

## **Report of the Dispute Resolution Section on the Arbitration Fairness Act and other Federal Arbitration Bills**

The Dispute Resolution Section of the New York State Bar Association ("the DR Section") urges Congress to carefully review arbitration bills introduced in Congress to ensure that they do not interfere with general commercial arbitration. This most particularly applies in the international context where arbitration is often the only practicable choice for dispute resolution. Bills intended to protect consumers and employees, which have garnered significant Congressional support, could also void pre-dispute arbitration provisions in certain additional categories of disputes, some not defined, and reverse decades of U.S. Supreme Court precedent relating to essential doctrines of arbitration jurisprudence. While these bills are apparently not intended to impact commercial arbitration, the unintended consequences of the bills would dramatically eviscerate the Federal Arbitration Act lessening the efficacy of arbitration as a dispute resolution mechanism for commercial disputes and doing serious damage to U.S. businesses.

The DR Section supports many of the principles underlying the introduction of remedial arbitration legislation, including the protection of the procedural due process rights of consumers and employees. However, the DR Section opposes the enactment of such legislation as an amendment to the Federal Arbitration Act. With respect to the Arbitration Fairness Act of 2007, H.R. 3010 and S. 1782 (the "Arbitration Bill") the DR Section further (a) supports remedial legislation with regard to consumers but takes no position as to the optimal solution for addressing the issue; (b) opposes the overly-inclusive nature of the ban on all employee arbitration and encourages the legislature to explore alternative solutions for their concerns; (c) opposes the invalidation of pre-dispute arbitration agreements in franchise contracts; (d) opposes the inclusion of vague language relating to statutes intended to regulate transactions between parties with "unequal bargaining power"; and (e) opposes the overturning for all arbitrations of long established and internationally recognized precedents as to the allocation of authority between the court and the arbitrator. The DR Section is extremely concerned that in its present form the Arbitration Bill could have the unintended consequence of negatively impacting virtually all domestic and international commercial arbitration.

### **1. Arbitration is the Dispute Resolution Mechanism of Choice for Many Commercial Transactions**

In 1925, in response to the needs of the business community, the U.S. Congress affirmed the importance of arbitration to promote trade by enacting the Federal Arbitration Act ("FAA"). The FAA accorded arbitration agreements the same treatment as other contracts and provided for limited judicial review of arbitration awards. As the Supreme Court stated "the central purpose of the FAA is to ensure that private

agreements to arbitrate are enforced according to their terms.” *Mastrobuono v Shearson Lehman Hutton*, 514 U.S. 42, 53-54 (1995).

The many benefits of arbitration have led to the extensive use of arbitration as the process of choice for dispute resolution in commercial contracts both domestically and internationally. These benefits include:

- *Flexible Process* –As arbitration is a creature of contract, the parties can design the process to accommodate their respective needs. Hearings may be set at the parties’ convenience and the less formal and adversarial setting minimizes the stress to what are often continuing business relationships. In the international context, arbitration can harmonize cross-border cultural and legal differences.
- *Efficiency*- Arbitration can provide for simpler procedural and evidentiary rules than ordinary litigation (*e.g.*, less discovery, limited motion practice, and narrower grounds for appeal) and create a mechanism whereby the parties can craft and implement a streamlined procedure.
- *Expertise*- Arbitration permits the parties to choose adjudicators with the necessary expertise to decide complex issues which often require industry specific expertise.
- *Finality*- Judicial review of awards is restricted to a few issues primarily related to the fundamental issues of procedural fairness, jurisdiction, and public policy. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital, the time value of money and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided.
- *Confidentiality*- Arbitral hearings, as opposed to court trials, are generally private and confidentiality can be agreed to by the parties. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. This is an important feature for many corporations, particularly when dealing with disputes over intellectual property and trade secrets.
- *Neutrality*- In the international context, arbitration most importantly provides a neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities who are detached from the parties or their respective home state governments and courts, in a setting in which bias is avoided and the rule of law is observed.
- *Enforceability* – In the international context, a critical feature is the existence and effective operation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") to which over 140 nations are parties, which enables the enforceability of international arbitration agreements and awards across borders. In contrast,

judgments of national courts are much more difficult and often impossible to enforce abroad.

