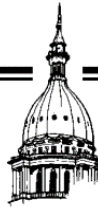




Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bills 901, 902, and 903 (as enacted)
Sponsor: Senator Tonya Schuitmaker
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACTS 369, 370, & 371 of 2012

Date Completed: 8-22-13

RATIONALE

Parties to a legal dispute may elect to resolve their disagreement through arbitration in order to avoid the time, costs, and process of litigation. In this way, they can privately resolve the dispute without the formal involvement or judgment of the court. Michigan's arbitration law, as reflected in former Chapter 50 (Arbitrations) of the Revised Judicature Act, was adopted in 1961 and was patterned after the Federal Arbitration Act adopted by the U.S. Congress in 1925. Unlike 49 other jurisdictions, Michigan did not adopt the Uniform Arbitration Act promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws, or Uniform Law Commission (ULC). More recently, the ULC promulgated an update of the uniform law, the 2000 Revised Uniform Arbitration Act. The uniform law has been adopted in at least 17 other jurisdictions, and Chapter 50 of the RJA had not been substantially modified since its enactment. It was suggested that Michigan modernize its arbitration law to address deficiencies and promote consistency with arbitration laws in other states, by adopting the uniform arbitration law proposed by the ULC in 2000.

CONTENT

Senate Bill 903 created the "Uniform Arbitration Act" to do the following:

- **Provide for the enforcement of an agreement to arbitrate.**
- **Govern arbitration proceedings, including the initiation and consolidation of proceedings.**

- **Authorize a court or arbitrator to order provisional remedies.**
- **Allow the parties to waive or vary a requirement of the Act, except as otherwise provided.**
- **Require a potential arbitrator to disclose facts that could affect his or her impartiality.**
- **Grant immunity from civil liability to an arbitrator, to the same extent as a judge acting in a judicial capacity.**
- **Specify an arbitrator's powers and duties.**
- **Outline an arbitrator's responsibilities in making an award.**
- **Specify conditions under which a court may vacate, or modify or correct, an arbitration award.**
- **Identify matters that may be appealed, and require an appeal to be taken as from an order or judgment in a civil action.**

Senate Bill 902 amended the Revised Judicature Act (RJA) specify that Chapter 50B (Domestic Relations Arbitration) controls if there is a conflict between it and the Uniform Arbitration Act. The bill also repealed Chapter 50 (Arbitrations) on July 1, 2013.

Senate Bill 901 amended the Condominium Act to require that arbitration proceedings in disputes under the Act be conducted under the Uniform Arbitration Act.

The bills took effect on July 1, 2013. Senate Bill 903 was tie-barred to Senate Bills 901

and 902. Those bills were tie-barred to Senate Bill 903.

Senate Bill 903

Scope of Act

On or after July 1, 2013, the Uniform Arbitration Act governs an agreement to arbitrate regardless of when the agreement is or was made. Except as otherwise provided, a party to an agreement or proceeding may waive, or the parties may vary the effect of, the Act's requirements to the extent permitted by law.

In applying and construing the Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

The Act states that it does not affect an action or proceeding commenced or right accrued before it took effect.

Notice

Except as otherwise provided, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, regardless of whether the other person acquires knowledge of the notice. A person has notice if he or she has knowledge of the notice or has received notice. A person receives notice when it comes to his or her attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

Agreement to Arbitrate

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract. (The Act defines "record" as information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.)

The court must decide whether an agreement to arbitrate exists or a

controversy is subject to an agreement to arbitrate.

Upon a person's motion showing an agreement to arbitrate and alleging another person's refusal to arbitrate, the court must do both of the following:

- Order the parties to arbitrate, if the refusing party does not appear or does not oppose the motion.
- Proceed summarily to decide the issue and order the parties to arbitrate, if the refusing party opposes the motion, unless the court finds that there is no enforceable agreement to arbitrate.

If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate. The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

If a party moves the court to order arbitration, or if the court orders arbitration, the court must stay any judicial proceeding that involves a claim alleged or actually subject to arbitration.

Unless a civil action already is pending between the parties, a complaint regarding the agreement to arbitrate must be filed and served as in other civil actions.

Provisional Remedies

Before appointment of an arbitrator, the court may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action. After an arbitrator is appointed and is authorized and able to act, both of the following apply:

- The arbitrator may issue orders for provisional remedies, as he or she finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy.
- A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator cannot act in a timely manner or provide an adequate remedy.

Arbitration Proceedings

Initiation of Proceedings. A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner or, in the absence of an agreement, by certified or registered mail or by service as authorized for the commencement of a civil action. Unless a person objects for lack or insufficiency of notice, the person waives any such objection by appearing at the hearing.

Consolidation of Proceedings. Unless an agreement to arbitrate prohibits consolidation, the court may consolidate separate arbitration proceedings as to all or some of the claims, if all of the following apply:

- There are separate agreements to arbitrate or separate arbitration proceedings between the same people, or one of them is a party to a separate agreement with a third person.
- The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions.
- The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings.
- 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.

