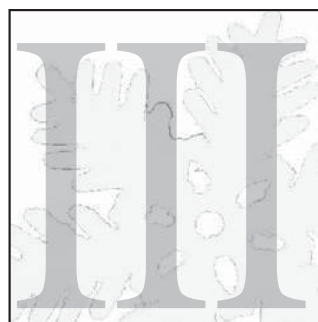
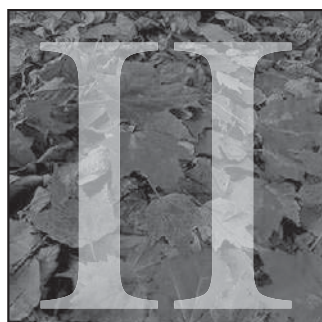

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IN THIS ISSUE:

ARTICLES

- Do Not Be Deterred: Learning the High Art of Amicus Brief Writing
- Leadership Traits of United States Marines
- How to Tame the Reptile
- "Welcome to the United States! Passport, attorney-client information, and trade secrets, please."

REPORTS

- Appellate Practice Report
- Legal Malpractice Update
- Legislative Report
- Medical Malpractice Report

- No-Fault Report
- Supreme Court Update
- Amicus Report

PLUS

- Schedule of Events
- MDTC Member Victories
- Meet the MDTC Leaders
- Member News
- Member to Member Services
- Welcome New Members



Appellate Practice Report

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Judicial Review of Arbitration Awards Under Michigan's Uniform Arbitration Act

Although Michigan's Uniform Arbitration Act ("MUAA"), MCL 691.1681, *et seq.*, has been in effect since 2013, many practitioners still think of MCR 3.602 when it comes to seeking judicial review of arbitration awards. In addition, the continued existence of the court rule has resulted in some confusion because it contains different deadlines for seeking to vacate, modify, or correct an arbitration award. But once it is determined that the Act applies, the timing and process for challenging an award becomes relatively straightforward.

Applicability of the MUAA

Section 3 of the Act provides that "[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made." At the same time, the Act "does not affect an action or proceeding commenced ... before this act takes effect." MCL 691.1713. This means that the Act governs if the claim for arbitration was filed on or after July 1, 2013. *Fette v Peters Const Co*, 310 Mich App 535, 541 (2015). The Act does not apply, however, "to an arbitration between members of a voluntary membership organization if arbitration is required and administered by the organization." MCL 691.1683(2).¹ Moreover, in domestic relations cases, if there is a conflict between the Act and the Domestic Relations Arbitration Act ("DRAA"), MCL 600.5070, *et seq.*, the DRAA controls. MCL 600.5070(1).

Timing to Seek Judicial Review of an Award

With one exception, the MUAA provides that if a party wants a court to vacate, modify, or correct an arbitration award, the party must file a motion within 90 days of receiving notice of the award, or of a modified or corrected award. See MCL 691.1703(2), 691.1704(1). The one exception is that a party seeking to vacate an award on the ground that it "was procured by corruption, fraud, or other undue means" must file a motion "within 90 days after the ground is known or by the exercise of reasonable care would have been known by the moving party." If there is not yet a pending civil action between the parties, "a complaint regarding the agreement to arbitrate must be filed and served as in other civil actions." MCL 691.1685(2).

So what about MCR 3.602? In contrast with the 90-day period for challenging an arbitration award contained in the MUAA, the court rule provides two different deadlines depending on whether there is already a pending civil action. If an action is pending, a motion to vacate, modify, or correct an award must be filed "within 91 days after the date of the award." MCR 3.602(J)(3), (K)(2).² But if there is **not** already a pending action, a complaint must be filed much sooner, i.e., "no later than 21 days after the date of the arbitration award." MCR 3.602(J)(1), (K)(1).

The key to deciding which deadline applies is to determine whether the MUAA governs the arbitration. If so, then the court rule does not apply, and the timing and procedure for challenging the award is governed by the MUAA. This is consistent with both the text of MCR 3.602 and the staff comment. MCR 3.602(A) provides:

Courts shall have all powers described in MCL 691.1681 *et seq.*, or reasonably related thereto, for arbitrations governed by that statute. **The remainder of this rule applies to all other forms of arbitration** (Emphasis added).