The enduring popularity of arbitration as a means of dispute resolution is reflected by the significant caseload at leading arbitral institutions. U.S. courts have repeatedly emphasized the importance of arbitration to the conduct of commercial transactions and recognized a strong federal policy favoring arbitration. *See e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 629, 631 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

## **2. The Most Significant Problems with the Arbitration Fairness Act**

Several arbitration bills have been introduced in Congress, but this Report focuses on the Arbitration Bill. The Arbitration Bill is the most sweeping of these proposed bills and has garnered the greatest support in the 110<sup>th</sup> Congressional Session, with the over 100 representatives as co-sponsors and the endorsement of several prominent Senators. The discussion in this Report of the issues in the context of the Arbitration Bill is intended to be applicable to any of the same problems raised by other congressional proposals that have been or may be introduced.

Both the House and the Senate versions of the Arbitration Bill provide in relevant part as amendments to Chapter 1 Section 2 of the FAA:

“(b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of--

- (1) an employment, consumer, or franchise dispute; or
- (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.”

These provisions of the Arbitration Bill would void arbitration agreements in a broad range of business disputes. The vague statutory language of the Arbitration Bill makes it impossible to determine the full impact of the bill in this regard. The bill’s proposed amendments to section 2 (c) of the FAA are not limited to the categories of parties that the bill proponents identify and seek to protect in section 2 (b) and the bill would reverse long standing Supreme Court precedents on “separability” and “competence-competence” with respect to all arbitrations. These arbitration concepts are

established throughout the world and are procedures essential to the functioning of arbitration.

Although we support many of the principles underlying the Arbitration Bill, because of its overbroad scope and its potential impact on a wide variety of domestic and international commercial arbitration agreements, we oppose the current draft of the Arbitration Bill and most particularly its form as an amendment to the FAA. We discuss below each of the areas impacted by the bill:

a. **Consumers** – We support bills that are tailored to protect consumers who have virtually no choice but to enter into certain types of agreements containing arbitration clauses (e.g., credit card agreements). However, we oppose Section 2(b)(1) as currently drafted and as an amendment to the FAA, and take no position at this time with respect to the optimal legislative remedy. We will be studying further the relative merits of addressing concerns about the ability of consumers to obtain justice through legislation that (i) invalidates pre-dispute arbitration agreements, (ii) provides for consumer opt-outs, or (iii) provides for fairness through procedural safeguards, and will also examine the ability of the courts to absorb potentially increased case loads at current funding levels without adverse impacts on other disputes not amenable to arbitration. We would oppose any legislation addressing consumer concerns that is framed as an amendment to the FAA rather than as a separate statute as discussed *infra* at paragraph 2(e).

b. **Employees** – Although we would support legislation intended to protect the due process rights of employees, we oppose Section 2(b)(1) because it is overbroad as currently drafted in its application to all employment agreements, an area in which arbitration has historically played a significant and socially useful role. One glaring example is that the Arbitration Bill would invalidate pre-dispute arbitration provisions in all employment agreements, including those between sophisticated parties with significant bargaining power who actively negotiate and freely enter into agreements containing arbitration provisions. We will be studying further the impact on the ability of employees to obtain justice with regard to employment-related disputes of legislation that (i) invalidates pre-dispute arbitration agreements (ii) safeguards the ability of employees to freely contract for various form of alternative dispute resolution and/or (iii) provides for fairness through procedural safeguards, and will also be studying the ability of the courts to absorb any potentially increased case loads at current funding levels without adverse impacts on other disputes not amenable to arbitration. We would oppose any legislation addressing employment concerns that is framed as an amendment to the FAA rather than as a separate statute as discussed *infra* at paragraph 2(e).

c. **Franchises** - We oppose Section 2(b)(1) insofar as it would invalidate pre-dispute arbitration provisions in franchise relationships. Importantly, franchise arrangements are agreements between businesses and this legislation will impact a vast sector of domestic and international businesses. Today, more than 75 industries operate within the franchising format and account for a significant percentage of all establishments in many important lines of business including restaurants, lodging, and retail food. Consumers frequent franchise establishments because they can depend on the consistent quality of franchised products and services. Arbitration agreements help both

franchisors and franchisees by providing a confidential forum in which to air disputes that could affect the franchised brand. Invalidating arbitration clauses in franchise agreements could impact the quality and service of the brand, not only harming the franchisors but also the franchisees.

