Uniform Arbitration Act in Missouri, The

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COMMENT

THE UNIFORM ARBITRATION ACT IN MISSOURI

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I. INTRODUCTION

In June 1980, Missouri enacted a modified version of the Uniform Arbitration Act of 1955 (UAA). Prior to the enactment of the Missouri Act (Act), Missouri courts would not enforce agreements to arbitrate.

1. RSMO §§ 435.350-.470 (Cum. Supp. 1980). Arbitration is a process by which parties select an impartial third party (the arbitrator) and refer disputes to him. The arbitrator then resolves the disputes based on the evidence and arguments presented by the parties. The parties agree in advance that the arbitrator's determination will be binding and that their dispute will be resolved outside the ordinary judicial processes. Resort to the courts usually will be prohibited any time there is a valid arbitration agreement. See text accompanying notes 9-11 infra. The parties' voluntary agreement to forego the use of litigation is enforceable. Enforcement of this agreement has survived constitutional challenges due to the voluntary nature of arbitration. The parties are not deprived of the use of the courts—they have chosen another method of dispute resolution. E.g., Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 276 (1932) (federal law, non-UAA); Snyder v. Superior Court, 24 Cal. App. 2d 263, 269-71, 74 P.2d 782, 785-86 (1937) (non-UAA); Sommer v. Mackay, 10 N.J. Misc. 644, 645, 160 A. 495, 496 (Sup. Ct. 1932) (non-UAA); Berkowitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 271-73, 130 N.E. 288, 290-91 (1921) (non-UAA).

An interesting comparison can be made between laws recognizing the enforceability of arbitration agreements and the recently invalidated Missouri statute which required an initial submission of medical malpractice claims to a review board before suit could be brought. The Missouri Supreme Court declared the medical malpractice claims statute to be in violation of MO. CONST. art. I, § 14, which guarantees access to the courts. State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. En Banc 1979). The essential difference between the two types of statutes appears to be that, in one case, arbitration is voluntary whereas, in the unconstitutional statute, the process was required.

although the courts would enforce an arbitration award. The most significant change wrought by the new law is the enforceability of agreements to arbitrate.

Under the Act, arbitration is likely to become an important method for resolving commercial disputes and labor-management disputes not pre-empted by federal law. In states that have modern arbitration


In passing the Act, the legislature did not repeal Missouri's prior arbitration statute, RSMO § 435.010 (1978), which provided that an agreement to arbitrate was not a bar to suit. The Act is limited in application to written agreements between "commercial persons" or between a commercial person and another. "Commercial persons" is defined as "all persons and legal entities, excluding any government or governmental subdivision or agency." Id. § 435.465.2 (Cum. Supp. 1980). The Act is limited further in application to agreements made subsequent to August 13, 1980, the effective date of the Act. Id. § 435.445. Presumably, the previously existing statute will continue to apply to all arbitration agreements made before the effective date of the Act, to oral agreements, and to agreements between governmental units.


4. RSMO § 435.350 (Cum. Supp. 1980). In addition to the enforceability of arbitration agreements provision, the Act adds the following provisions addressing areas previously not dealt with by statute: (1) a method to compel or stay arbitration, and to stay court proceedings on issues which are arbitrable, id. § 435.355; (2) the court may appoint arbitrators if the parties' method of appointment fails, id. § 435.360; (3) a right to counsel and to cross-examine witnesses, id. §§ 435.370(2), .375; (4) the arbitrators may permit depositions to preserve testimony, id. § 435.380.2; (5) awards are required to be made within a time agreed on by the parties or as set by order of the court, id. § 435.385.2; (6) the arbitrator has the power to modify or correct awards, id. § 435.390. The Act eliminates provisions contained in the previous statute which gave the arbitrator the power to punish for contempt and required a request for confirmation to be made within one year of award. Id. §§ 435.040, .090 (1978). Both statutes require notice of the hearing to be given to the parties, but the Act sets five days as minimum for notice. Compare id. § 435.370(1) (Cum. Supp. 1980) with id. § 435.050 (1978). The standards for vacating or modifying and correcting an award by the courts are, however, substantially the same. Compare id. §§ 435.405-.410 (Cum. Supp. 1980) with id. §§ 435.100-.110 (1978).

5. State law will be pre-empted by federal labor law which has developed under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). E.g., Teamsters Local 116 v. Fargo-Moorhead Auto. Dealers Ass'n, 459 F. Supp. 558, 560-61 (D.N.D. 1978); Grubb v. Leroy L. Wade & Son, Inc., 384 S.W.2d 528, 534-35 (Mo. 1964). The federal law, however, may be supplemented in labor

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A state's version of the UAA also may control arbitration under collective bargaining contracts involving public employees since they are not protected by the National Labor Relations Act, 29 U.S.C. § 152(2) (1976). For example, Maine and Minnesota provide expressly in their versions of the UAA that the statute applies to disputes arising under arbitration provisions in collective bargaining contracts. ME. REV. STAT. ANN. tit. 14, § 5927 (1980); MINN. STAT. ANN. § 572.08 (West Cum. Supp. 1981). Both states have used the UAA provisions to govern labor arbitration where the employer was the state or a subdivision of the state. E.g., Maine School Admin. Dist. No. 5 v. M.S.A.D. No. 5 Teachers Ass'n, 324 A.2d 308, 312 (Me. 1974); State v. Berthiaume, ___ Minn. ___, 259 N.W.2d 904, 909 (1977). Illinois has not included specifically labor arbitration in its version of the UAA, although it exempted labor arbitration from the section dealing with vacating awards, thereby implying that the rest of the statute covered labor arbitration. See ILL. ANN. STAT. ch. 10, § 112(e) (Smith-Hurd Cum. Supp. 1980-1981). Illinois has recognized that the statute applies to collective bargaining agreements involving public employees. E.g., Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974); Board of Educ. v. Champaign Educ. Ass'n, 15 Ill. App. 3d 335, 304 N.E.2d 138 (1973). The Illinois courts have restricted the ability of governmental units to contract to arbitrate, however, by examining arbitration agreements for the delegation of nondelegateable powers. See, e.g., Board of Trustees v. Cook County Teachers Local 1600, 22 Ill. App. 3d 1053, 1056, 318 N.E.2d 197, 199-200 (1974); Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 491-92, 315 N.E.2d 634, 642 (1974).

