Utah's Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration

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I. INTRODUCTION

This article will discuss the provisions of the recently adopted Revised Uniform Arbitration Act (RUAA) the Utah Legislature passed in 2002. The RUAA became effective in Utah on May 15, 2003. The RUAA is codified in UTAH CODE ANN. §§ 78-31a-101 through 131. Its provisions will apply to all contracts that are entered into after May 6, 2002, and to contracts made before May 6, 2002 by agreement of the parties. As of November, 2003, the RUAA has been adopted by eight states[1] and is currently being considered by eleven others.

Utah's RUAA was patterned after the Revised Uniform Arbitration Act that was approved by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in August, 2000. The NCCUSL version of the Revised Uniform Arbitration Act was finalized after a four-year drafting period. This project was undertaken to bring arbitration law into line with developments in the field of arbitration since the original Uniform Arbitration Act was approved in 1955. The RUAA has been endorsed by the American Bar Association, the National Academy of Arbitrators, the American Arbitration Association, and others.[2] The Revised Uniform Arbitration Act was adopted by the NCCUSL without a single negative vote being cast by the Uniform Law Commissioners.[3]

II. HISTORY

The original Uniform Arbitration Act ("UAA") was promulgated by the NCCUSL in 1955. Thereafter, the UAA was enacted by 49 jurisdictions. Utah did not adopt the UAA until 1985.

The 1925 United States Federal Arbitration Act ("FAA") was enacted by Congress in 1925 and applied to all contracts involving interstate commerce. The FAA and the Utah Uniform Arbitration Act have a number of similar provisions. The old Uniform Arbitration Act, the Federal Arbitration Act, and the new Revised Uniform Arbitration Act were created to ensure the enforcement of pre-dispute arbitration agreements. The limited grounds for vacating or modifying awards are similar in all three acts.

Like the current Federal Arbitration Act, Utah's old Uniform Arbitration Act deals mainly with such basic matters as the enforcement of arbitration agreements, appointment of arbitrators, compelling attendance of witnesses, limited discovery rights and review of awards. The old statute left much to be worked out in the courts, the rules of arbitration administration organizations, and the agreements of parties.

The RUAA is more complete and comprehensive of arbitration practice and procedure. It was created to codify case law addressing the arbitration process, and to resolve ambiguities in and questions raised by the old UAA. The new Utah Revised Uniform Arbitration Act deals with such matters as arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure, arbitrator immunity, discovery, subpoenas, pre-hearing conferences, dispositive motions, punitive damages, attorneys' fees and other remedies which could be the subject of an arbitration award.

III. PUBLIC POLICY FAVORING ARBITRATION

Utah's public policy favors arbitration. The Utah Uniform Arbitration Act provides for the arbitration of pre-existing disputes (by agreement of the parties) as follows:

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> "[o]n motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement: ... (b) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate."[4]

The Act also provides: "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim."[5]

The Utah Supreme Court has a well established history in defining a public policy that liberally encourages the broad enforcement of extrajudicial dispute resolution agreements that have been voluntarily entered into. *See eg. Central Florida Investments, Inc. v. Parkwest Associates,* 40 P.3d 599 (Utah 2002); *Intermountain Power Agency v. Union Pacific R.R. Co.,* 961 P.2d 320, 325 (Utah 1998); *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.,* 925 P.2d 941, 946 (Utah 1996); *Allred v. Educators Mut. Ins. Ass'n,* 90 P.2d 1263, 1265 (Utah 1996); *Docutel Olivetti Corp. v. Dick Brady Systems, Inc.,* 731 P.2d 475 (Utah 1986); *Lindon City v. Engineers Constr. Co.,* 636 P.2d 1070 (Utah 1981).

