

# ***THE REVISED UNIFORM ARBITRATION ACT***

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The Revised Uniform Arbitration Act (RUAA) is intended to replace the 1955 Uniform Arbitration Act; 49 jurisdictions have arbitration statutes, 35 have adopted the Uniform Arbitration Act, and 14 have adopted substantially similar legislation.

Since the promulgation of the 1955 Act, we have seen a great increase in the use of arbitration, greater complexity of the many disputes resolved by arbitration, and the development of laws of arbitration. All of these changes prompted NCCUSL to appoint a drafting committee to develop a RUAA.

The 1955 Act did not address many of the issues raised in modern arbitration. For instance, it did not provide any guidance on the following points:

1. Who decides the arbitrability of a dispute and by what criteria;
2. Whether a court or arbitrator may issue provisional remedies;
3. How a party can initiate an arbitration proceeding;
4. Whether arbitration proceedings can be consolidated;
5. Whether arbitrators are required to disclose facts likely to affect impartiality;
6. To what extent arbitrators or an arbitration organization are immune from civil actions;

7. Whether arbitrators or representatives of arbitration organizations can be required to testify in another proceeding;
8. Whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process;
9. Whether a court may enforce a pre-award ruling by an arbitrator;
10. What remedies an arbitrator may award, especially with regard to attorneys fees, punitive damages or other exemplary relief;
11. Whether a court can award attorneys fees and costs to arbitrators and arbitration associations;

12. Whether a court can award attorneys fees and costs to the prevailing party in an appeal of an arbitrator's award; and
13. What section of the RUAA would not be waivable, a provision intended to ensure that sections of the RUAA which provide fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another.

While the drafting committee considered these issues, they also kept in mind that arbitration is a consensual process in which the intent of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness.

This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs.

In most instances, RAAA provides a default mechanism to apply when the parties do not have a specific agreement on a particular issue. The drafting committee also recognized that the underlying reason many parties choose arbitration is the relative speed, lower costs, and greater efficiency of the process.

For example, Section 10 allows consolidation of issues involving multiple parties. This can be of special importance in adhesion situations where there are numerous persons with essentially the same claims against a party to the arbitration agreement.

Finally, in most cases, parties intend the decision of arbitrators to be final with minimal court involvement unless there is a clear unfairness or denial of justice. The contractual nature of arbitration means that the provision to vacate awards is limited.

Some of the new provisions are intended to reflect developments in arbitration law and to ensure that the process is a fair one. For example, Section 12 requires arbitrators to make important disclosures to the parties, Section 8 allows courts to grant provisional remedies in certain circumstances to protect the integrity of the arbitration process, and Section 17 includes limited rights to discovery while recognizing the importance of expeditious arbitration proceedings.

### *FEDERAL PREEMPTION.*

The United States Supreme Court has issued a number of decisions concerning the Federal Arbitration Act, and the drafting committee had to take into consideration federal preemption in cases of interstate commerce. So far, federal preemption questions have centered largely on two key front-end issues: enforcement of the agreement to arbitrate and issues of substantive arbitrability. The committee felt that it could not adopt or propose any changes which had the effect of mooting or limiting contractual agreements to

arbitrate in light of the proarbitration policies of FAA. There are some back-end issues of preemption; however, the Supreme Court had not spoken definitively on these issues.

There are some exceptions to the general rule of preemption. In a couple of cases, when parties who clearly contracted for a particular choice of law provision to conduct their arbitration under state laws, the provision effectively trumps the preemptive effect of the FAA.

Also, the Supreme Court made clear that when ascertaining whether a particular contract agreement to arbitrate is enforceable, one looks to the general contract law of each state with the proviso that the enforceability of arbitration agreements must be determined by the same standards as used for all other contracts.

There are other issues where a state law may apply, such as procedural matters dealing with discovery.

The committee did not specifically address international arbitration noting that some twelve states have adopted statutes directed to international arbitration and that seven have based their statutes on the Model Arbitration Law proposed by the United Nations Commission on International Law (UNCITRAL) IN 1985..

I will now discuss some of the specific provisions in RUAA which were not in or are different from the Uniform Arbitration Act.

