

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019

PHILADELPHIA, TUESDAY, AUGUST 20, 2019

VOL 260 • NO. 35

An **ALM** Publication

## CONSTRUCTION LAW

# It Ain't Your Father's Arbitration Act Anymore ... or Perhaps It Is

BY KENNETH W. LEE

*Special to the Legal*

Back in early 1983, and before law school had become even a twinkle in my eyes, I remember my father, who was an attorney, bemoaning about an agreement to which I was party, the arbitration clause in it, and the recent “change in the law” as he described it to me. My father explained that the “change in the law” might prevent me from having my case heard by the court due to the arbitration clause and, being from a small county, “heard by the court” could be advantageous. I settled!

Since 1982, the Pennsylvania Uniform Arbitration Act, 42 Pa.C.S.A. Sections 7301-7320 (Subchapter A), Sections 7341-7342 (Subchapter B) (UAA), has remained unchanged. However, as of July 1, the Pennsylvania Revised Uniform Arbitration Act, 42 Pa.C.S.A. Section 7321.1-7321.31 (Subchapter A.1), §§7341-7342 (Subchapter B.1 or Section 2 depending on the version)



*areas of commercial contracts and the litigation thereof, construction litigation, construction-related insurance matters, municipal and government contracts, and surety law. He can be reached at [klee@postschell.com](mailto:klee@postschell.com).*

**KENNETH W. LEE** is a principal in Post & Schell's construction, government contracts and surety law practice group in Harrisburg. He practices in the

(RUAA), became effective. Based upon my review of numerous comments about the RUAA, I began to bemoan this “change in the law” and my bemoaning of the RUAA appeared to be much more justified than my father's. The commentary, or more correctly the exegeses, about the RUAA suggested that the Pennsylvania General Assembly had caused an Armageddon to “common-law” arbitration, as that term and process is generally understood within the construction industry.

While, upon closer examination, the RUAA may not be an

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Armageddon to the construction industry's traditional notion of “common-law” arbitration, the RUAA does lay a trap for the unwary if common-law arbitration as traditionally perceived is the mechanism desired for dispute resolution.

Within the construction industry, arbitration is typically thought of as being a dispute resolution mechanism that is held in private as opposed to being opened to the public as if in a court and upon an arbitrator's award being issued, would resolve with finality all disputes presented without an ability

to appeal and overturn the arbitrator's award based upon an error of law or fact by the arbitrator with any irregularity and resulting injustice necessary to overturn the award having to be established by clear, precise and convincing evidence. See UAA, Section 7341; *Runewicz v. Keystone Insurance*, 476 Pa. 456, 383 A.2d 189 (1978); *PG Metals v. Hofkin*, 420 Pa. 620, 218 A.2d 338 (1966); *Andrew v. CUNA Brokerage Services*, 976 A.2d 496 (Pa. Super. 2009); *F.J. Busse v. Zipporah*, 879 A.2d 809 (Pa. Super. 2005).

But here is one bit of good news: that standard apparently does not change under the RUAA with Section 7341 (common-law arbitration) of the RUAA being identical to Section 7341 of the UAA stating as follows with changes in [brackets]:

“Section 7341 Common Law Arbitration.

The award of an arbitrator in a nonjudicial arbitration which is not subject to [Subchapter A.1 (relating to revised statutory arbitration)], or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.”

The good news continues because the procedures pertaining to common-law arbitration under the RUAA are essentially the same as under the UAA. Section 7342 of the

UAA previously set forth the “procedure” applicable to common-law arbitration and incorporated certain sections of Subchapter A governing “statutory arbitration.” These sections were 7303, 7304, 7305, 7309, 7317, 7318, 7319, and 7320 except subsection (a)(4). The RUAA does likewise. Section 7342(a) thereof incorporates the following Sections of the RUAA's statutory arbitration subchapter and, as my comparisons below demonstrate, little has changed substantively under the RUAA to the Procedure for common-law arbitration:

#### **SECTION 7321.6**

(relating to application for judicial relief)—This is nearly identical to Section 7313 of the UAA. The only change is that under the RUAA the application is to be made by “motion” and heard by the court in the manner as provided by law or rule “for making and hearing motions.” The UAA referred to “petition” rather than “motion.” Because a “motion” may not institute an action under the Pennsylvania Rules of Civil Procedure but a petition may, then where an action has not been instituted then a “petition/motion” or a “complaint/motion” should probably be utilized;

#### **SECTION 7321.7(A)**

(relating to validity of agreement to arbitrate)—This language is very similar to Section 7303 of the UAA and the changes in the RUAA do not appear to be substantive;