Federal public policy also favors arbitration of pre-existing disputes. Section 2 of the Federal Arbitration Act is similar to the new Utah Revised Uniform Arbitration Act and reads in relevant part as follows: "... an agreement in writing to submit to arbitration, an existing controversy arising out of such content shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6]

In Dean Witter Reynolds, Inc. v. Byrd, the Supreme Court of the United States considered whether an arbitration agreement that was enforceable pursuant to statute must be enforced, even if the enforcement would result in bifurcated proceedings.[7] The Supreme Court has consistently held that courts must compel arbitration when a valid arbitration agreement exists and a motion to compel arbitration is made. *See eg. Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 35 (1967); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1 (1983); *Southland Corp. v. Keating,* 465 U.S. 2 (1984): *Perry v. Thomas,* 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. V. Dobson,* 513 U.S. 265 (1995); *Doctor's Assocs. V. Cassarotto,* 517 U.S. 681 (1996).

IV. RUAA HIGHLIGHTS.

The Federal Arbitration Act and the old Utah Uniform Arbitration Act are bare-bones statutes that address matters affecting basic arbitration principles. The new Utah Revised Uniform Arbitration Act was designed to be more comprehensive and to (1) codify existing case law interpreting arbitration statutes, (2) resolve ambiguities inherent within the statutes, and (3) modernize arbitration practice and procedure. The following represents the top ten highlights of arbitration practice and procedure under the new RUAA:

1. Arbitrability: Jurisdiction, and Venue – Utah Code Ann. §§ 78-31a-107, 108, 127 and 128

The old UAA did not address the question of who decides arbitrability of a dispute and by what criteria.[8] Section 78-31a-107(1) of the Utah RUAA restates the proposition that was the central premise of the old UAA, as well as the current FAA, that agreements to arbitrate are "enforceable ... except upon a ground that exists at law or in equity for the revocation of contract."[9]

Section 78-31a-107(2) and (3) defines who decides the important issue of arbitrability when the parties themselves have not decided. Matters of substantive arbitrability; i.e., "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate,"[10] are for the courts to decide. Matters of procedural arbitrability; i.e., "whether a condition precedent to arbitrability has been fulfilled,"[11] are for the arbitrator to decide. This dichotomy about who determines substantive and procedural arbitrability follows the majority approach under both the old UAA and the current FAA.[12]

Although the general rule in section 78-31a-107(2) is that the court decides substantive arbitrability, the parties may agree that

the arbitrator shall make this determination. Arbitration organizations, such as the American Arbitration Association and the International Chamber of Commerce, provide that arbitrators rather than courts make the initial determination of substantive arbitrability.[13]

Utah Code Ann. § 78-31a-127(1) defines jurisdiction to enforce arbitration agreements. It differs from the old Utah UAA, which conferred jurisdiction to enforce arbitration clauses on courts in the state where the agreement was made.[14] Section 78-31a-127(1) grants power to enforce an arbitration agreement in Utah courts with personal and subject matter jurisdiction over the controversy.

Section 78-31a-127(2) deals with jurisdiction to enter judgment on an arbitration award. It provides that an agreement providing for arbitration in a particular state confers "exclusive jurisdiction" on the courts of that state to enter judgment.

Section 78-31a-128 addresses the venue requirements in matters relating to the judicial supervision and management of arbitration proceedings. Any application for judicial relief or remedy is to be made in the county specified in the arbitration agreement. Where the parties do not designate a county, venue is proper in the court where an adverse party resides or has a place of business. If there is no such residence or place of business then venue is appropriate in a court of any county. All subsequent judicial proceedings relating to the arbitration are to be held in the court hearing the initial motion for relief. Forum shopping is prohibited.

2. Arbitrator Disclosure – Utah Code Ann. § 78-31a-113

Section 78-31a-113 provides that neutral arbitrators must make a full and timely disclosure (1) to the parties and other arbitrators of financial interests they may have in the outcome of the arbitration; (2) relationships with a party, witness or other person or entity involved in the arbitration; and (3) in the case of a party-appointed arbitrator, the nature of the arbitrator's relationship with the party appointing the arbitrator. Matters regarding failure to disclose by an arbitrator are grounds for vacating an award. The disclosure requirement is ongoing throughout the course of the arbitration, and for a reasonable period thereafter.