The Missouri Act neither excludes nor includes labor disputes from its provisions. The argument can be made that, to the extent the government can execute collective bargaining agreements, arbitration provisions in those contracts will be governed by the Act. For a rejection of this view, see Maryland Classified Employees Ass'n v. Anderson, 281 Md. 496, 506-13, 380 A.2d 1032, 1037-41 (1977).

Many states have enacted specific statutes dealing with arbitration in relation to public employees in general or with regard to particular classes of employees, such as firemen. Where there is such a statute, it would control arbitration with regard to the particular group. These statutes seem to be aimed more at arbitration of disputes arising during contract negotiation than at disputes arising during the term of a contract. See generally McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 COLUM. L. REV. 1192 (1972).

6. Examples of areas where arbitration clauses have been used to settle disputes are uninsured motorists settlements under insurance policies, separation agreements in divorce proceedings, and the administration of decedents' estates. See Annot., 18 A.L.R.3d 1264 (1968); Aksen, Arbitration Under the Uninsured Motorist Endorsement, 1965 INS. L.J. 17; Coulson, Family Arbitration—An Ex-
judicial review of arbitration awards. It will address in less detail the remaining aspects of the Act. Most of the case law cited is from jurisdictions that have adopted the UAA, but there is a considerable body of law from jurisdictions that have similar, although not identical, statutes.  

II. ENFORCEMENT OF AGREEMENTS TO ARBITRATE

The fundamental objective of the Act is to provide expeditious and inexpensive resolution of disputes without judicial involvement. Nonetheless, the Act provides opportunities for judicial intervention at various stages of the procedure. The first opportunity arises when the arbitrability of a dispute is challenged. Under the Act, a court may compel arbitration on a showing that there is an agreement to arbitrate and that a party to the agreement has refused to proceed with arbitration. Conversely, a court may stay arbitration that is either pending or commenced on a showing that there is no such agreement. In either case, the court must proceed summarily and disregard the merits of the dispute to be arbitrated. 

Thus, at this initial stage the role of the court is limited to enforcing the arbitration clause of a contract or finding that no arbitration clause exists. Questions regarding the remainder of the contract are reserved for the arbitrator.

In determining the issue of arbitrability for purposes of compelling or staying arbitration, the courts utilize a two-step analysis: (1) is there an arbitration agreement in effect between the parties; if so, (2) does that agreement contemplate resolution of the particular controversy via arbitration? Parties generally use a specific clause in a contract to establish an arbitration agreement and, ordinarily, that clause will leave no doubt


8. Uniform construction among the states adopting the UAA is one purpose of the uniform statute. See RSMO § 435.450 (Cum. Supp. 1980). Therefore, court interpretations from adopting states should be more influential in Missouri courts than is normally the case. See Garver v. Ferguson, 76 Ill. 2d 1, 8, 389 N.E.2d 1181, 1183 (1979).


10. Id. § 435.355.2.

11. Id. § 435.355.1-.2.

about its intended effect. It is unnecessary, however, to use any specific language or even to use a form of the word "arbitrate," if it is evident that the parties intended to submit controversies to a third party for resolution.\footnote{13 See, e.g., Joseph F. Trionfo & Sons, Inc. v. Ernest B. LaRosa & Sons, Inc., 38 Md. App. 598, 605, 381 A.2d 727, 731-33 (1978) (court decided clause did not cover the particular dispute).}

It also is possible to incorporate an arbitration agreement by reference. Incorporation can be accomplished either through reference to a particular arbitration agreement in another contract, e.g., incorporation by a subcontract of the arbitration rules contained in the general contract,\footnote{14 See, e.g., Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 724, 558 P.2d 517, 518-19 (1978) (general contract incorporated agreement by reference to external document, subcontract incorporated agreement by reference to general contract); Nordenstrom v. Swedberg, 143 N.W.2d 848, 851 (N.D. 1966) (subcontract incorporated agreement by reference to general contract).} or through incorporation of the trade rules of an organization to which one or both of the parties belong.\footnote{15 See, e.g., Frank J. Rooney, Inc. v. Charles W. Ackerman, Inc., 219 So. 2d 110, 112 (Fla. Dist. Ct. App. 1969) (incorporation by reference of American Institute of Architects' provisions for arbitration); Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 724, 558 P.2d 517, 518-19 (1976) (incorporation by reference of American Institute of Architects' provisions for arbitration).} Where an agreement to arbitrate is not contained in the contract, but is incorporated by reference, it is more likely that some courts will find that one or more of the parties did not intend to make arbitration their exclusive remedy.\footnote{16 See generally M. Domke, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 7.01 (1968). Domke's discussion relies primarily on New York and federal law, but cases from those courts are cited often by UAA jurisdictions as authority. The discussion and cited authority, therefore, should be valuable.} This tendency seems logical in light of the voluntary nature of arbitration. If a provision for enforceable arbitration is not set forth clearly in a contract, there is reason to question whether a party has intended to waive his right to use the courts. The deciding factor appears to be whether the agreement was incorporated in such a manner as to make the party aware that arbitration was to be the sole means of dispute resolution.\footnote{17 \textit{Id.}} This problem should be obviated under the Act since the statute specifically requires any contract which contains an arbitration agreement also to contain a statement in ten-point capital letters: "THIS CONTRACT CONTAINS A BINDING ARBITRATION
PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.”  
When the requisite notice is included in the contract, a party will find it difficult to argue that a reasonable person would have been unaware of the arbitration provision. The statute does not specify the consequences of omitting the notice. Presumably, the arbitration agreement would be unenforceable.