The need for arbitration is even more pressing in the international franchise context. Many of the U.S. franchise businesses are multinational operations with dozens to hundreds of franchisees around the world. Illustrative of global franchise operations are McDonald's, Burger King, Hilton, Intercontinental, Athlete's Foot and UPS Stores. If cross-border pre-dispute arbitration provisions in franchise agreements are voided, U.S.-based franchisors will be placed at an extreme disadvantage to franchisors of other nationalities and forced to either (1) choose foreign law and venue to govern arbitration agreements; or (2) litigate disputes in domestic courts all around the world which may be slow to resolve disputes and biased in favor of a local party.

**d. Statutes that regulate contracts or transactions between parties of unequal bargaining power** – We oppose the enactment of Section 2(b)(2) of the Arbitration Bill which invalidates a pre-dispute arbitration agreement if it “requires arbitration of a dispute arising under a statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” The phrase “unequal bargaining power” is undefined. In virtually every transaction one party can be argued to have greater power. Similarly, the Arbitration Bill does not specify which statutes are intended to be covered by the language “statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” There are a great many statutes that may be argued to fall within this general description including securities, antitrust, ERISA, parts of the Uniform Commercial Code, bankruptcy law, intellectual property and a host of others. Even the consumer protection laws which have been enacted in states across the country, similar to Section 349 of the New York State General Business Law, the New York State Consumer Protection Act, would be implicated. While intended to protect consumers, these statutes are very often raised as claims in commercial cases, and would likely fall within the Arbitration Bill's provisions. The Arbitration Bill would lead to a virtually endless stream of cases in the courts in which this Arbitration Bill provision is invoked as governing and could be used to defeat the arbitration agreement in a multitude of contracts in which arbitration was an essential portion of the parties' agreement. Because of the factual issues raised in determining whether the parties have equal or unequal bargaining power, essentially every case could wind up in court and subjecting the parties to the costs and delay of both litigation and arbitration.

**e. The Arbitration Bill Overrules Established Arbitration Doctrines** - Because of the potential of an amendment to the FAA to create an impact far beyond its original intended scope, we oppose the enactment of the Arbitration Bill or any other legislation designed to deal with the protection of a limited class of potential arbitration parties as an amendment to the FAA.<sup>1</sup> We also oppose the enactment of Section 2(c) of the

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<sup>1</sup> See, e.g., The Fairness in Nursing Home Arbitration Act of 2008, S. 2838 and H.R. 6126, which we urge, if legislation is to be passed, be enacted as a separate statute and not as an amendment to the FAA.

Arbitration Bill which would alter in all arbitrations the current law as to the allocation of authority and timing of review between the court and the arbitrators as to the jurisdiction of the arbitral tribunal. Such legislation would reverse decades of U.S. Supreme Court precedents on “separability” and “competence-competence,” doctrines which are the conceptual cornerstones of arbitration as an autonomous and effective form of dispute resolution and serve to create the framework for the division of authority between the court and the arbitrator. The proposed amendments to section 2(c) of the FAA do not limit the reach of these changes to the categories of disputes for which it seeks to invalidate pre-dispute agreements. Nor does the Arbitration Bill distinguish between domestic and international disputes. The changes in the law proposed would thus apply to all arbitrations equally.

The doctrine of separability means that the agreement to arbitrate is “separate” or “separable” from the underlying contract, so that a contract is viewed as containing two discrete agreements: the agreement to arbitrate and the underlying contract. Making this distinction, the invalidity of the underlying contract does not necessarily invalidate the agreement to arbitrate and does not deprive the arbitrator of jurisdiction to decide on the validity of the underlying contract. Based on this principle, cases are referred to the arbitrator by the court if it is the underlying contract and not the agreement to arbitrate that is challenged.

Competence-competence is the principle pursuant to which a determination is made as to how the authority to decide issues is allocated between courts and arbitrators. This allocation determines both (i) the question of who rules first on the arbitrators’ jurisdiction (*i.e.*, whether the court determines it on a motion to stay or compel arbitration or upon review of the award on a petition to vacate or confirm the award); and (ii) what standard of review is to be given to the arbitrators’ ruling on challenges to their jurisdiction. Under established U.S. principles of competence-competence, if the challenge is not based on an objection to the validity or scope of the agreement to arbitrate itself, the arbitrator decides first.