3. Arbitrator and Administrator Immunity – Utah Code Ann. §§ 78-31a-115 and 126

Section 78-31a-115 follows the pre-existing rule that both arbitrators and organizations administering an arbitration are immune from civil liability for actions taken in the course of arbitration. Furthermore, except for cases in which arbitrator misdeeds have been prima facie established, arbitrators are incompetent to testify about arbitration matters. The new RUAA also provides for payment of attorneys fees by the party that unsuccessfully seeks to compel arbitrator testimony.

4. Consolidation – Utah Code Ann. § 78-31a-111

Section 78-31a-111 prevents courts from consolidating arbitrations where the arbitration agreement of a party opposing consolidation expressly prohibits it. For arbitration agreements that are silent on the issue of consolidation, the Utah Uniform Arbitration Act strikes a compromise. Section 111 rejects the position of the majority of federal cases that prohibit consolidation under any circumstance. Instead, Section 111 provides that consolidation is appropriate where the disputes arise out of the same transactions, have issues in common, and the prejudice resulting from a failure to consolidate is not outweighed by delay or prejudice to those opposing consolidation.

5. Provisional Remedies – Utah Code Ann. § 78-31a-109

Section 78-31a-109 codifies existing law in many jurisdictions which allow courts to grant provisional remedies in aid of arbitration. This section grants arbitrators the authority to grant similar relief in arbitration. To make an arbitrator's interim order effective, the new Utah RUAA provides for court enforcement of the granting of arbitrator awarded provisional relief, but not the denial of that relief.

6. Case Management – Utah Code Ann. § 78-31a-116

Section 78-31a-116 gives an arbitrator the authority to conduct preliminary conferences with the parties to resolve scheduling and discovery matters prior to holding hearings on the merits. The arbitrator along with the parties should consider creating an Arbitration Scheduling Order that, at a minimum, addresses the following: (1) the date and place of arbitration, (2) cutoff dates for adding claims and parties, (3) fact and expert discovery, (4) witness disclosure, (5) disclosure and handling of exhibits, (6) motion cutoff, (7) pre-hearing briefs, (8) form of the award, (9) need for a reporter, (10) interim status conferences, (11) technology needs for the hearing and (12) a system for communicating with the arbitrator.

7. Discovery/Subpoenas – Utah Code Ann. § 78-31a-118

Section 78-31a-118 leaves discovery to the parties and the arbitrators to decide on a case by case basis. All discovery tools permitted by the Utah and Federal Rules are available for the parties to use if they choose to do so. However, the arbitrator has wide discretion in limiting the scope of discovery. Discovery should be fair, efficient, and cost-effective.

Section 118 gives authority to arbitrators to order discovery of third parties. Prior to the enactment of the new RUAA, there had been some conflict as to the authority of an arbitrator to order discovery from third parties. Under the RUAA, the arbitrator has a broad range of sanctions to use.

Utah Code Ann. § 78-31a-118(3) is the provision of the Utah RUAA

governing discovery practice. Under the new RUAA the parties are allowed great freedom in formulating their own discovery rules. For the drafting committee, discovery epitomized the conflict over whether arbitration would become merely a surrogate form of litigation or whether it would remain a dispute-resolution mechanism separate from litigation.[15] Many proponents of arbitration have advocated that Arbitration is more efficient than litigation due largely in part to limited and efficient discovery. However, there is concern that arbitration is becoming too professionalized and is taking on more of the attributes of traditional litigation. The challenge will be to keep the complex simple.

Utah Code Ann. § 78-31a-118(7) is a new provision that should help parties secure necessary information in an arbitration proceeding that involves persons located outside the state of the hearing. Under the old Utah UAA, enforcing a subpoena or a discovery related order against a person in another state required two court actions as well as additional arbitration involvement.

For example, suppose an arbitration regarding a construction dispute is held in Utah. As part of the arbitration, one party must depose a witness, who will be unavailable for the hearing. Furthermore, let's suppose the witness resides in New Mexico. Under the old UAA, the party taking the deposition must seek a subpoena from the arbitrator under section 17(a); request enforcement of that subpoena by a court in Utah; and then file the Utah court order in the appropriate court in New Mexico for the subpoena's issuance and enforcement. The person upon whom the subpoena was served would then file its objection with the court of the jurisdiction wherein that party resides.