If the court finds an arbitration agreement to be in effect between the parties, it then must decide whether the agreement contemplates resolution of the particular controversy via arbitration. The arbitration clause may be as specific or as broad as the parties desire, and the court must apply the clause as written. Often, arbitration clauses will be written in general language, e.g., stating that the parties will arbitrate “all disputes arising in connection with this contract.” When such language is used, the court must construe the clause in the light of the particular controversy. Various approaches have been taken. In Harrison F. Blades, Inc. v. Jarman Memorial Hospital Building Fund, Inc., the arbitration clause included the “all disputes” language quoted in the above example. The dispute focused on which party to a construction contract was responsible for extra costs incurred by the contractor due to delays and changes caused by the owner. The court looked to the remainder of the contract, which provided that the contractor was excused from paying liquidated damages for delays caused by the owner, but which did not address the question of payment of extra costs caused by those delays. The court held that the dispute was not covered by the arbitration clause because the contract did not address the particular issue in question.


In cases where there is a question regarding the authority of a public body to make an agreement to arbitrate particular matters, the courts may refuse to apply an agreement to arbitrate. Board of Trustees v. Cook County College Teachers Local 1600, 22 Ill. App. 3d 1053, 1056, 318 N.E.2d 197, 200 (1974); County of Stephenson v. Bradley & Bradley, Inc., 2 Ill. App. 3d 421, 425, 275 N.E.2d 675, 678 (1971).

21. Id. at 230, 248 N.E.2d at 292.
In contrast, the court in *Roosevelt University v. Mayfair Construction Co.* found that a clause allowing arbitration of "[a]ll claims, disputes and other matters in question arising out of, or relating to the contract or the breach thereof" was broader than the clause used in *Blades.* The *Roosevelt* court deemed it significant that the contract specifically exempted only two types of controversies from arbitration. The court refused to infer any other exceptions, holding that a dispute centered on owner-caused delays in construction was arbitrable.

The contrast between *Blades* and *Roosevelt* can be explained by a difference in the two courts' philosophies of the applicability of arbitration clauses. The *Blades* court adopted a narrow approach: any issue not specifically mentioned in the contract is not arbitrable. *Roosevelt* exemplifies the broad approach that an arbitration clause should be interpreted to cover any dispute which has its source in the performance of the contract, regardless of whether the parties anticipated the issue. The decisions are both from Illinois; this may explain the attempt in *Roosevelt* to distinguish the clauses used. Nevertheless, *Roosevelt* represents the majority view that doubts should be resolved in favor of arbitrability, and that arbitration clauses should be interpreted broadly.

The courts ultimately are responsible for deciding whether a dispute is arbitrable. A few courts have taken the position that, when the scope of an arbitration agreement is unclear, the decision about its applicability initially should be made by the arbitrator, subject to review by the court. This stance seems to be motivated by a desire to promote expeditious handling of disputes through arbitration, and at the same time to develop a record on the issue of arbitrability before a decision on that issue is made by the court. If the arbitrator decides the case is arbitrable and the challenging party is dissatisfied with the award, that party still may raise

(clause reading "all disputes arising under this contract" did not cover demand charge for water service since demand charge not mentioned in contract, although charge was valid between parties).

24. Id. at 1056, 331 N.E.2d at 844.
the issue either in an application to vacate the award or in opposition to the other party's motion to have the award confirmed. Thus, the opportunity to have the court decide the issue of arbitrability is not lost by initially referring the case to an arbitrator. Nevertheless, the preferred course is for the court to decide the issue of arbitrability when it hears the application to compel or to stay arbitration. If the court decides the issue initially, the parties will not have to spend time and effort in arbitration, only to discover that they must litigate the dispute because it is not covered by the agreement to arbitrate. When the arbitrator makes the initial decision on arbitrability, such a duplication of effort could result.

An agreement to arbitrate may be severable from the contract and remain in effect even when the remainder of the contract is unenforceable. Several jurisdictions have recognized the severability of arbitration agreements. Severability becomes an issue when one party challenges the validity of an entire contract, part of which is an agreement to arbitrate, or when a party wishes to rescind a contract according to its terms. Where the court finds an arbitration clause severable, the issue of the validity of the contract or its rescission will be usually one for the arbitrator rather than for the courts. Although a jurisdiction may recognize arbitration clauses as severable, there are other factors which make the issue of contract validity or rescission nonarbitrable. If there is a dispute whether the arbitration clause is valid, e.g., a claim that the clause was induced by


fraud, the court will decide the validity or rescission of the entire contract, even though the arbitration clause was severable. On the other hand, if a party claims to be the victim of fraudulent inducement, but has accepted some of the benefits of the contract and seeks damages for the fraud rather than contesting the validity of the contract, including the arbitration clause, the damages issue is arbitrable. By accepting some of the benefits of the contract, the party will have accepted the contract method for resolving disputes. The courts also may consider whether the arbitration clause is broad enough to cover the issue of contract validity or rescission. The fact that an arbitration clause is severable, however, does not guarantee that all disputes are arbitrable; even those jurisdictions which recognize severability limit the application of the doctrine. The party desiring to arbitrate still must be prepared to show that the particular arbitration clause covered the type of dispute at hand, and that the clause is not subject to a claim of invalidity.

