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Pennsylvania's New Revised Statutory Arbitration Act: What the Oil and Gas Industry Needs to Know

*By Kenneth J. Witzel**

Last year, Pennsylvania enacted the Revised Statutory Arbitration Act. It went into effect on July 1, 2019. While many aspects of private arbitration remain the same in Pennsylvania, the Act ushered in some meaningful changes. The author of this article discusses 10 of the most important, which should be considered whenever a dispute arises that is within the scope of an agreement to arbitrate.

More and more oil and gas disputes in Appalachia seem to be resolved through arbitration, rather than traditional litigation. The change should come as no surprise given the advantages arbitration can have over traditional litigation in the right circumstances. Such advantages include a more streamlined dispute resolution process, the opportunity to appoint decision makers with relevant industry expertise (which can be particularly important in oil and gas matters), confidentiality, and the ability to avoid undesired precedent in the event of an adverse outcome.

Last year, Pennsylvania enacted the Revised Statutory Arbitration Act (“RSAA”).¹ It went into effect on July 1, 2019. While many aspects of private arbitration remain the same in Pennsylvania, the RSAA ushered in some meaningful changes—10 of the most important of which are discussed below—that should be considered whenever a dispute arises that is within the scope of an agreement to arbitrate. Entities that conduct business in Pennsylvania should also consider reviewing the arbitration provisions that they regularly use, as revisions may be warranted.

1) ELIMINATION OF COMMON LAW ARBITRATION

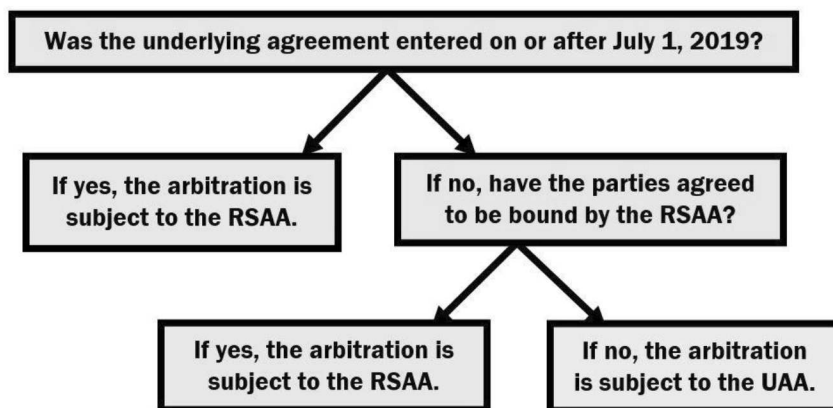
The most over-arching change is the RSAA’s elimination of “common law” arbitration. Before July 1, 2019, most private arbitrations in Pennsylvania were classified as either: (i) common law arbitrations, which were subject to minimal statutory and judicial oversight;² or (ii) “statutory arbitrations,” which were

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¹ 42 Pa.C.S.A. §§ 7321.1 to 7321.31.

² See 42 Pa.C.S.A. §§ 7341 to 7342 (prior to amendment on July 1, 2019).

governed by the Pennsylvania Uniform Arbitration Act (“UAA”).³ As of July 1, 2019, the RSAA’s effective date, common law arbitration no longer exists for new disputes in Pennsylvania.⁴ As depicted below, disputes arising from agreements entered on or after July 1, 2019, are now governed by the RSAA. Disputes arising from agreements entered before that date are now governed by the UAA, unless the parties agree to be bound by the RSAA.



The phasing out of common law arbitration is important. While common law arbitration afforded parties broad latitude in crafting and implementing their agreements to arbitrate, it often led to confusion, particularly as to procedural matters. This was most evident where the parties had not agreed to adopt procedural rules, such as those of the American Arbitration Association (“AAA”).⁵ In such instances, proceedings were dependent, in large part, on the parties’ willingness to agree to and abide by a set of procedures *after* their dispute had arisen—often an inopportune time. The RSAA and the UAA address this problem by providing a basic default set of rules for arbitration proceedings. Thus, where the parties’ agreement to arbitrate is unclear as to procedural matters, the proceedings are much less likely to be derailed due to procedural uncertainties.

