoint a time and place” for a hearing, to instead provide that “[i]f an arbitrator orders a hearing” the arbitrator shall set a time and place for the hearing, thereby recognizing that in a variety of circumstances factual matters may not be in dispute and an evidentiary hearing may be unnecessary.⁶⁴

To facilitate electronic commerce, the PA RUAA eliminates requirements for a written notice of a hearing, and instead allows notice to be given in any reasonable manner, and reduces the period of time a notice must be given before a hearing from ten

55. 42 Pa.C.S.A. §7321.18(c).

56. 42 Pa.C.S.A. §7321.18(e).

57. 42 Pa.C.S.A. §7321.18(d).

58. 42 Pa.C.S.A. §7321.18(f).

59. 42 Pa.C.S.A. §7321.18(g).

60. 42 Pa.C.S.A. §5331.

61. 42 Pa.C.S.A. §7321.16(a).

62. 42 Pa.C.S.A. §7321.16(b).

63. Paragraph 3 of ULC Comments to §15 of the RUAA.

64. Compare 42 Pa.C.S.A. §7307(a)(1) with §7321.16(c).

to five days.⁶⁵ All of these procedures, however, may be waived or modified by the terms of an arbitration agreement or by agreement of the parties to an arbitration proceeding.⁶⁶

The PA RUAA contains requirements not found in the text of the RUAA as approved by the ULC that require arbitration hearings involving consumer transactions to be held at “a location reasonably convenient to the consumer.”⁶⁷

The PA RUAA defines consumer transactions as those between a merchant and a consumer domiciled in Pennsylvania in which obligations are incurred for personal, family or household purposes, including personal injury claims arising in consumer transactions. “Merchant” refers to a manufacturer, supplier, distributor, or any other person that in the ordinary course of business holds itself out as having knowledge or skills particular to consumer transactions.⁶⁸

The requirement to hold hearings at locations convenient to consumers may be waived or modified by the terms of an arbitration agreement or by agreement among the parties to an arbitration proceeding.⁶⁹

REMEDIES, ATTORNEY FEES AND COSTS

Except for providing that the expenses and fees of arbitrators and other expenses incurred in the conduct of an arbitration proceeding (other than a party’s attorney fees) shall be paid as prescribed by the award unless otherwise prescribed by an arbitration agreement, the PA UAA does not address types of remedies that may be provided by an arbitration award.⁷⁰

The PA RUAA provides that an arbitrator may order whatever remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding.⁷¹ These remedies may include punitive damages if such an award is authorized by law in a civil proceeding involving the same claim.⁷² If an arbitrator awards punitive damages, the arbitrator is required to specify in the award the basis in both fact and law for authorizing the award and separately state the amount of the punitive damages.⁷³

The PA RUAA carries forward provisions of the PA UAA providing for the award of expenses and fees of arbitrators and other expenses,⁷⁴ but also allows the arbitrator to award reasonable attorney fees and expenses if such an award would be authorized in a civil action involving the same claim or if authorized by agreement of the parties or by the terms of an agreement that is the subject of an arbitration proceeding.⁷⁵

JUDICIAL ENFORCEMENT OF PREAWARD RULINGS

The PA RUAA adds procedures not found in the PA UAA for the enforcement of preaward rulings by arbitrators. To seek enforcement of an award, a party may re-

65. 42 Pa.C.S.A. §7321.16(c).

66. 42 Pa.C.S.A. §7321.5(a).

67. 42 Pa.C.S.A. §7321.16(f).

68. 42 Pa.C.S.A. §6321.2.

69. 42 Pa.C.S.A. §7321.5(a).

70. 42 Pa.C.S.A. §7312.

71. 42 Pa.C.S.A. §7321.22(c).

72. 42 Pa.C.S.A. §7321.22(a).

73. 42 Pa.C.S.A. §7321.22(e).

74. 42 Pa.C.S.A. §7321.22(d).

75. 42 Pa.C.S.A. §7321.22(b). The PA RUAA expands the authorization for an award of attorney fees and expenses beyond §25(b) of the RUAA as promulgated by the ULC by allowing an award if authorized under the terms of an agreement that is subject to an arbitration proceeding.

quest the arbitrator to incorporate the ruling into an order and then make a motion for an expedited order to confirm the ruling. The court is required to summarily review the motion and to issue an order confirming the award unless grounds exist to vacate, modify or correct the award.⁷⁶ A court order confirming and enforcing a preaward ruling is not an appealable order.⁷⁷

AWARDS

The PA RUAA eliminates the PA UAA provision that an arbitrator must deliver an award personally or by registered mail to each party unless alternative procedures are specified in an arbitration agreement. Instead, the PA RUAA simply requires the arbitrator to give notice of the award to each arbitration party, and as noted previously, establishes general rules for when a party has notice.⁷⁸

