

SESSION OF 2018

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE BILL NO. 2571**

As Agreed to April 26, 2018

Brief*

HB 2571 would repeal the existing Uniform Arbitration Act (UAA) and replace it with the Uniform Arbitration Act of 2000 (or Revised Uniform Arbitration Act [RUAA]). The bill also would enact 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 brief, and headings containing only provisions that are substantially similar to those currently in the UAA are denoted with a “**”.]

Definitions

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

Notice

The RUAA would outline notice requirements, including taking action reasonably necessary to inform another person

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in ordinary course, regardless of the other person acquiring knowledge, actual notice, and receipt of notice.

Applicability

The RUAA would only apply to arbitration agreements made on or after July 1, 2018. It would not apply to actions or proceedings commenced or rights accrued before that date. The UAA would continue 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 could waive or the parties could 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 would require 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 would have 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 would have 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 would provide 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 would decide whether an agreement exists or a controversy is subject to an agreement, an arbitrator would decide 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 would provide that a person could 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 would be required to order arbitration. If the refusing party opposes the motion, the court would be required to summarily decide the issue and order arbitration unless it finds no enforceable arbitration agreement.

A person could file a motion alleging an arbitration has been initiated or threatened without an arbitration agreement. A court would be required to summarily decide this issue and order the parties to arbitrate if it finds there is an enforceable

agreement. A court could not order arbitration if it finds there is no enforceable agreement.

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

The above motions would have to 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 would be 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 would be required to stay a judicial proceeding involving a claim subject to the arbitration. If the claim is severable, the court could 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, would be able to enter an order for provisional remedies as it would under a civil action. After appointment of an arbitrator, the arbitrator would be allowed to issue orders for provisional remedies as it would under a civil action, and a party would be 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 would not be waived by a party making a motion for provisional remedies.

Initiation of Arbitration

The RUAA would specify the notice required to initiate an arbitration proceeding. Appearance at the arbitration hearing would waive 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 would be 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 would require the agreed method of appointment of an arbitrator 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,

would appoint the arbitrator, and such arbitrator would have 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 would require 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 would have a continuing obligation to disclose such facts, and the RUAA would include 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 would require 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 would provide the same immunity for an arbitration organization as that of a judge of a Kansas court acting in a judicial capacity. Such immunity would not be lost due an arbitrator's failure to make disclosures required under the RUAA.

An arbitrator or arbitration organization would not be competent to testify and could 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 would be 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 could conduct arbitration as the arbitrator considers appropriate for a fair and expeditious disposition, and the arbitrator's authority would include the power to hold conferences with the parties before the hearing and determine the admissibility, relevance, materiality, and weight of any evidence.

The arbitrator could 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 would set 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 would require a replacement be

appointed to continue the proceeding and resolve the controversy.

*Attorney Representation ***

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

Subpoenas; Depositions; Testimony; Discovery

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

The arbitrator could 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 could 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 could order a party to comply with discovery-related orders, issue subpoenas, and take action against a noncomplying party to the extent a court could in a civil action.

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

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

The court could 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 would be required to be served and enforced in the manner they would be 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 could request the ruling be incorporated into the award. A prevailing party could move the court for an expedited order to confirm the award, and the court would have to summarily decide the motion. The court would have to confirm the award unless the court vacates, modifies, or corrects the award.

Record and Timing of Award

The arbitrator would be 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 would be 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 could 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 would be waived unless the party gave notice of the objection before receiving notice of the award.

Modification or Correction of Award by Arbitrator

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

An arbitrator could 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 could be included in an award.)

Other than the above remedies, an arbitrator would be 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 would not 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, would be 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 could move the court to confirm the award. The court would be 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 would be 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 would have to 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 would have to 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 could order a rehearing. If the grounds are corruption, fraud, or partiality, corruption, or misconduct by the arbitrator, a rehearing would be required to be conducted before a new arbitrator. If the award is vacated on any other grounds listed, the rehearing would be required to be before the same arbitrator or successor. The rehearing decision would have to be issued within the same time limits as provided for an award.

If the court denies a motion to vacate, it would be required to confirm the award unless a motion to modify or correct the award is pending.

(The UCC 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 would be required to 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 would be required to modify or correct and then confirm the award. Otherwise, unless a motion to vacate is pending, the court would be required to confirm the award.

A motion to modify or correct could 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 would be 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 would direct 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 would state 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 would be amended to update references from the UAA to the RUAA.

Arbitration or Mediation of Trust Instruments

The bill would provide 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 would apply when the dispute is related to the validity of the trust, unless all interested persons consent to arbitration or mediation of the dispute.

Conference Committee Action

The Conference Committee agreed to remove the original contents of HB 2571, related to disclosure of audio or video recordings made and retained by law enforcement using a body camera or a vehicle camera, and to insert the contents of HB 2186, as amended by the House Committee

on Judiciary, related to the Uniform Arbitration Act, and HB 2126, related to the arbitration and mediation of trust instruments. [Note: The Conference Committee inserted the original contents of HB 2571 in the Conference Committee report for SB 336.]

Background

HB 2186 [Uniform Arbitration Act]

HB 2186 was introduced at the request of the Kansas Bar Association (KBA) in the 2017 Legislative Session. In the House Committee on Judiciary hearing, a representative of the KBA's Alternative Dispute Resolution Section testified in support of the bill. The Uniform Law Commission provided written-only testimony supporting the bill. No neutral or opponent testimony was provided.

The House Committee adopted a technical amendment correcting a statutory reference.

[Note: The Conference Committee report for HB 2571 contains only the language from HB 2186, as amended by House Committee, regarding the Uniform Arbitration Act, with date references updated. HB 2186 proceeded to be amended by the House Committee of the Whole to add provisions related to teachers' due process procedures. The Senate Select Committee on Education Finance then replaced the contents of HB 2186 with revised contents of SB 251, relating to school finance. The Conference Committee report for HB 2571 does not contain provisions regarding teachers' due process or school finance.]

According to the fiscal note prepared by the Division of the Budget on HB 2186, as introduced, the Office of Judicial Administration indicates enactment of the bill could decrease the number of cases filed in district courts as a result of more cases being resolved through arbitration. This

would decrease time spent by judicial and nonjudicial staff working on cases, and the decrease in cases could also result in a decrease in docket fee revenue. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2018 Governor's Budget Report*.

HB 2126 [Arbitration or Mediation of Trust Instruments]

HB 2126 was introduced in the House Committee on Judiciary at the request of the KBA in the 2017 Legislative Session. At the hearing before the House Committee, a representative of KBA testified in support of the bill. No neutral or opponent testimony was provided.

The House Committee recommended the bill be placed on the Consent Calendar.

According to the fiscal note prepared by the Division of the Budget on HB 2126, the Office of Judicial Administration indicates enactment of the bill would have no fiscal effect on revenues or expenditures of the Judicial Branch.

arbitration; trusts; judiciary; Uniform Arbitration Act; Uniform Trust Code

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