#### **SECTION 7321.8**

(relating to motion to compel or stay arbitration)—The language is

similar to Section 7304(a), (b), (d), and (e) of the UAA without any substantive changes apparent;

#### **SECTION 7321.12(A)**

(relating to appointments of arbitrator; perceived as a neutral arbitrator)—The language is the same as Section 7305 of the UAA;

#### **SECTION 7321.18**

(relating to witnesses; subpoenas; depositions; discovery)—This section of the RUAA codifies practices under case law and compacts other rules and statutes previously relied upon in common-law arbitration “procedures.” While subsections (a) (subpoenas), (b) (depositions), and (f) (compulsory laws) of Section 7321.18 are identical or very similar to Section 7309(a), (b) and (c) of the UAA, subsections (c), (d), (e) and (g) of Section 7321.18 set forth the procedure for discovery, if granted by the arbitrator under Section 7321.18(c), compliance with discovery, protective orders by the arbitrator and court enforcements of subpoenas or discovery-related matters as to arbitrations within the commonwealth and “in connection with an arbitration proceeding in another state” per Section 7321.18(g) which often were handled by proceedings such as “letters rogatory”;

#### **SECTION 7321.27**

(relating to jurisdiction)—This section is substantially similar to Section 7318 of the UAA:

#### **SECTION 7321.28**

(relating to venue)—This section is similar to Section 7319 of the UAA but combines subsections (1) and (2) of Section 7319 into one section. The substantive

change pertains to specific venues listed under Section 7319(b) of the UAA with Section 7321.28 requiring venue to be determined “as provided by the Pennsylvania Rules of Civil Procedure”;

## **SECTION 7321.29**

(relating to appeals), except subsection 7321.29(a)(4)—subsection (a) is identical to Section 7320(a) of the UAA. Subsection 7321.29(b) modifies Subsection 7320(b) of the UAA to set forth a definitive appeal period of 30 days from an order or judgement.

## **THE TRAP**

The RUAA eliminates the “default” provision under Section 7302(a) of the UAA that specifically required all arbitration agreements to be common-law arbitration under Subchapter B, Sections 7341 and 7342 of the UAA, unless the arbitration agreement specifically stated that arbitration of disputes are subject to the Subchapter governing statutory arbitration. Section 7302(a) previously stated:

“(a) General rule. —An agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute, in which case the arbitration shall be governed by this subchapter.”

Essentially, Section 7302(a) of the UAA permitted those of us

within the construction industry to generalize in drafting arbitration clauses. We knew that the terms “arbitration” or “common-law arbitration” would “default” to the typical construction industry arbitration without the right of appeal to a court as to an arbitrator’s findings of law or facts or damages awarded by the arbitrator without more precise language, see *Capital Manufacturing v. Rafco Industries*, Civil Action No. 05-979, 2005 U.S. Dist. Lexis 8407, (E.D. Pa. May 6, 2005); *Runewicz*, supra. Such generalizing has had to cease as of July 1, the effective date of the RUAA.

Reading Section 7321.4 of the RUAA in conjunction with Sections 7341 and 7342 thereof as well as the elimination of the UAA “default” it is readily apparent that for disputes on or arising from construction projects to be resolved pursuant to the construction industry’s traditional concept of common-law arbitration, specific reference to “42 Pa.C.S.A. Sections 7341, 7342 (relating to common-law arbitration)” must be set forth in the agreement to arbitrate or a construction contract’s arbitration provisions. Reliance cannot be had upon terms such as “common-law arbitration” or “American Arbitration Association” because the “default” provision under Section 7302(a) of the UAA has not required the courts to determine if such terms compelled the traditional common-law arbitration under Sections 7341 and 7342, and of the specific language in Section 7321.4(a) of the RUAA “defaulting”

any arbitration agreement to statutory arbitration stating:

“(a) Subsequent agreements. — This subchapter [statutory arbitration] governs an agreement to arbitrate made on or after the effective date of this subchapter.”

Simply put, the “default” is now reversed so as to create a presumption of statutory arbitration under an arbitration agreement unless specifically stated to be otherwise. The RUAA necessitates the revision to every type of agreement utilized in the construction industry where traditional common-law arbitration is desired. The failure to so revise the agreements (owner/design professional, owner/contractor, subcontractor and so forth) may well subject the parties to statutory arbitration with the potential of arbitration de novo, strict scrutiny of the arbitrator’s award as well as the arbitrator’s findings of law and fact, endless appeals and expanded discovery as provided under the RUAA’s statutory arbitration subchapter. The trap for the unwary has thus been set and immediate action within the construction industry is necessary. ●