The PA UAA allows an arbitrator to change an award upon the application of a party or upon a submission received from a court considering a petition to confirm, vacate, modify or correct an award, if (1) there was an evident miscalculation of figures or evident mistake in the description of a person, thing or property referred to in the award; or (2) the arbitrator provided an award on an issue not submitted which may be corrected without affecting the merits of the decision on the issues submitted.⁷⁹

The PA RUAA modifies the types of changes that may be made to an award by an arbitrator upon the motion of a party or upon submission by a court to allow an arbitrator to modify or correct an award (1) that is imperfect in a matter of form not affecting the merits of the decision on the claims submitted; (2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or (3) as needed to clarify an award.⁸⁰

Under the PA RUAA, only a court can change an award if it addresses an issue not submitted to the arbitrator that may be corrected without affecting the merits of the decision.⁸¹

The PA RUAA also increases the period of time during which an application may be made to an arbitrator to change an award from ten days after delivery of the award to the applicant to 20 days after the movant receives notice of the award.⁸²

The PA RUAA does not make substantive changes to vacatur provisions of the PA UAA, but changes the procedural requirements for vacating an award based on a claim that there was no arbitration agreement.⁸³ The PA UAA provides that an award may be vacated if there was no agreement to arbitrate, claims that no agreement to arbitrate exists were not raised and rejected in judicial proceedings to compel or stay arbitration, and the issue was raised by the applicant "at the arbitration hearing."⁸⁴ The PA RUAA, however, requires a party seeking to vacate an award be-

76. 42 Pa.C.S.A. §7321.19.

77. 42 Pa.C.S.A. §7321.29(a). *Also see* Paragraphs 3 and 4 of ULC Comments to §18 of the RUAA.

78. Compare 42 Pa.C.S.A. §§7310(a) with 7321.3 and 7321.20(a).

79. 42 Pa.C.S.A. §§7311(a) & 7315(a)(1) & (2).

80. 42 Pa.C.S.A. §§7321.21(a) and 7321.25(a)(1) & (a)(3).

81. 42 Pa.C.S.A. §7321.25(a)(2).

82. Compare 42 Pa.C.S.A. §§7311(b) and 7321.21(b).

83. Compare 42 Pa.C.S.A. §§7314 and 7321.24. A minor difference between the RUAA as adopted by the ULC and the PA RUAA is that Pennsylvania law provides that an arbitration award may be vacated if an arbitrator improperly conducted a hearing so as to prejudice the rights of a party without an explicit requirement that prejudice be "substantial" as required by §23(a)(3) of the RUAA. This change was made to conform state law with §10(a)(3) of the FAA which allows an award to be vacated based upon "misbehavior by which the rights of any party have been prejudiced." 9 USC §10(a)(3).

84. 42 Pa.C.S.A. §7314(a)(1)(iv).

cause of the absence of an arbitration agreement to have participated in the arbitration hearing and to have raised the issue not later than the beginning of the arbitration hearing.⁸⁵

The PA RUAA extends from 30 to 90 days the period time after notice of award during which a party may file a motion with the court for modification or correction of an award. Otherwise, the PA RUAA does not change the grounds or procedures to seek judicial modification or correction of an award.⁸⁶

ATTORNEY FEES AND LITIGATION EXPENSES IN JUDICIAL PROCEEDINGS TO CONFIRM, MODIFY OR CORRECT AN AWARD

Under the PA UAA, upon granting an order of court confirming, modifying or correcting an arbitration award, the judgment entered by the court upon application by the prevailing party may include an award of costs.⁸⁷ The PA RUAA further authorizes the court to add reasonable attorney fees and litigation expenses to the extent such an award would be authorized by law in a civil action involving the same claim as the arbitration award.⁸⁸

The provisions of the PA RUAA authorizing an award of costs and litigation expenses differ from the text of the RUAA as approved by the ULC by limiting the ability of the court to make such an award only to circumstances in which an award of attorney fees and litigation expenses would be authorized by law in a civil proceeding.⁸⁹ However, this limitation may be waived by the parties to an arbitration agreement or proceeding.

REVIEW OF ARBITRATION AWARDS INVOLVING STATE AGENCIES AND POLITICAL SUBDIVISIONS

With respect to arbitration agreements entered into by “the Commonwealth government” and arbitration agreements executed by political subdivisions relating to agreements with unions and employees, the PA UAA provides that an arbitration award may be modified or corrected where an award is contrary to law and is such that had it been a verdict of a jury a court would have entered a different judgment notwithstanding the verdict.⁹⁰ This rule is repealed by the PA RUAA, thereby making the review of arbitration awards involving government agencies subject to the same standards as applicable to awards involving non-governmental parties. Because the PA RUAA applies only to arbitration agreements entered into on or after July 1, 2019, however, current law will continue to apply to awards made under arbitration agreements executed prior to July 1, 2019.