However, under section 118(7), in any state that has adopted the RUAA, like New Mexico, the party may take the subpoena directly from the arbitrator in Utah and serve it upon the party. Should the party fail to comply, the New Mexico court would enforce the subpoena. The New Mexico court would also determine matters involving the subpoenaed party's objections, if any.

8. Motions – Utah Code Ann. § 78-31a-106

Utah Code Ann. § 78-31a-106 is the provision of the Utah RUAA governing motion practice. The old UAA used the term "application" for all actions filed with courts involving the arbitration process. For example, a party seeking to compel another person to arbitrate a matter would file an "application" with a court for an order to compel arbitration.[16] The Utah RUAA changed the terminology so that section 106 requires that all actions be filed "by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing motions." Thus, a party seeking to require another to arbitrate would file a motion to compel arbitration with the appropriate court.[17]

9. Remedies – UTAH CODE ANN. § 78-31a-126

Utah Code Ann. § 78-31a-126(3) is a new provision that grants courts discretion to award "reasonable attorneys' fees and other reasonable expenses of litigation" to a prevailing party in a "contested judicial proceeding" to confirm, vacate, modify or correct an award. Still, Section 126(3) is discretionary. For example, where a party challenges an arbitration award because the law on the matter is uncertain but the party loses, a court might well decide not to grant attorneys' fees and costs because the losing party has appealed on a close issue or has helped to develop arbitral law on the matter in dispute.[18]

Section 126(3) is prohibitive. For example, section 126(3) prohibits a court from awarding attorneys' fees and costs where a party has not "contested" a judicial proceeding.

Section 126(3) is a waivable provision under section 105(3). Where parties believe that a judicial challenge is likely by whoever loses the arbitration, they may agree that a court does not have the authority to add attorneys' fees and costs to a judgment.[19]

10. Post Arbitration Hearing and Appeals Utah Code Ann. §§ 78-31a-119, 121, 123, 124, 125 and 126

Prior to the adoption of the RUAA in Utah, Utah Code Ann. § 78-31a-13 governed the modification of awards by an arbitrator. Under section 13, a party was able to apply directly to the arbitrator for clarification of an award. The RUAA follows the old UAA approach. Utah Code Ann. § 78-31a-121 provides a mechanism for parties to apply directly to the arbitrator to clarify an award. This provision is an exception to the common-law *functus officio* doctrine, that states when arbitrators finalize an award and deliver it to the parties, they can no longer act on any matter.[20]

The benefit of section 121 of the new Utah RUAA is evident in comparison with the FAA, which has no similar provision. Because the FAA has no clear statutory authority for arbitrators to clarify awards, case law on this issue is contradictory and confusing. Often, parties under the FAA must bring a new proceeding in the U.S. District Court to clarify an arbitrator's decision.[21] The procedure for correcting errors under section 121 of the new Utah RUAA enhances the efficiency of the arbitral process in a manner similar to that of the old Utah UAA.

Though heavily debated, the drafters of the RUAA decided to not revise the old UAA with regard to vacatur. While Utah Code Ann. § 78-31a-124 has changed in form, the content remains quite similar to old Utah Code Ann. § 78-31a-14.

V. CONSUMER ISSUES

Some have questioned whether there should be special safeguards imposed on pre-dispute agreements requiring arbitration. The questions have been raised most often in the areas of employee/

employer and consumer/service provider relationships. The Drafters of the RUAA specifically steered clear of providing special requirements for arbitration agreements involving particular types of parties and transactions.

The RUAA is intended to apply to ALL agreements to arbitrate. If arbitration agreements conflict with applicable contract law, then the agreement may be unenforceable. The RUAA cannot change the federal law that precludes it from singling out agreements to arbitrate for special limitation. Therefore, the matter of arbitral fairness must be left to the respective state and federal legislative bodies and to the courts for further development.