Over forty years ago in *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 (1967) the Supreme Court established the doctrine of separability. The court stated that such a principle was necessary to effectuate the parties’ intention and serve the objectives of the FAA that parties be allowed to proceed in arbitration in accordance with their agreement in a speedy manner “and not subject to delay and obstruction by the courts.” This holding has been reaffirmed and expanded in several Supreme Court decisions rendered since 1967. In *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court clarified the concept of competence-competence. *See also Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

The principles of separability and competence-competence do not bar court review for all time but make a choice as to who should be delayed. A choice must be made between the party seeking to arbitrate on the basis of an arbitration clause who would like to move forward with the arbitration and the party who would like to delay it in court proceedings. When entering into the arbitration agreement the parties in a commercial transaction have a parallel and mutual interest in the utilizing arbitration and

gaining its benefits. Once a dispute arises, however, the respondents in the arbitration very frequently have an interest in delay, as defendants in all cases generally do, causing them to attempt to delay the proceedings by a detour to the court house if that is available. In the United States, based on the court's recognition of the arbitration agreement itself (or of the parties' agreement to have the arbitrator decide whether there is an agreement to arbitrate), the combined doctrines make a choice in favor of allowing the arbitration to go forward in accordance with the agreement of the parties to arbitrate, with the decision of the arbitrator to be reviewed by the court at the conclusion.

Modern arbitration statutes of many countries codify the principles of separability and competence-competence. *See e.g.*, UNCITRAL Model Law on Commercial Arbitration, Article 16 (which has been adopted in over 50 countries including Japan, India, Mexico, Nigeria, and Russia); English Arbitration Act of 1996, Sections 7, 30; Swiss Private International Law, Sections 178(3), 186; French *Nouveau Code de Procédure Civile*, Article 1458. The ICSID Convention, to which the United States is a party, also expressly provides in Section 3, Article 41 that the arbitral tribunal shall determine its own competence and jurisdiction. Institutional rules for international arbitration likewise provide for the arbitral tribunal to decide on its own jurisdiction and incorporate the principles of separability and competence-competence.<sup>2</sup>

While the precise application of competence-competence and separability varies somewhat from jurisdiction to jurisdiction, at a minimum, the universal rule is that the arbitrator may proceed with the arbitration notwithstanding jurisdictional challenges. This is consistent with current U.S. law pursuant to which a party can ask the court under the FAA to stay the arbitration, but unless a court issues an order staying the arbitration, the arbitrator has authority to proceed with the matter.

The Arbitration Bill would overturn this fundamental principle of arbitration jurisprudence. Under the Arbitration Bill U.S. courts will have the sole authority to determine the validity of arbitration agreements, “irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.” This is a sweeping overhaul of arbitration law both as developed by the courts in the United States and as established internationally. It would mean that the arbitrator would have to stop the proceedings if a party alleged that the contract was for any reason invalid or unenforceable and courts would have to serve as watchdogs for all arbitrations, even if the challenging party had no

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<sup>2</sup> *See, e.g.*, American Arbitration Association International Dispute Resolution Procedures, Article 15; International Chamber of Commerce for the International Court of Arbitration, Rules of Arbitration, Article 6, Section 4; Arbitration Rules of the World Intellectual Property Organization, Article 36; Arbitration Rules of the London Court of International Arbitration, Article 23.1; Swiss Rules of International Arbitration, Article 21; Arbitration Rules of the Singapore International Arbitration Centre, Article 25.1; Arbitration Rules of the Dubai International Arbitration Centre, Article 6.1; Arbitration Rules of the Hong Kong International Arbitration Centre, Article 20.

specific objection to the arbitration clause itself. Claims that a contract is void or unenforceable for some reason arise in virtually every contract dispute. By requiring the courts alone to review such claimed defects of the contract, the Arbitration Bill would lead to the very involvement in court proceedings that the parties sought to avoid by entering into the arbitration agreement in the first place. The parties' expectations of a forum of choice with all of the benefits of arbitration would be defeated and the U.S. courts will have to handle a larger number of cases added to already crowded dockets. In the international context this is of particular concern as parties choose arbitration to avoid being subject to domestic courts, an objective that would be defeated by this provision.