2) AFFIRMATIVE DISCLOSURE REQUIREMENTS FOR ARBITRATORS IN RSAA ARBITRATIONS

³ See 42 Pa.C.S.A. §§ 7301 to 7320.

⁴ See 42 Pa.C.S.A. § 7321.4.

⁵ Arbitrations under agreements adopting the rules of the American Arbitration Association were generally considered to be a “common law” arbitrations. *U.S. Claims, Inc. v. Dougherty*, 914 A.2d 874, 876 (Pa. Super. 2006).

Although the UAA permits arbitration awards to be set aside in limited circumstances due to an arbitrator's conflict of interest,⁶ it does not require arbitrators to affirmatively disclose facts that could call their impartiality into question, unless the parties' agreement requires them to do so.⁷ Without such information, it can be difficult, if not impossible, for parties to know if an arbitrator's appointment is objectionable.

The RSAA addresses the problem by requiring all individuals who have been asked to serve as arbitrators to "make reasonable inquiry" and to "disclose to all parties" and any other arbitrators "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding" before accepting an appointment as an arbitrator.⁸ Such facts include any financial or personal interest the person may have in the outcome of the proceedings, as well as any existing or past relationships with the parties and their counsel, any witnesses, or any other arbitrator.⁹ The arbitrator's disclosure obligations remain in effect throughout the proceedings, and a failure to disclose may result in the vacating of an award.¹⁰

Generally, the disclosure requirements under the RSAA apply to both neutral and non-neutral arbitrators. However, the parties can waive or vary the requirement for non-neutral arbitrators at any time, including in their agreement to arbitrate.¹¹ As to a neutral arbitrator, the parties cannot "unreasonably restrict" the right to disclosure before a controversy subject to arbitration arises.¹²

3) RECUSAL REQUIREMENTS FOR ARBITRATORS IN RSAA ARBITRATIONS

⁶ See 42 Pa.C.S.A. §§ 7314(a)(1)(i)–(ii), 7341; *Donegal Ins. Co. v. Longo*, 610 A.2d 466 (Pa. Super. 1992).

⁷ See Raymond D. Pepe & Stephen G. Yusem, *Major Changes to Pennsylvania Arbitration Law to Take Effect July 1, 2019*, 90 Pa. Bar Association Quarterly, 57, 63 (April 2019). Disclosure obligations and disqualification standards may be expressly stated in the parties' agreement, or they may be included indirectly through the parties' adoption of arbitration rules that include such requirements and standards. See, e.g., AAA Consumer Arbitration Rules, R-18, R-19; AAA Commercial Arbitration Rules, R-17, R-18; Construction Industry Arbitration Rules, R-19, R-20.

⁸ 42 Pa.C.S.A. § 7321.13(a).

⁹ *Id.*

¹⁰ 42 Pa.C.S.A. § 7321.13(b), (d).

¹¹ See 42 Pa.C.S.A. § 7321.5(a), (b)(3).

¹² 42 Pa.C.S.A. § 7321.5(b)(3).

The RSAA provides that an individual may not serve as a neutral arbitrator if the arbitrator would be required must disqualify himself or herself from participating in a proceeding under Rule 2.11 of Pennsylvania's Code of Judicial Conduct.¹³ Rule 2.11 provides that a judge must disqualify himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned[.]" and continues by setting forth a lengthy, but non-exhaustive, list of circumstances that would require recusal.¹⁴ The parties may, at any time, including in their agreement to arbitrate, waive, or vary this standard.¹⁵

The UAA does not provide a recusal standard for arbitrators.

4) EXPRESS AUTHORITY OF ARBITRATORS TO ENTER PRELIMINARY INJUNCTIONS IN RSAA ARBITRATIONS

The UAA does not address whether, and under what circumstances, arbitrators may issue orders for provisional remedies, such as temporary restraining orders and preliminary injunctions.¹⁶ The UAA's lack of clarity can pose problems and result in delays in situations where immediate interim relief is critical, such as where an oil and gas lessee has been wrongfully prevented from accessing its leasehold to conduct operations or perform maintenance. These problems can be avoided where the parties have adopted the AAA's rules, which authorize arbitrators to grant emergency and interim relief.¹⁷

The RSAA is much clearer than the UAA regarding provisional remedies. It expressly authorizes arbitrators to issue orders for provisional remedies "to the same extent and under the same conditions as if the controversy were the subject of a civil action[.]"¹⁸ If a matter is "urgent" and an arbitrator has not yet been appointed or is unable to provide an adequate remedy, the RSAA permits a party to move a court to enter an order for provisional remedies without waiving the party's right to arbitrate.¹⁹ The RSAA also authorizes a party to present an expedited motion to a court to confirm an order awarding provisional relief.²⁰ This authorization, which cannot be waived by the

¹³ 42 Pa.C.S.A. § 7321.12(b).