#### **SECTION 4. EFFECT OF AGREEMENT TO ARBITRATE; NONWAIVABLE PROVISIONS.**

(a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:  
(1) waive or agree to vary the effect of the requirements of Section 5(a), 6(a), 8, 17(a), 17(b), 26, or 28;

(2) agree to restrict unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding;

(3) agree to restrict unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator;  
or

(4) waive the right under Section 16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this [Act], but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or Section 3(a) or (c), 7, 14, 18, 20(d) or (e), 22, 23, 24, 25(a) or (b), 29, 30, 31, or 32.

Section 6 provides for the court to determine issues of substantive arbitrability and an arbitrator to decide procedural arbitrability whether conditions precedent to arbitrability have been fulfilled and whether a contract containing an agreement to arbitrate is enforceable.

However, these provisions are waivable by the parties in their agreement to arbitrate and they may agree that an arbitrator is to determine issues of substantive arbitrability.

These provisions are essentially what has been developed in case law and practice.

*Section 8 - Provisional Remedies.* This section provides that before an arbitrator is appointed and is authorized and enabled to act, the court, upon the motion of a party to an arbitration proceeding and for good cause, may enter a provisional remedy to protect the effectiveness of the arbitration proceedings.

After an arbitrator is appointed and authorized and enabled to act, the arbitrator may issue such orders in the same manner as if the controversy were subject to a civil action.

After an arbitrator is in a position to act, the party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator cannot act timely or if the arbitrator cannot provide an adequate remedy.

*Section 9 - Initiation of Arbitration.* This section sets forth the procedures for giving notice to the parties to the

agreement to arbitrate. The notice must describe the nature of the controversy and the remedies sought. Unless a party makes an objection as to lack or insufficiency of notice, as provided in Section 15(c), the person waives his objection to lack or insufficiency of notice by appearing at a hearing. It is important to remember that a notice must be given to all parties to the agreement, not just to the one against whom a claim is asserted.

*Section 10 – Consolidation of Separate Arbitration*

*Proceedings*. This section permits a party, upon a motion to the court, to ask the court to order consolidation of separate arbitration proceedings as to some or all of the claims. It sets forth the conditions under which an order may be issued; however, it prohibits a court from consolidating claims of a party to an agreement to arbitrate which prohibits consolidation. Some of the conditions required are:

- ◆ that the claim has arisen in substantial part from the same transaction or series of transactions;

- ◆ the existence of common issue of law or fact create the possibility of conflicting decisions in separate arbitration proceedings; and
- ◆ prejudice would result from a failure to consolidate that is not outweighed by the risk of undue delay or prejudice to the rights or hardships of the parties opposed to the consolidation.

Section 12 - Disclosure by Arbitrator. This section requires that an individual requested to serve as an arbitrator, after making a reasonable inquiry, disclose to all parties any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator, including financial interests in the outcome of the proceedings and an existing or past relationship with any of the parties, their counsel, representatives, witnesses or other arbitrators.

The obligation of an arbitrator to disclose is a continuing one.

If the arbitrator discloses the fact and a party timely objects to the appointment or continued service, the objection may be grounds for vacature. Also, if an arbitrator did not disclose a conflict of interest, upon timely objection of a party, an award may vacated.

An arbitrator appointed as a neutral who does not disclose a known direct or material interest in the outcome of the proceedings, or a known existing or substantial relationship with a party, is presumed to act with evident partiality.

*Section 14 - Immunity of Arbitrator, Competency to Testify, and Attorneys Fees and Costs.* An arbitrator is immune from civil liability, to the same extent as a judge. It generally makes an arbitrator or arbitration organization incompetent to testify at any subsequent proceeding.

If a person commences a civil action against an arbitrator arising from their service as an arbitrator, or to otherwise testify in violation of this section, the court shall award the

arbitrator reasonable attorneys fees and other reasonable expenses of litigation.

Section 15 - Arbitration Process. This section authorizes the arbitrator to conduct the arbitration in a fair and expeditious manner, to order arbitration conferences and determine admissibility, relevance, materiality and weight of any evidence. The arbitrator may also summarily dispose of any claims or particular issues. Generally, the arbitrator shall determine time and place of a hearing with proper notice to the parties and conduct the arbitration itself.

Section 17 - Witnesses, Subpoenas, Depositions and Discovery. An arbitrator may issue subpoenas for the attendance of witnesses and production of records and other evidence and may administer oaths. An arbitrator may also permit deposition of witnesses and determine the conditions for taking the deposition. The arbitrator may issue protective orders to prevent disclosure of privileged information, confidential information, and trade secrets.

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