Appointment of Arbitrator. If the parties agree on a method for appointing an arbitrator, that method must be followed unless it fails. If the parties have not agreed, the agreed-upon method fails, or an appointed arbitrator fails to act and a successor has not been appointed, the court must appoint the arbitrator. An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party, may not serve as an arbitrator.

Before accepting appointment, an individual who is requested to serve as an arbitrator must disclose to all parties and to any other arbitrators any known facts that a reasonable person would consider likely to

affect the arbitrator's impartiality. If an arbitrator discloses a fact required to be disclosed and a party timely objects to the appointment or continued service of the arbitrator, the objection may be a ground for vacating an award made by that arbitrator. If an arbitrator does not disclose a fact required to be disclosed, the court may vacate an award upon a timely objection by a party.

Arbitrators & Hearings

An arbitrator may conduct an arbitration in the manner that he or she considers appropriate for a fair and expeditious disposition of the proceeding. The arbitrator's authority includes the power to hold conferences with the parties before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

An arbitrator may decide a request for summary disposition if all interested parties agree or, on the request of one party, if that party gives notice to all other parties and they have reasonable opportunity to respond.

If an arbitrator orders a hearing, he or she must set a time and place and give notice of the hearing not less than five days before it begins. On a party's request and for good cause, or on the arbitrator's own initiative, the arbitrator may adjourn the hearing as necessary but may not postpone it to a time later than that fixed by the agreement to arbitrate unless the parties consent to a later date.

If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of them, but all have to conduct the hearing.

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

A party to an arbitration proceeding may be represented by a lawyer.

An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence, and may administer oaths. An arbitrator may permit a deposition of any witness to

be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed or is unable to attend a hearing.

An arbitrator may permit or limit discovery. If an arbitrator allows discovery, he or she may order a party to comply with the discovery-related orders, issue subpoenas for the attendance of witnesses and the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action.

An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action.

In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and may not be required to produce records regarding arbitration proceedings, to the same extent as a judge acting in a judicial capacity. This does not apply, however, to the extent necessary to determine the claim of an arbitrator or organization against a party to the arbitration proceeding or to a hearing on a motion to vacate an award if the moving party establishes that a ground for vacating the award exists.

An arbitrator, or an arbitration organization acting in that capacity, is immune from civil liability to the same extent as a judge acting in a judicial capacity.

Arbitration Awards

If an arbitrator makes a preaward ruling in favor of a party, the party may request the arbitrator to incorporate the ruling into an award. A prevailing party may move the court for an expedited order to confirm the award, in which case the court must decide the motion summarily. The court must issue an order to confirm the award unless it vacates, modifies, or corrects the award.

An arbitrator must make a record of an award and give each party a copy. On motion by a party, the arbitrator may

modify or correct an award based on circumstances specified in the Act.

An arbitrator may award punitive damages or other exemplary relief if that award is authorized by law in a civil action involving the same claim, and the evidence produced at the hearing justifies the award under the legal standards applicable to the claim. An arbitrator may award reasonable attorney fees and other reasonable expense, if that award is authorized by law in a civil action involving the same claim or by agreement of the parties. The arbitrator may order other remedies that he or she considers just and appropriate. An arbitrator's expenses and fees, and other expenses, must be paid as provided in the award.

On motion to the court by a party to an arbitration proceeding, the court must vacate an arbitration award under certain conditions, e.g., the award was procured by corruption or fraud, there was corruption by the arbitrator, or the arbitrator exceeded his or her powers. The court may order a rehearing, unless the award is vacated because there is no agreement to arbitrate. If the court denies a motion to vacate an award, it must confirm the award unless a motion to modify or correct the award is pending.

The court also must modify or correct an arbitration award, under certain circumstances.

On granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court must enter a judgment that conforms with the order. The judgment may be recorded and enforced as any other judgment in a civil action. The court may allow reasonable costs of the motion and subsequent judicial proceedings. On request of a prevailing party to a contested judicial proceeding, the court also may add reasonable attorney fees and other reasonable expenses of litigation, incurred in a judicial proceeding after the award is made, to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

A Michigan court that has jurisdiction over the controversy and the parties may enforce an agreement to arbitrate. An agreement to arbitrate that provides for arbitration in Michigan confers exclusive jurisdiction on

the court to enter judgment on an award under the Act.

Appeals

Except as provided below, a request for judicial relief under the Act must be made by motion to the court and heard in the manner provided by court rule for making and hearing motions.

An appeal may be taken from any of the following:

- An order denying a motion to compel arbitration.
- An order granting a motion to stay arbitration.
- An order confirming or denying confirmation of an award.
- An order modifying or correcting an award.
- An order vacating an award without directing a rehearing.
- A final judgment entered under the Act.

The appeal must be taken as from an order or a judgment in a civil action.

Senate Bill 902

Chapter 50B of the RJA governs arbitration in domestic relations matters, and controlled if there was a conflict between Chapter 50B and Chapter 50. The bill specifies that Chapter 50B controls if there is a conflict between it and the Uniform Arbitration Act.

The bill also repealed Chapter 50 of the RJA on July 1, 2013.