Thus, the court rule makes clear that the statutory procedures apply **except** in cases that are not governed by the statute (e.g., domestic relations arbitrations or arbitrations



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commenced before the Act took effect). The staff comment to MCR 3.602 confirms this, explaining that the rule applies “to all other forms of arbitration that are not described in the [MUAA].”

Section 3 of the Act provides that “[o]n or after July 1, 2013, this act governs an agreement to arbitrate whenever made.”

Grounds for Vacating, Modifying, or Correcting an Award

The grounds for vacating, modifying, or correcting an award are straightforward, but limited. Courts may vacate arbitration awards on grounds such as corruption, fraud, “evident partiality,” or misconduct by the arbitrator. A court may also vacate an award if the arbitrator “exceeded the arbitrator’s powers,” if there was “no agreement to arbitrate,” or if the arbitration was conducted without proper notice of its initiation. MCL 691.1703(1).

Probably the most common challenge to an arbitration award is that the arbitrator exceeded his or her powers. “[A]rbitrators can be fairly said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” *DAIIE v Gavin*, 416 Mich 407, 434 (1982).

In addition to asking the court to vacate an arbitration award, a party may request that the award be corrected or modified. A court may modify or correct an award if:

- (a) there is a “mathematical miscalculation” or “evident mistake in a description of a person, thing, or property referred to in the award”;
- (b) the arbitrator made an award on a claim that wasn’t submitted to the arbitrator, and the error can be corrected “without affecting the merits of the decision” on the claims that *were* submitted; or

(c) the award is “imperfect in a matter of form not affecting the merits of the decision on the claims submitted.”

MCL 691.1704. A party may join a motion to modify or correct an award with a request to vacate the award. MCL 691.1704(3).

Appeals

Once the court has decided a party’s motion to vacate, correct, or modify an award, the MUAA also provides a right to appeal. A party may appeal an order “confirming or denying confirmation of an award,” “modifying or correcting an award,” or “vacating an award without directing a rehearing.” An appeal may also be taken from “a final judgment entered under th[e] act.” MCL 691.1708.³

Conclusion

There is still a relative dearth of case law addressing the MUAA’s provisions, and the precise interplay between the statute and MCR 3.602 is not always crystal clear. The key is making the initial assessment of whether the arbitration is governed by the MUAA. If so, then its provisions control.

Panel Assignment in the Michigan Court of Appeals and Sixth Circuit

One of the questions appellate lawyers regularly field from clients concerns panel assignment: “Who’s going to hear my case?”

Most often, the answer is, “We don’t know yet.” In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, parties don’t learn which judges are assigned to a case until fairly close to oral argument. The Michigan Court of Appeals provides notice of oral argument and panel assignments about three to four weeks before an argument. The Sixth Circuit “seeks to give at least six weeks’ advance notice of oral argument,”⁴ but doesn’t notify parties of panel assignments until two weeks before argument.

Still, it’s possible to give clients a general sense of how courts assign judges to panels. For the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, the answer is that panel assignments are largely random—but not **completely** random.

Judge Assignment in the Michigan Court of Appeals

The Michigan Court of Appeals currently includes 26 judges. Each judge is elected from one of four geographical districts.⁵ In 2012, the Michigan Legislature enacted legislation to gradually reduce the number of judges for each district from seven to six,⁶ so the Court is on the road to having only 24 judges.⁷

The Court hears oral arguments at monthly sessions, and holds at least nine sessions per year.⁸ For each session, a computer program assigns the Court’s judges into panels of three. The Court’s Internal Operating Procedures explain that this program “randomly rotates judicial assignments so that each judge sits with every other judge an approximately equal number of times over the years.”⁹ In other words, the random rotation isn’t **truly** random; it tries to equalize pairings.

The Court handles motions somewhat differently. It considers substantive motions each Tuesday through “regularly scheduled motion docket panels at each of the court’s locations.”¹⁰ The Court assigns a motion panel to each of Michigan’s four districts on a monthly basis. Its Internal Operating Procedures don’t explain how the Court assigns judges to motion panels but, presumably, the procedure looks something like the procedure for merits panels.