¹⁴ Pa. Code Jud. Conduct, Rule 2.11.

¹⁵ See 42 Pa.C.S.A. § 7321.5(a).

¹⁶ See Pepe & Yusem, *supra* note 7 at 64.

¹⁷ See AAA Consumer Arbitration Rules, R-37; AAA Commercial Arbitration Rules, R-37, R-38; Construction Industry Arbitration Rules, R-38, R-39.

¹⁸ 42 Pa.C.S.A. § 7321.9(b)(1).

¹⁹ 42 Pa.C.S.A. § 7321.9(a), (b)(2), (c).

²⁰ 42 Pa.C.S.A. § 7321.19.

parties,²¹ can be critical in situations where a party refuses to comply with an arbitrator's order.

5) AGREEMENTS PRESUMED TO PERMIT CONSOLIDATION/ CLASS ARBITRATION IN RSAA ARBITRATIONS

The issue of class arbitration has recently emerged as being particularly important in the context of post-production cost litigation.²² Here again, while the UAA does not address whether two or more separate arbitration proceedings may be consolidated, the RSAA does. Under the RSAA, unless an agreement to arbitrate prohibits consolidation, a court may order separate arbitration proceedings to be consolidated as to some or all of the claims raised if:

- There are separate agreements to arbitrate or separate arbitration proceedings between the same persons, or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding 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; and
- 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.²³

It should be noted that to the extent the RSAA's language authorizing consolidation also applies to class arbitration, it is contrary to jurisprudence applying the Federal Arbitration Act ("FAA"). More particularly, the United States Supreme Court has held that a court may not compel arbitration on a class-wide basis unless the agreement to arbitrate expressly permits class-wide arbitration.²⁴ Because it is not clear whether the FAA would preempt the

²¹ 42 Pa.C.S.A. § 7321.5(c)(5).

²² *Chesapeake Appalachia, L.L.C. v. Ostroski*, 199 F.Supp.3d 912, 917 (M.D. Pa. 2016); see also *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*, No. 4:14-CV-0620 (M.D. Pa. Apr. 28, 2017); *Abrams v. Chesapeake Energy Corp.*, No. 4:16-CV-1343 (M.D. Pa. Dec. 21, 2017).

²³ 42 Pa.C.S.A. § 7321.11.

²⁴ See *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019) (class-wide arbitration cannot be compelled under an agreement to arbitrate that is subject to the FAA where the agreement is ambiguous regarding class-wide arbitration); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010) ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so")

RSAA's presumption of class arbitrability,²⁵ a party who wishes to preclude the possibility of a class arbitration must include language in its agreements to arbitrate that expressly prohibits class arbitration.²⁶

6) ARBITRATORS AUTHORIZED TO PERMIT BROADER DISCOVERY IN RSAA ARBITRATIONS

One of the advantages of arbitration can be the avoidance of protracted and costly discovery. Consistent with that objective, under the UAA, an arbitrator's authority to allow discovery is limited.²⁷ An arbitrator may issue subpoenas requiring witnesses to attend the hearing and to produce documents and other evidence, but depositions are only permitted where the witness is unable to attend the hearing or cannot be served with a subpoena.²⁸

Discovery is more readily available under the RSAA. In addition to the subpoena and deposition-related powers granted to arbitrators under the UAA, the RSAA empowers arbitrators to allow the parties to engage in broader discovery if they believe it will "make the proceedings fair, expeditious and cost-effective."²⁹

The RSAA's provisions pertaining to the issuance of subpoenas and the taking of depositions may not be waived or modified until after a controversy subject to arbitration arises.³⁰ But the parties' may, at any time, including in their agreement to arbitrate, waive, or vary the RSAA's provisions concerning other types of discovery, such as written discovery.³¹

7) ARBITRATORS AUTHORIZED TO ENTER PROTECTIVE AND OTHER DISCOVERY ORDERS IN RSAA ARBITRATIONS

(emphasis in original); *see also* *Quilloin v. Tenet Health Sys. Phila., Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) ("[s]ilence regarding class arbitration generally indicates a prohibition against class arbitration"); *Ostroski*, 199 F.Supp.3d at 917.