The Act differs from the UAA in that it specifically exempts from its provisions "contracts of insurance and contracts of adhesion." By excluding contracts of insurance, Missouri has eliminated an area where arbitration frequently is used in other jurisdictions—uninsured motorist claims. Although adhesion contracts are not excluded from the UAA, many courts have refused to enforce arbitration provisions in such contracts. Presumably the phrase "adhesion contracts" in the Act has the same meaning as in Missouri case law. The case law definition covers standardized contracts which are imposed on one party who lacks any significant negotiation and bargaining power. For this reason, an arbitration

33. See Nelley v. Mayor & City Council, 224 Md. 1, 14, 166 A.2d 234, 240 (1960); Atcas v. Credit Clearing Corp., 292 Minn. 334, 348, 197 N.W.2d 448, 456 (1972).
34. See, e.g., Atcas v. Credit Clearing Corp., 292 Minn. at 348, 197 N.W.2d at 456.
36. See generally Aksen, supra note 6.
37. See Wright, Arbitration Clauses in Adhesion Contracts, 33 ARB. J. 41 (June 1978).
38. Surface v. Ranger Ins. Co., 526 S.W.2d 44, 47 (Mo. App., Spr. 1975). Since the Act specifies that arbitration clauses in adhesion contracts are unenforceable per se, there would be no need to consider the question of conscionability. It has been stated that adhesion contracts are unconscionable only where "extracted by the overreaching of a contracting party who is in an unfairly superior bargaining position." USA Chem., Inc. v. Lewis, 557 S.W.2d 15, 24 (Mo. App., K.C. 1977). Presumably, the arbitration clause in adhesion contracts will be unenforceable without affecting the validity of the remainder of the contract.
clause found in a preprinted contract into which one party has had no input may prove unenforceable in Missouri. Since an arbitration clause, in theory, reflects a voluntary choice of the parties to forego the use of the courts, any situation where the bargaining power of the parties is significantly unequal arguably negates the volitional element of arbitration.\textsuperscript{39} In all likelihood, the same reasoning persuaded Missouri to exclude insurance contracts from the Act; insurance contracts have the characteristics of adhesion contracts and the insured parties have no real choice in foregoing use of the courts.

An untimely demand or application for an order compelling arbitration will make an arbitration clause unenforceable. The parties may insert a provision in the arbitration clause limiting the time within which a demand may be made. The interpretation and enforcement of such limits usually will be left to the arbitrator.\textsuperscript{40} In the absence of a contractual limit on the time for making a demand, no statute of limitation applies because arbitration is not an action at law.\textsuperscript{41} Once a demand has been made and refused, however, a cause of action for breach of the contract to arbitrate does accrue, and the statute of limitations will apply with respect to an application for compelling arbitration.\textsuperscript{42}

Laches may apply when no demand has been made and there is no contractual time limit for making a demand.\textsuperscript{43} Authority is divided, however, as to whether the arbitrator or the court should decide if a party is barred by laches.\textsuperscript{44} It is equally unclear whether the parties can initiate a court action over the subject of the dispute once it has been determined


\textsuperscript{41} See, \textit{e.g.}, Lewiston Fire Ass'n v. City of Lewiston, 354 A.2d 154, 167 (Me. 1976); Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. 149, 155, 218 N.W.2d 751, 755 (1974).

\textsuperscript{42} Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. at 155, 218 N.W.2d at 755-56.

\textsuperscript{43} See, \textit{e.g.}, Buckley v. Small, 52 Mich. App. 454, 456, 217 N.W.2d 422, 423 (1974); Har-Mar, Inc. v. Thorsen & Thorshov, Inc., 300 Minn. at 157, 218 N.W.2d at 756.

that the time has expired for initiating arbitration. As a practical matter, in many cases when time limits for demanding arbitration have expired, the time limit also will have passed on the legal cause of action.

The time limits for initiating arbitration reflect a tendency to allow the parties maximum control over the resolution of their disputes. Parties may designate contractually the time limits which will control. Nevertheless, the courts will establish an equitable limit for the initiation of arbitration through the use of laches.

A claim that a dispute is not arbitrable also may be lost by failure to assert the claim in a timely manner. It has been held, for example, that the lack of an agreement to arbitrate cannot be raised for the first time after an award has been issued. In contrast, when a party contests arbitrability at the initial hearing to compel arbitration, at the arbitration hearing, and at the confirmation proceedings, the issue of arbitrability is raised in a timely fashion and is preserved for appeal following confirmation. A claim of nonarbitrability is not untimely simply because the party proceeded to arbitration on demand. A party may withdraw from the proceeding and request a stay of arbitration, provided he does so prior to the making of an award.

Once a party has asserted the claim of nonarbitrability in a timely fashion by raising the issue in opposition to a motion to compel arbitration, he does not waive the claim by failing to appeal the order compelling arbitration. In fact, many jurisdictions do not allow one to appeal an order compelling arbitration. The Act lists the types of orders which are ap-

45. Martin Domke states that it is well settled that a party would be precluded from initiating a court action if that party has lost his right to arbitrate due to delay. M. DOMKE, supra note 16, § 15.02, at 148. See also Chambers v. Beaunit Corp., 404 F.2d 128, 132 (6th Cir. 1968) (federal law, non-UAA); River Brand Rice Mills v. Latrobe Brewery Co., 305 N.Y. 36, 41, 110 N.E.2d 545, 547, 122 N.Y.S.2d 19, 21 (1953) (non-UAA). There does not seem to be sufficient authority, however, to say that the question is well settled. Nevertheless, the argument in favor of the view is sound. To allow suit would be contrary to the contractual agreement to arbitrate controversies. As a practical matter, the issue will arise only when the time delay has not exceeded the statute of limitations for the particular cause of action.


pealable; an order compelling arbitration is not among them. 50 Thus, in Missouri, it seems that a party may raise and preserve nonarbitrability as a ground to vacate simply by asserting that claim at proceedings to compel arbitration and reasserting it before the arbitrator. If there is no proceeding to compel arbitration, a party may accomplish the same result by making a motion to stay and then contesting arbitrability before the arbitrator, if the motion is denied. 51