In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, panel assignments are **mostly** random. Both courts use algorithms that prevent Judge X and Judge Y from sitting on the same merits panels month after month.

The Court also maintains an administrative motion docket.¹¹ Typically, “the Chief Judge or another designated judge acting alone” will enter orders on administrative motions.¹² Michigan Court Rule 7.211(E) lists examples of administrative motions, such as motions to consolidate cases, to adjourn a hearing date, or to file an amicus curiae brief.

Judge Assignment in the Sixth Circuit Court of Appeals

The number of judges for each of the nation's twelve circuits is established by statute.¹³ The Sixth Circuit Court of Appeals currently has 16 judges.

Congress doesn't have much to say about how circuit courts of appeals should assign judges to panels. The controlling statute simply states, "Circuit judges shall sit on the court and its panels in such order and at such times as the court directs."¹⁴ But the Court's Internal Operating Procedures explain its procedures for panel assignment.

Internal Operating Procedure 34 states that the Court meets for two-week sessions. Each of the Court's judges sits for four consecutive days during a session.¹⁵ The Court begins by assigning each active judge to one of the session's two weeks. Then "the balance of the court's active judges are assigned to the other sitting week."¹⁶ After assigning judges to one of the session's two weeks, the Court uses a computer program to divide judges into panels. This program considers how long it's been since each judge sat on the same panel as the Court's other judges, and matches judges with "the longest intervals between sitting pairing."¹⁷ This process ensures that each judge has "the opportunity to sit with as many different colleagues as possible"¹⁸ So, like the Michigan Court of Appeals, the Sixth Circuit's procedure for assigning

merits panels is largely random, but not completely random.

As for motions, the Sixth Circuit randomly assigns judges to motion panels on a quarterly basis.¹⁹ These motion panels consider any motions filed before a case is assigned to a merits panel.²⁰ Although the Court's Internal Operating Procedures explain that panels are assembled randomly, they don't specify how motions are assigned among the Court's various panels. After a case is assigned to a merits panel (which means after assignment to the oral-argument calendar), the merits panel considers any motions in that case.²¹

Once the court has decided a party's motion to vacate, correct, or modify an award, the MUAA also provides a right to appeal.

Bottom line

In both the Michigan Court of Appeals and the Sixth Circuit Court of Appeals, panel assignments are **mostly** random. Both courts use algorithms that prevent Judge X and Judge Y from sitting on the same merits panels month after month. The result is a bit of a paradox: to ensure that panel assignments appear random, both courts have adopted mechanisms to prevent truly random assignments.

Endnotes

1. Nevertheless, "a party to such an arbitration may request a court to enter an order confirming an arbitration award and the court may confirm the award or vacate the award for a reason contained in section 23(1)(a), (b), or (d)." *Id.*
2. That is, unless the motion "is predicated on corruption, fraud, or other undue means," in which case "it must be filed within 21 days after the grounds are known or should have been known." MCR 3.602(J)(3). In addition, "[a] motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award." *Id.*
3. In contrast, MCR 3.602(N) provides only that "[a]ppeals may be taken as from orders or judgments in other civil actions."
4. 6 Cir. IOP 34(b)(1).
5. MCL 600.302.
6. MCL 600.303a.
7. See IOP 7.201(D).
8. IOP 7.201(C).
9. IOP 7.201(D).
10. MCR 7.211(D); IOP 7.211(E).
11. MCR 7.211(E).
12. IOP 7.211(E)(2)
13. 28 USC 44.
14. 28 USC 46.
15. 6 Cir. IOP 34(a)(1).
16. 6 Cir. IOP 34(a)(1).
17. 6 Cir. IOP 34(a)(1).
18. 6 Cir. IOP 34(a)(1).
19. 6 Cir. IOP 27(a).
20. 6 Cir. IOP 27(a).
21. 6 Cir. IOP 27(a)(2).

SAVE THE DATE

MDTC Meet & Greet Reception

Friday, February 2, 2018

Firebird Tavern

6 - 7:30 p.m.

419 Monroe St. Detroit, MI 48226

Join us for this complimentary opportunity to meet and greet current members of the MDTC!