The change in the standards for the review of awards in disputes involving government agencies will not affect arbitration proceedings pursuant to statutory procedures required for the resolution of controversies involving state and local agencies, such as the arbitration of disputes by the Board of Claims and arbitration involving local government police officers and firefighters, because the PA RUAA applies only to voluntarily executed arbitration agreements and not to adjudicative and arbitral proceedings governed by other statutes.

85. 42 Pa.C.S.A. §7321.24(a)(5).

86. Compare 42 Pa.C.S.A. §§7315 and 7321.25.

87. 42 Pa.C.S.A. §7316.

88. 42 Pa.C.S.A. §7321.26(c).

89. Compare 42 Pa.C.S.A. §7321.26(c) with section 25(c) of the RUAA as approved by the ULC.

90. 42 Pa.C.S.A. §7302(d)(1)(i) & (ii).

MODIFICATIONS AND WAIVERS

The PA RUAA enhances party autonomy by enabling waivers or modifications of many of its provisions. The statute itemizes those sections that may not be waived or modified by a party to an arbitration agreement or proceeding and sections that may not be waived or varied by a party before a controversy arises that is subject to an agreement to arbitrate. All other provisions are waivable.⁹¹ For example, the parties can agree (1) that the arbitrator, not the court, will decide the issue of arbitrability;⁹² (2) to restrict or enlarge access to discovery;⁹³ and (3) to modify the type of remedies that may be awarded by an arbitrator.⁹⁴

The PA RUAA prohibits waiving or modifying the following provisions:⁹⁵

- ∞ the application of the RUAA to agreements to arbitrate made on or after July 1, 2019;
- ∞ the procedures for consideration of motions to compel or stay arbitration;
- ∞ the immunity of arbitrators from civil liability and from being compelled to provide testimony or to produce records regarding arbitration proceedings;
- ∞ the ability of a court to request that an arbitrator consider whether to modify or correct an arbitration award;
- ∞ the right to file a motion to issue an order confirming an award;
- ∞ the right to request a court to vacate an award;
- ∞ the right to request a court to modify or correct an award;
- ∞ the requirement that the court upon granting a final order confirming or vacating an award enter judgment in conformity with the order that may be recorded, docketed and enforced as in a civil action;
- ∞ the authority of the court to allow reasonable costs of a motion to confirm or vacate an award and subsequent judicial proceedings;
- ∞ the requirement that the RUAA be interpreted in a manner that promotes the uniformity of law among the states; and
- ∞ the right to use electronic records and signatures.

The following provisions may not be waived before a controversy arises subject to an agreement to arbitrate, but may be modified or waived after a controversy arises:⁹⁶

- ∞ the right to request judicial relief;
- ∞ the requirement that an arbitration agreement is valid, enforceable and irrevocable except upon grounds that exist for the revocation of a contract;
- ∞ the right to seek provisional remedies;
- ∞ the power of an arbitrator to issue subpoenas or allow the taking of depositions;
- ∞ the power of the court with jurisdiction over a controversy to enforce an agreement to arbitrate;

91. 42 Pa.C.S.A. §7321.5(a).

92. 42 Pa.C.S.A. §7321.7; see, *First Options of Chicago, Inc. v. Kaplan* 514 US 938, 939 (1995).

93. 42 Pa.C.S.A. §7321.18.

94. 42 Pa.C.S.A. §7321.22.

95. 42 Pa.C.S.A. §7321.5(c).

96. 42 Pa.C.S.A. §7321.5(b).

- ∞ the right to appeal orders denying motions to compel or stay arbitration, orders confirming, denying, modifying, correcting or vacating awards and the entry of final judgment;
- ∞ the procedure for giving notice of the initiation of an arbitration proceeding, provided that notice may not be unreasonably restricted;
- ∞ the disclosure of facts that may affect the impartiality of a neutral arbitrator, provided that disclosures may not be unreasonably restricted; and
- ∞ the right to be represented by counsel, except as otherwise provided by an agreement between an employer and a labor organization.

To the extent permissible, a waiver or modification of the provisions of the PA RUAA may occur in the language of an arbitration agreement, by terms of an arbitration agreement incorporating the rules of an arbitration organization that differ from those of the PA RUAA, or by agreement among the parties to an arbitration proceeding, including an agreement to be governed by the rules of an arbitration organization.

CONCLUSION

The implementation of the PA RUAA on July 1, 2019, will significantly affect arbitration agreements entered into on or after that date and will allow parties to agreements executed prior to July 1, 2019, to opt in to coverage by the act. The law will provide rules of procedure governing a substantial number of issues not addressed by the PA UAA, but at the same time will give the parties to arbitration agreements and proceedings broader discretion to modify and waive its requirements.