Although an award will not be made solely on the basis of one party’s default, 52 it is possible to arbitrate a dispute ex parte. The impact of the rules on ex parte arbitration is to prevent a party from frustrating the arbitration process by refusing to participate, but at the same time to preserve that party’s right to have a court determine the arbitrability of the dispute. 53 The Act specifically provides that a controversy may be resolved on the evidence, notwithstanding the failure of one party to appear after adequate notice. 54 There is some case law, however, that courts will enforce ex parte awards only if there is a prior court order compelling arbitration or if the arbitration agreement specifically provided for ex parte arbitration. 55 Incorporating the arbitration rules of an agency, such as the

Management, Ltd. v. Howasa, Inc., 14 Ill. App. 3d 536, 539, 302 N.E.2d 754, 756 (1973) (order compelling arbitration and staying court proceedings was appealable); Miyoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972) (allowed discretionary appeal denying stay of arbitration if danger of irreparable damage).

51. Id. § 435.405.1(5) provides that an award may be vacated because there was no agreement to arbitrate if the issue was not determined adversely in a proceeding to compel or stay and the party did not participate in the hearing without raising that objection.
52. The Act provides that the arbitrator may make an award “notwithstanding the failure of a party duly notified to appear,” but that the award will be made “upon the evidence produced.” Id. § 485.370(1). The clear implication is that no award can be made without evidence being produced.
53. Id. § 435.405.1(5).
54. Id. § 435.370(1).
55. See, e.g., Maine Cent. R.R. v. Bangor & Aroostook R.R., 395 A.2d 1107, 1117-19 (Me. 1978). In Ramonas v. Kerelis, 102 Ill. App. 2d 262, 248 N.E.2d 711 (1968), the court held that where an agreement to arbitrate is incident to the main agreement of the parties, and one of the said parties, without fault on the part of the other, fails and refuses to proceed with the portion of the agreement providing for arbitration, then such other party may proceed to establish his claim before the arbitrator regardless of the nonappearance of the other party.

Id. at 271-72, 248 N.E.2d at 716. This language indicates that neither an order compelling arbitration nor a reference to rules providing for ex parte arbitration is necessary before valid ex parte arbitration can occur. In Ramonas, however,
American Arbitration Association, which provide for ex parte arbitration, has been found to be a sufficient provision for ex parte arbitration. If another problem with ex parte arbitration, when there is no court order to arbitrate, is that a party who refuses to participate in arbitration still may contest arbitrability of the dispute through a motion to vacate the award. The procedure would not be available had there been a prior order compelling arbitration. Given the expeditious procedures for compelling arbitration by court order under the Act, it would be preferable for the party desiring to arbitrate to procure a court order, and thus avoid any litigation over the propriety of an ex parte award.

III. THE ARBITRATION PROCESS

Two methods commonly used for choosing arbitrators are either to name the arbitrator(s) in advance or to select the arbitrator(s) through an agency such as the American Arbitration Association. If the chosen method fails to provide arbitrators as contemplated by the agreement, the Act provides that the court may appoint arbitrators. Unfortunately, the Act does not delineate the guidelines to be used by the court. Likewise, the case law provides little guidance. Nevertheless, the court must follow the arbitration agreement as closely as possible and may not exercise its power until the agreement has failed. There are situations where the parties will contemplate appointing arbitrators who are not strictly neutral, e.g., in tripartite arbitration, each party selects an arbitrator, and the two arbitrators select a third, neutral arbitrator. There is non-UAA authority suggesting that where a vacancy is in one of the nonneutral positions, the

the parties had incorporated the rules of the American Arbitration Association, which provided for ex parte proceedings. Id. at 265, 243 N.E.2d at 713. See generally M. Domke, supra note 16, § 18.04.


Section 29 of the Commercial Arbitration Rules of the American Arbitration Association provides:

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as he may require for the making of an award.

court should appoint an arbitrator who will act in the same capacity. In any other case, the guiding principles for court appointment of arbitrators presumably will be impartiality and qualifications to hear the particular dispute.

The Act contemplates that the arbitrator will conduct a hearing at which the parties may present their cases. It does not provide a method of discovery in preparing for the hearing, and courts generally have declined to make the civil rules of discovery available to participants in arbitration. The rationale expressed by one court was that "arbitration, once undertaken, should continue freely without being subjected to a judicial restraint which would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitrational." This aspect of arbitration serves to expedite the proceedings and to maintain an informal atmosphere, even though it requires participation in a hearing without the degree of preparation common to litigation. The parties could agree to allow discovery if they believe it is necessary to the presentation of a case, but apparently this is done infrequently. Even where the parties agree to allow discovery, the court will not supervise the proceeding since it is not a part of litigation before the court. Thus, the parties also would have to provide for resolving any disputes over discovery, with an attendant reduction of the expediency and economy which make arbitration attractive.

The Act does grant subpoena power to the arbitrator and does provide for the taking of depositions to preserve testimony of witnesses who cannot be compelled to attend a hearing or who will be unable to attend. These provisions insure that the parties can present evidence material to the controversy, as guaranteed by the Act. The arbitrator may exercise


65. See Goldberg, supra note 63, § 3.03.


67. Id. § 435.380.2.

68. Id. § 435.370(2).
his discretion in the use of these tools, but if his decisions show partiality, the award will be vacated. Therefore, the Act provides the parties with the means to present their case and assures fairness in the application of those means.