Senate Bill 901

The Condominium Act requires a developer, at the exclusive option of a purchaser, co-owner, or person occupying a restricted unit, to execute a contract to settle by arbitration any claim that might be the subject of a civil action against the developer involving an amount less than \$2,500 and arising out of or relating to a purchase agreement, condominium unit, or project. Also, at the exclusive option of the association of co-owners, a developer must execute a contract to settle by arbitration any claim that might be the subject of a civil action against the developer arising out of or relating to the common elements of a

condominium project and involving an amount of \$10,000 or less.

A contract to settle by arbitration must specify that the arbitration will be conducted by the Arbitration Association. The arbitrator or arbitrators must be appointed as provided by reasonable rules of the Arbitration Association. An arbitration award is binding on the parties to the arbitration.

Previously, arbitration under the Act was required to proceed according to Chapter 50 of the RJA, and could be supplemented by reasonable rules of the Arbitration Association. Under the bill, instead, arbitration under the Condominium Act must proceed according to the Uniform Arbitration Act. The procedures of that Act may be supplemented by reasonable rules of the Arbitration Association.

MCL 559.244 (S.B. 901)
600.5070 (S.B. 902)
691.1681-691.1713 (S.B. 903)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Michigan's previous arbitration law, embodied in Chapter 50 of the RJA, was patterned after a 1925 Federal law, and was considered by many legal practitioners to be a "bare bones" statute. Chapter 50 had not been significantly updated since its 1961 enactment, despite the evolution and greater embrace of arbitration, on both the State and Federal levels. Because gaps in Chapter 50 were filled in by case law, Michigan's arbitration law had been described as a patchwork of jurisprudence that was complicated by a lack of uniformity across state lines.

The Uniform Arbitration Act enacted by Senate Bill 903 does not depart from the foundational provisions of Chapter 50, but it contains procedural provisions that were not present in Michigan's long-standing arbitration statute. These include notice requirements for initiating arbitration, validating the use of electronic records and contracts consistent with Federal law, bifurcating the role of courts and arbitrators in determining eligibility for arbitration,

enabling courts to direct consolidation of proceedings in the interest of justice, strengthening arbitrator impartiality by requiring arbitrators to disclose known financial interests or personal relationships, authorizing arbitrators to limit or permit discovery, and specifying requirements for awards of punitive damages when and if appropriate. The uniform act is a qualitatively improved statute that offers arbitration participants enhanced predictability, lower costs, shorter proceedings, and, over time, increased national uniformity of state arbitration legislation.

Supporting Argument

It is important that the Uniform Arbitration Act does not affect Chapter 50B of the RJA, which took effect in 2001 and deals with domestic relations arbitration. If arbitration is elected in a domestic relations matter, Chapter 50B controls if there is a conflict between it and the Uniform Arbitration Act.

Opposing Argument

The Uniform Arbitration Act does not add anything of value to the State's arbitration system. Indeed, some of its mandates detract from Michigan's voluntary arbitration system. It includes a right to appeal because a party to arbitration thinks the arbitrator was unfair, which adds instability to a process in which people seek stability and adds costs to a system in which people seek frugality. The Act also adds arbitration by contract to the system, which is a grave concern to elder law practitioners, because clauses requiring dispute resolution by arbitration may be hidden deep within pages of an agreement, such as one with a nursing home. The Elder Law and Disability Rights Section of the State Bar of Michigan adopted a position in opposition to the bills; according to its position statement, the "Section condemns these bills as a violation of due process and an attempt to undermine the rights of seniors and people with disabilities as they allow contracts of adhesion". The legislation adds levels of uncertainty to what had been a stable arbitration system in Michigan.

Response: On the contrary, the Uniform Arbitration Act addresses problems that existed in Michigan's arbitration system and it ensures consistency and uniformity with Federal law and laws of other states. The concern about a senior citizen, or anyone, unwittingly entering into an

arbitration agreement because such an agreement was hidden in mounds of paperwork is nothing new. That concern and scenario existed under Chapter 50, too. Signatories to a contract are responsible for understanding what they are agreeing to when they sign, and this legislation does not change that. The uniform act does not mandate that anyone enter into arbitration, but protects the rights of parties to arbitration proceedings and the integrity of the arbitration system. As for appeals, the previous system provided for court review and either enforcement or vacation of an arbitration order by the circuit court, but did not identify appellate processes or guidelines. The Uniform Arbitration Act improves that aspect of arbitration by specifying parameters for the appeals process. The Alternative Dispute Resolution Section of the State Bar adopted a position of support of the legislation. In its position statement, the Section stated that the Uniform Arbitration Act "does not mandate or require arbitration, but is designed to provide a framework if arbitration takes place and replaces an antiquated statute".

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills will have an indeterminate, but likely minimal, fiscal impact on State and local government. To the extent that the bills divert claims from traditional trial court dispute resolution, there may be long-run cost savings associated with reduced caseloads. A public body also may become a party to arbitration, which will have an indeterminate effect on public expenses; there is potential for modest savings in legal costs, but this will vary based on circumstances unique to each dispute.

Fiscal Analyst: Dan O'Connor

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.