²⁵ *Compare Moscatiello v. Hilliard*, 595 Pa. 596, 603, 939 A.2d 325, 329 ("The FAA does not preempt the procedural rules governing arbitration in state courts, as that is beyond its reach."); *with Stolt-Nielsen*, 130 S.Ct. at 1773 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion[.]"); *Quilloin*, 673 F.3d at 232 ("even if the agreement explicitly waived Quilloin's right to pursue class actions, the Pennsylvania law prohibiting class action waivers is surely preempted by the FAA").

²⁶ *See* 42 Pa.C.S.A. § 7321.5(a).

²⁷ *See* *Pepe & Yusem*, *supra* note 7 at 64.

²⁸ 42 Pa.C.S.A. § 7309(a)–(b).

²⁹ 42 Pa.C.S.A. §§ 7321.18(a)–(c).

³⁰ 42 Pa.C.S.A. § 7321.5(b)(1)(iv).

³¹ 42 Pa.C.S.A. § 7321.5(a).

The RSAA also authorizes arbitrators to enter protective orders to prevent the disclosure of protected information and to take action against a noncomplying party “to the extent a court could” if the matter were proceeding in Pennsylvania state court.³² This authority may be restricted or eliminated by the parties at any time, including in their agreement to arbitrate.³³ Arbitrators are not granted similar authority under the UAA.

8) GREATER AUTHORITY OF ARBITRATORS TO CONSIDER AND GRANT SUMMARY DISPOSITION IN RSAA ARBITRATIONS

Depending on the claims at issue and the facts surrounding them, dispositive motions can be viewed as either a useful tool for achieving an expeditious result, or an inefficient and unnecessary detour. When a party to an agreement entered into before July 1, 2019, believes claims may be amenable to summary disposition and the parties’ agreement does not expressly or implicitly allow summary disposition,³⁴ the party should consider agreeing to submit to arbitration under the RSAA rather than the UAA. The RSAA expressly permits arbitrators to decide a claim or issue by means of summary disposition, if either (i) all parties agree to it; or (ii) a party requesting summary disposition gives notice to all other parties, and the other parties have a reasonable opportunity to respond.³⁵ The UAA does not provide for summary dispositions, and unless the parties agree to allow them, they are not available.

9) ARBITRATORS AUTHORIZED TO AWARD PUNITIVE DAMAGES AND ATTORNEY’S FEES IN RSAA ARBITRATIONS

As discussed above, the RSAA expressly authorizes arbitrators to take many of the same actions that a state court judge could take. This trend of expanding arbitrators’ authority continues in the area of damages. Unless the parties have agreed otherwise,³⁶ arbitrators in an arbitration subject to the RSAA may award punitive damages, other exemplary damages, attorneys’ fees and costs to the same extent they could be awarded if the matter were to be tried in state

³² 42 Pa.C.S.A. §§ 7321.18(d)–(e).

³³ 42 Pa.C.S.A. § 7321.5(a).

³⁴ The AAA’s Commercial Arbitration and Consumer Arbitration Rules grant an arbitrator the authority to allow dispositive motions if the moving party has shown that the motion “is likely to succeed and dispose of or narrow the issues in the case.” See AAA Commercial Arbitration Rules, R-33; AAA Consumer Arbitration Rules, R-33. See also Construction Industry Arbitration Rules, R-34 (“Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case.”).

³⁵ 42 Pa.C.S.A. § 7321.16(b).