The Act provides only minimal procedural requirements for hearings. The parties are free to establish the procedure to be followed and the rules of evidence to be used, if any. Such provisions in an agreement are not subject to alteration by the courts or the arbitrator. It is not a ground for attacking an award that a procedural or evidentiary decision is contrary to what a court would have decided. Where no rules of procedure or evidence are provided in the agreement, the arbitrator has considerable power to administer the hearing, with limited review of his decisions, e.g., the arbitrator may apply formal rules of evidence if the agreement does not otherwise provide, as long as he does not exclude material evidence. The better practice may be for the arbitrator to impose as few procedural and evidentiary rules as possible for the conduct of an orderly and fair hearing. This restraint will help preserve the informal and expeditious nature of arbitration.

The Act provides certain procedural safeguards for the conduct of hearings. The parties have a right to notice five days before the hearing. There is the right to be represented by counsel at the hearing, which may not be waived by any agreement prior to the hearing. Finally, the parties are guaranteed the right to be heard, to present material evidence, and to

69. Id. § 435.405.1(2).
70. The procedural requirements pertaining to the hearing are notice of the hearing to the parties, postponement on request for good cause, hearing material evidence, allowing cross-examination, having all arbitrators present, and allowing attorneys to represent the parties. Id. §§ 435.370–.375.
75. RSMO § 435.370(2) (Cum. Supp. 1980). See generally Annot., 75 A.L.R.3d 132 (1977). The arbitrator may not be free to restrict the admission of evidence in all jurisdictions. For example, Indiana's version of the UAA provides that "[t]he parties are entitled to be heard, to present any and all evidence material to the controversy regardless of its admissibility under judicial rules of evidence." IND. CODE ANN. § 34-4-2-6(b) (Burns 1973).
77. Id. § 435.375.
cross-examine witnesses. These minimal safeguards guarantee procedural fairness without making the arbitration process unduly long or complicated. The Act insures the effectiveness of the safeguards by providing that the omission of any of them is a ground for vacating an award. Prior to the adoption of the modified UAA, Missouri law provided essentially the same safeguards of notice and presentation of evidence, but there were no comparable requirements concerning cross-examination or the right to representation by counsel.

When the hearing concludes, the arbitrator must submit an award to the parties. The award must be made within the time fixed by the agreement or, when no time was agreed on, within the time fixed by the court after application of one of the parties. Failure to make an award in a timely fashion makes the award ineffective, but a party may waive any time limit by failing to object to the delay prior to the time the award is delivered to that party. The provisions on timeliness of an award, in keeping with the other provisions and interpretations of the Act, allow the parties to control the process and provide for court intervention only when necessary to assure that the arbitration process will be effectuated.

The only requirements concerning the form of the award are that it be in writing and that it be signed by each arbitrator joining in the award. The award may include monetary relief or, if the parties so provide in the agreement, there is authority that an order for specific performance may be made. There is no requirement that the award contain a statement of

78. Id. § 435.370(2).
79. Id. § 435.405.
80. Id. § 435.050 (1978).
81. It is not mandatory that an oral hearing be held. For example, under the Commercial Arbitration Rules of the American Arbitration Association, § 36, a waiver of such hearing may be made.
A provision for specific performance could be made expressly or through adopting, by reference, an arbitration rule such as § 42 of the Commercial Arbitration Rules of the American Arbitration Association. If an arbitration agreement provides for specific performance, the arbitrator may award such relief,
either findings of fact or conclusions of law. Failure to include such a statement is not a basis for review by a court. Typically, the award will be made without an opinion. The award need not address individually each point of the submission provided it resolves the entire controversy submitted. When the award indicates, however, that the arbitrator did not consider each issue submitted, the award is not adequate. For example, when the award specifically addresses one issue, but is silent on another, the award may be vacated.

The central requirement of an award is that it completely resolves the parties' dispute. The detailing of logical and legal principles common to judicial opinions is not necessary to commercial arbitration because, in arbitration, there is less concern with establishing and maintaining consistent legal principles than with resolving particular disputes as they arise.

IV. ENFORCEMENT AND REVIEW OF AWARDS

The Act provides that the parties may apply to the court for confirmation of the arbitrator's award. The advantage of confirmation is that a confirmed award may be enforced as any other judgment. The court

even though a court would not. Grayson-Robinson and Staklinski both illustrate this principle. Some of the difficulty of supervision is eliminated since it will be the arbitrator, rather than the court, who must deal with disputes over performance. The court's role is confined to confirming or vacating awards, which does not require an assessment of the merits of a dispute. There is not a substantial body of case law dealing with awards of specific performance, which may indicate that they are not made frequently.


89. McKinney Drilling Co. v. Mach 1 Ltd. Partnership, 32 Md. App. 205, 211, 359 A.2d 100, 103 (1976). A recent Missouri case decided under the prior arbitration law held that an award which specifically addressed one of three issues submitted and made no reference to the other two was invalid. The court characterized the award as "not a final decision as to all issues submitted." Stix & Co. v. Schoor, 579 S.W.2d 160, 162-63 (Mo. App., E.D. 1979). The statutory grounds for review under the prior law are substantially the same as under the Act. Compare RSMO § 435.100 (1978) with id. § 435.405 (Cum. Supp. 1980). Thus, the Stix case presumably will remain good law.

90. RSMO § 435.400 (Cum. Supp. 1980). The application may be made as a motion. Id. § 435.425. The procedure for initiating litigation need not be followed, except that service on the opposing party is the same as service of a summons, unless the parties agree otherwise. Id. An award also will be confirmed where a motion to vacate is denied or where an application is granted and a modification is made by the court. Id. §§ 435.405.4, .410.2.