VI. FEDERAL PRE-EMPTION

To date, the preemption related opinions of the United States Supreme Court have focused on two key issues; (1) enforcement of the agreement to arbitrate; and (2) issues of substantive arbitrability. The Supreme Court has specifically and consistently opined that state law, including adaptations of the RUAA and the like, limiting contractual agreements to arbitrate, must yield to a strong public policy as codified in Sections 2, 3 and 4 of the Federal Arbitration Act. Thus, the FAA remains preemptive of state statutes that limit the parties agreement to arbitrate or does not otherwise place arbitration agreements on an equal footing as other contracts.

If a conflict exists between the Utah Uniform Arbitration Act and the FAA concerning matters of arbitrability, it is clear that the FAA would preempt the application of the Utah Uniform Arbitration Act. The Utah Supreme Court held in *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.* that "state law governing arbitration is preempted only 'to the extent it actually conflicts with federal law.'"[22]

For example, in the case of *Mastrobuono v. Shearson Lehman Hutton, Inc.,* there was a direct conflict regarding the arbitrator's authority under a state statute to award punitive damages.[23] The underlying contract contained a choice of law provision requiring disputes to be resolved under the laws of New York. It also contained an arbitration clause. The Court ruled that New York law was preempted by the FAA because New York law denied arbitrators the ability to award punitive damages. Accordingly, if there is a conflict between a state statute that limits arbitrability and the provisions of the Federal Arbitration Act, the state statute, to the degree that it conflicts with the FAA, will be preempted and the more inclusive provisions of the FAA will be applied.

Take note, however, that the Supreme Court has been silent with regard to "back end" issues such as standards and procedure for vacatur, confirmation, and modification of arbitration awards. Thus, it is unclear whether or not the FAA preempts the RUAA on these matters.

VII. CONCLUSION

Will the new RUAA change the breadth and scope of arbitration practice and procedure; or is the RUAA the culmination of arbitration practice and procedure that has evolved under the Federal Arbitration Act and the old Uniform Arbitration Act?

Whatever the outcome, it was the intent of the National Conference of Commissioners on Uniform State Laws to provide each state with an opportunity to establish a uniform and effective means of arbitration practice and procedure that could be referenced to and used throughout the country.

Like any important statutory change, the RUAA required compromises by the many participants who had differing interests. Nevertheless, all who took part in the drafting process worked toward the same end for a more efficient, modern, and fair arbitration system that was consensual and served the best interests of the contracting parties and the public as a whole.

To everyone: Happy Arbitrating!

1. Adopting states in alphabetical order: Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, and Utah. *See* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp
2. *Id.*
3. The Revised Uniform Arbitration Act was approved by a vote of: 50 for the act, none against the act, one abstention and two not voting. Each state had a vote along with the District of Columbia, Puerto Rico and the Virgin Islands; Senator Lyle served as one of the National Law Commissioners and was instrumental in getting the RUAA adopted in Utah's 2002 General Legislative Session; Senate Bill 171.
4. Utah Code Ann. §§ 78-31a-108(1)(b).
5. Utah Code Ann. §§ 78-31a-108(7).
6. Federal Arbitration Act 9 U.S.C. 2.
7. *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct 1238, 84 L.Ed.2d 158.
8. Andrew D. Ness, *The Revised Uniform Arbitration Act of 2000,* 21 Fall Construction Law 35 (2001).
9. Heinsz, 56 JUL Disp. Resol. J. At ?
10. Utah Code Ann. § 78-31a-107(2).
11. Utah Code Ann. § 78-31a-107(3).
12. Heinsz, 56 JUL Disp. Resol. J. at 31.
13. *Id.* at 40.
14. UAA § 17.
15. *Id.* at 34.
16. *Id.* at 30.
17. *Id.* at 31.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Buzas Baseball, inc. v. Salt Lake Trappers, Inc.,* 925 P.2d 941, 952 (Utah 1996) citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941) and *Volt Information Sciences v. Stanford,* 489 U.S. 468 (1989).
23. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995).