³⁶ See 42 Pa.C.S.A. § 7321.5(a).

court.³⁷ The only caveat being that if an arbitrator elects to award punitive damages or other exemplary relief, the award must specify the “basis in fact justifying and the basis in law authorizing the award . . .”³⁸ Arbitrators may also order “additional remedies” as they consider “just and appropriate under the circumstances of the arbitration proceeding,” and the fact that a court “could not or would not” order such remedies is not grounds for vacating or refusing to confirm an award.³⁹

In contrast, unless the parties’ agreement provides to the contrary, arbitrators in UAA arbitrations may award a party the “expenses and fees” of arbitration, but not attorney’s fees, punitive damages, or other exemplary damages.⁴⁰ Nevertheless, many agreements associated with upstream and midstream oil and gas activities are also subject to the FAA,⁴¹ which the U.S. Supreme Court has interpreted to authorize arbitrators to award punitive damages unless such damages are precluded by the parties’ agreement.⁴²

Ultimately, a party seeking to avoid exposure to liability for punitive and other exemplary damages should include language in its agreement to arbitrate disallowing any such damages.

10) ARBITRATION AWARDS ARE MORE SUSCEPTIBLE TO VACATION

Finally, those familiar with Pennsylvania common law arbitrations know that common law arbitration awards are virtually unassailable. By statute, such awards can only be vacated or modified if “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.”⁴³ But arbitration awards entered in arbitrations governed by the UAA and the RSAA are not afforded the same degree of deference. Courts are required to vacate awards entered under either statute for a variety of reasons, including, for example, where a party is prejudiced by an arbitrator’s refusal to postpone a hearing upon a showing of “sufficient cause for postponement,” refusal “to consider evidence material to the controversy,” or failure to conduct the hearing

³⁷ 42 Pa.C.S.A. § 7321.22(a), (b).

³⁸ 42 Pa.C.S.A. § 7321.22(e).

³⁹ 42 Pa.C.S.A. § 7321.22(c).

⁴⁰ See 42 Pa.C.S.A. § 7312.

⁴¹ See, e.g., *Ostroski*, 199 F.Supp.3d at 915–16 (holding that oil and gas lease involved interstate commerce and arbitration under it was subject to the FAA).

⁴² See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁴³ 42 Pa.C.S.A. § 7341.

in accordance with the applicable statutory procedures.⁴⁴ An award must also be vacated if an arbitrator appointed as a neutral arbitrator displays “evident partiality.”⁴⁵ Given these standards, which cannot be waived or modified by the parties in an arbitration subject to the RSAA,⁴⁶ parties and arbitrators must proceed with caution and follow all applicable rules in an effort to preserve the integrity of an award. Parties’ counsel should be circumspect when considering whether to object to the admission of any evidence that may be deemed to be “material” by a court in the future.

CONCLUSIONS AND RECOMMENDATIONS

The RSAA makes important changes to private arbitrations in Pennsylvania. The RSAA eliminates common law arbitration and, by default, provides arbitrators with near-judicial authority regarding a variety of matters. While parties will continue to have the ability to alter many of the RSAA’s and the UAA’s default arbitration rules, some rules are non-waivable, or may only be waived after a controversy arises. Entities conducting business in Pennsylvania should review their “stock” arbitration provisions to determine whether changes should be made. When controversies arise under agreements entered before July 1, 2019, parties should carefully consider whether they should attempt to agree that the RSAA, rather than the UAA, will govern.

Finally, while this article addresses some of the RSAA’s more important changes to arbitration, it is by no means exhaustive. Other changes include:

- The means by which arbitration proceedings are to be initiated;
- The proper forum and procedure for raising issues of arbitrability and compelling or staying arbitration;
- Arbitrator immunity;
- An arbitrator’s authority to correct or modify an arbitration award; and
- The confirmation of arbitration awards.

For additional guidance on these and other issues related to arbitration agreements in Pennsylvania, qualified counsel should be consulted.

⁴⁴ 42 Pa.C.S.A. §§ 7314(a)(1)(iv), 7321.24(a)(3).

⁴⁵ 42 Pa.C.S.A. §§ 7314(a)(1)(ii), 7321.24(a)(2)(i). Under the RSAA, a neutral arbitrator who fails to disclose either (i) a “known, direct and material interest in the outcome of the arbitration proceeding[.]” or (ii) a “known, existing and substantial relationship with a party[.]” is presumed to have acted with “evident partiality.” 42 Pa.C.S.A. § 7321.13(d).

⁴⁶ See 42 Pa.C.S.A. § 7321.5(c)(8).