91. Id. § 435.415.
may refuse to confirm an award only if grounds sufficient to vacate or to modify and correct the award are submitted by one of the parties\(^\text{92}\) in opposition to the award. A court may not refuse to confirm an award because the relief is something the court could not grant in a suit at law,\(^\text{93}\) because the arbitrator may have made a mistake,\(^\text{94}\) or because the court would have acted differently.\(^\text{95}\) The effect of confirmation is to convert a contractual arrangement of the parties into a judicially recognized resolution of the dispute. The party who procures an award has the right to use the court's power to collect or otherwise enforce the award. The parties need not rely on the good faith of their opponent to comply with the award, but since the Act sets no time limit within which confirmation must be requested, the prevailing party may attempt to collect an award without court intervention. Such an effort often may be desirable in order to preserve or improve already strained business relationships.

The courts are given limited powers to vacate\(^\text{96}\) or to modify and correct awards.\(^\text{97}\) There are five statutory grounds for vacating awards, and the party seeking vacatur must allege specifically one of the statutory grounds.\(^\text{98}\) Those grounds are: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality by an arbitrator who was appointed as a neutral, or corruption of any arbitrator, or arbitrator misconduct prejudicing the rights of a party; (3) the arbitrator exceeded his power; (4) the arbitrator refused to postpone a hearing when good cause was shown for delay, refused to hear evidence material to the controversy, or otherwise conducted the hearing in a manner contrary to the Act; and (5) there was no arbitration agreement, that issue had not been determined adversely at a hearing to compel or stay arbitration, and the party did not participate in arbitration without contesting arbitrability.\(^\text{99}\) These are essentially the same grounds for review used under the

92. Id. § 435.400.
97. Id. § 435.410.

https://scholarship.law.missouri.edu/mlr/vol46/iss3/4
prior Missouri law.\textsuperscript{100} Under none of the grounds is a mistake of law or a mistake of fact sufficient reason, by itself, to vacate an award.\textsuperscript{101} Thus, an arbitrator may make an award based on fairness or other equitable considerations, even though to do so is contrary to legal precedent.\textsuperscript{102} His factual findings generally are not subject to review for sufficiency or accuracy.\textsuperscript{103} This flexibility in making an award may account, in part, for the practice of not writing an opinion. There is no need for an opinion to justify or explain the decision to a reviewing court.

If there is a claim of corruption, fraud, or misconduct in the procurement of an award, a court may review the basis of the award for evidence supporting the claim.\textsuperscript{104} Even gross errors by the arbitrator are not, however, sufficient evidence of fraud or corruption to warrant vacating an award.\textsuperscript{105} Nor is it sufficient that an award may be for an amount in excess of what a court would have awarded.\textsuperscript{106} It also has been stated that, to warrant vacating an award for fraud, the fraud must appear on the face of the award.\textsuperscript{107} This author was unable to find any cases where a court vacated

\begin{footnotes}
\textsuperscript{100} Compare id § 435.405 with id. § 435.100 (1978). The older statute sets out the same grounds as in the Act, except the ground concerning arbitrability. Arbitrability was not an issue under the older law since arbitration agreements were not specifically enforceable.


\end{footnotes}
an award under the UAA for fraud, corruption, or other undue means. This indicates that such a claim will be difficult to support and that a party seeking review will have a greater opportunity for success if he can characterize his claim under one of the other grounds for vacating an award.

Partiality of an arbitrator becomes an issue when the arbitrator is understood to be a neutral. An arbitrator's relationship with a party can be evidence of partiality. Whether that relationship will give rise to a presumption of partiality depends on the significance, duration, and regularity of the relationship. The arbitrator is not expected, however, to be absolutely free of relationships with participants in the arbitration. In fact, it apparently is not unusual for the arbitrator to know one or both of the parties or to have business contacts with them. The dividing line is where the relationship is significant enough to suggest that it would interfere with the arbitrator's fairness. An arbitrator's conduct of a hearing also may be evidence of partiality if that conduct reveals the requisite bias. In any event, the party charging partiality must allege specific acts of the arbitrator which are evidence of the bias. Where the party has knowledge of facts indicating partiality, but does not challenge the arbitrator's impartiality until after the award is issued, there is some author-


If the parties have adopted the rules of the American Arbitration Association, there is also a duty on the part of the arbitrator to disclose any relationship he may have with a party or a witness. Failure to disclose such a relationship may result in the award being vacated. See Annot., 56 A.L.R.3d 697, 709-10 (1974); M. Domke, supra note 16, § 21.03.


ity that the challenge will be waived.\textsuperscript{113} This rule counters the natural tendency to see partiality in an arbitrator only after an adverse award. The proper procedure would be for the party to ask the arbitrator to disqualify himself as soon as there is evidence of partiality.

The most common ground for a successful challenge to an award is that the arbitrator has exceeded his authority either by determining a matter not submitted to him or by not following the rules established by the statute or the agreement. A controversy which is submitted to arbitration with reference to specific guidelines, either within the agreement or incorporated by reference, must be decided in accordance with those guidelines. The arbitrator may not disregard the parties' directives or make an award not contemplated by the agreement. Such action is in excess of the arbitrator's authority and is a ground for vacating the award.\textsuperscript{114} Such action must be distinguished from the making of an award which does not follow the law of the jurisdiction—an action which is not in excess of authority.\textsuperscript{115} When the parties agree to arbitration as a method of dispute resolution, they do not agree necessarily that their disputes will be resolved in the same manner as a court would resolve them. Rather, the arbitrator is given the power to make awards suitable to the particular dispute and in keeping with the parties' contract, even if that means, for example, using a measure of damages a court would not use\textsuperscript{116} or awarding attorney fees when a court would not.\textsuperscript{117} The parties may agree, however, that the arbitrator will decide the case as a court would decide it, and failure to follow


\textsuperscript{116} E.g., University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974).

the law in such a case is in excess of authority.\textsuperscript{118} In essence, the parties' agreement forms the law to be applied by the arbitrator.

Not only does the parties' agreement limit the arbitrator's actions, but the issues submitted to the arbitrator limit the actions he may take. It is in excess of authority to render an award which addresses an issue not submitted,\textsuperscript{119} which fails to resolve each issue submitted,\textsuperscript{120} or for an arbitrator to allow a third party to participate in a hearing when that third party was not a party to the arbitration agreement.\textsuperscript{121} The arbitrator's authority varies from contract to contract. That authority is derived from the agreement, rather than from statutes and case law. Allowing an arbitrator to exceed that authority runs counter to the voluntary basis of arbitration. A charge that an arbitrator has exceeded his authority is, in


\textsuperscript{120} See McKinney Drilling Co. v. Mach I Ltd. Partnership, 32 Md. App. 205, 211, 359 A.2d 100, 103 (1976) (arbitrator failed to consider a counterclaim); Stix & Co. v. Schoor, 579 S.W.2d 160, 162-63 (Mo. App., E.D. 1979) (submitted on three issues, award addressed only one; case decided under prior law).

\textsuperscript{121} See McKinney Drilling Co. v. Mach I Ltd. Partnership, 32 Md. App. 205, 211, 359 A.2d 100, 104 (1976).

essence, a charge that he has acted in a manner beyond what the parties agreed to allow.

Unless limited by the parties' agreement, arbitrators are given considerable leeway in the procedures used in conducting hearings, and review of their conduct must take this into consideration.\textsuperscript{122} Their discretion concerning admission of evidence is equally great; only where material evidence is excluded is there a ground for reversal.\textsuperscript{123} When the arbitrator improperly has excluded material evidence, the objection must be made at the hearing in a manner which will preserve a record of the objection, or the objection will be waived.\textsuperscript{124} The rationale behind this rule appears to be the same as that behind the policy of requiring objections to partiality to be made before the award is rendered—the finality of awards is safeguarded.

The court's powers to modify and correct an award are even more limited than the power to vacate. The modification and correction procedure is designed only to correct clerical and mathematical errors. The statutory grounds for modification and correction are: (1) there was a miscalculation of figures or a mistake in describing any person, thing, or property referred to in the award; (2) the award covered an area not submitted to the arbitrator and may be corrected without affecting the merits of the decision rendered on the issues actually submitted; and (3) there was a mistake in the form of the award not affecting the merits.\textsuperscript{125} Only when the error or miscalculation does not affect the merits of the award will the court be empowered to modify or correct the award.\textsuperscript{126} As with vacatur, a decision of law or of fact by the arbitrator goes to the merits, thus, an error in such a decision is not a ground for modification or correction.\textsuperscript{127}


\textsuperscript{124} See Safety Control, Inc. v. Verwin, Inc., 16 Ariz. App. 540, 542-43, 494 P.2d 740, 742-43 (1972). Many arbitration hearings are conducted without a transcript. The American Arbitration Association rules provide for a transcript only when a party requests one. Without a record, preservation of an objection would have to be documented specifically.


The Act places time limits on applications to vacate or to modify and correct awards. An application to vacate must be made within ninety days of the delivery of the award to the challenging party, or, if the grounds are fraud, corruption, or undue means, within ninety days from the time those grounds are known or should have been known. There is a statutory time limit of ninety days from the delivery of the award to a party within which that party may apply for modification or correction. The application may be made in the alternative with a motion to vacate. Even though a challenge to an award procedurally may be made in opposition to a motion to confirm rather than as a separate motion, if confirmation is requested after the time limits have passed for challenge to the award, the challenge will be untimely. The time limits assure the finality of the award; courts are not likely to allow circumvention of this policy. For example, the time period for a court challenge is not extended by first applying to the arbitrator for correction or modification under the Act. Nor will a party be allowed to circumvent one of the time limits by filing an action for declaration that the award is null and void after the time limit has expired.

In an action to vacate or modify an award, testimony of the arbitrator is inadmissible for the purpose of establishing the grounds for vacatur or modification. There are, however, exceptions to that rule. When the testimony of a dissenting arbitrator could establish partiality, misconduct, or what issues were submitted, some courts will admit the testimony. Most courts would not allow an arbitrator to explain an award or to im-

129. Id. § 435.410.3.
peach an award in which he joined.135 These restrictions evince a policy to avoid requiring the arbitrator to justify his decision or to explain the process he used in arriving at the decision. Requiring such explanations would amount to review of awards on the merits and would tend to undercut the arbitrator's flexibility, a crucial aspect of arbitration.

A properly issued arbitration award is a final determination of the issues submitted to arbitration, and the parties may not litigate or re-arbitrate those issues.136 Adoption of any other policy toward the finality of arbitration decisions would negate the purposes of arbitration—economic and expeditious resolution of disputes. The res judicata effect of awards makes arbitration meaningful because the parties can be certain that the decision represents the end of the conflict. The confirmation of awards puts the power of court enforcement behind the decision.

V. CONCLUSION

The Act provides an expeditious, informal, and relatively inexpensive method for resolving disputes. In addition, it allows the parties to structure the means for resolving their disputes and to choose arbitrators who can best resolve them. The arbitrator, unlike a judge and jury, usually will be acquainted with the technical information necessary to decide a case. The savings in time and expense, along with the additional control by the parties over the resolution of their disputes, often should outweigh any disadvantage there may be in limited review of awards. Arbitration is likely to become a widely used option in Missouri, as it has in other jurisdictions with modern arbitration statutes.

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135. See Annot., 80 A.L.R.3d 155 (1977); Note, Arbitration and Award—Admission of Arbitrator's Depositions and Testimony to Prove Misconduct or Fraud, 13 Wake Forest L. Rev. 803 (1977).


Missouri also recognized the res judicata effect of awards under the prior arbitration statute. See, e.g., Masonic Temple Ass'n v. Farrar, 422 S.W.2d 95 (Mo. App., St. L. 1967).