### **3. Consequences of the Arbitration Bill**

The Arbitration Bill would have profound and unintended consequences for all forms of domestic and international arbitration and could also have a grave and harmful impact on international commerce. In its present form the Arbitration Bills applies retroactively to existing contracts under which disputes have not yet arisen, and thus would overturn existing arbitration agreements and expectations as to both substantive and procedural matters. It would cause untold delays and additional costs and alter the economics of the bargains that were made. Courts have acknowledged the significance of the contractual provisions that deal with dispute resolution to the economics of the transaction. As the Supreme Court said in *Bremen v. Zapata Off-Shore Company*, *supra*, 407 U.S. at 14 in addressing the dispute resolution clause of the contract: "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *See also, Carnival Cruise Lines v. Shute*, 499 U.S.585, 594 (1991); *Roby v. Corporation Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993).

However, even applying the Arbitration Bill only prospectively would not save it from inflicting severe harm. Domestic parties would be leery of contracting for arbitration and forced to forgo its important benefits if they were likely to be caught up in a lengthy and expensive side trip into the courts. As the changes in U.S. law become known, the U.S. will no longer be viewed as a friendly forum for international arbitration, and parties engaged in international commerce would shun the U.S. for fear of being dragged into U.S. domestic courts. International arbitration would move elsewhere with the consequent inconvenience and increased costs for U.S. parties and loss of revenues for U.S. institutions. Indeed U.S. parties could find themselves in the bizarre position of choosing the law of a foreign jurisdiction over U.S. law as the governing law in their international contracts to avoid the evisceration of their arbitration agreements. Both domestic and international arbitration would be chilled in a manner neither intended by the Arbitration Bill's proponents nor necessary to achieve its purpose.

### **4. Other Arbitration Bills Pending**

So many arbitration bills have been introduced in Congress that it is not possible to address all of them in this Report. Some of these bills attempt to impose procedural requirements on arbitration, as an alternative to invalidating arbitration agreements. While establishing due process standards for specified classes of arbitration parties is

certainly an alternative that should be given serious consideration and may in some cases be the best way to address the concerns identified, care must be taken to ensure that such legislation is either clearly limited to the classes the statute is intended to protect or consistent with established arbitration practice.

For example, the Fair Arbitration Act of 2007, S. 1135, 110<sup>th</sup> Cong. (2007), would require an administering institution thus banning *ad hoc* arbitration and would require that the arbitrator be a member of the bar of the court in the United States where the hearing is conducted. These features conflict directly with standard arbitration practice and would make it virtually impossible to hold international arbitrations in the United States. Additionally, both domestic and international arbitrations are frequently and effectively conducted without an administering institution. One of the common features of international arbitration is the selection of at least one arbitrator who is not linked to the jurisdiction of either of the parties so as to ensure neutrality. Other conflicts between arbitration practice and proposed bills exist.

The problems that may be raised for commercial arbitration by new statutory procedural due process requirements in arbitration can be avoided if such requirements are limited in application to the designated classes the statute is intended to protect. At the very least, great care must be taken not to interfere with standard commercial arbitration practices in the drafting of any arbitration legislation

### **Conclusion**

The Arbitration Bill will radically change the legal framework with respect to the validity of pre-dispute arbitration agreements in a broad range of cases and the division of authority between the courts and the arbitrators. These changes will have a major impact on both domestic and international business interests and lead to extensive and expensive court proceedings that the parties contracted to avoid. This does not appear to be the intention of the Arbitration Bill's proponents and great care must be taken in the drafting of any legislation to protect specific categories of disputants to ensure that the legislation has no unintended impact on commercial disputes.

The goals of the Arbitration Bill can be achieved in various ways without the negative effects that the bill in its present form will have on U.S. businesses. The enactment by Congress of a separate statute protecting designated classes is least likely to cause unintentional adverse impacts on U.S. businesses that select arbitration as the dispute resolution mechanism in commercial transactions. This could be accomplished as a new Chapter 4 of the FAA, as an amendment to another relevant statute or as a new and separate statute. Such a separate statute could be tailored to meet the specific concerns of the legislature and would be consistent with previously enacted legislation that established different rules for arbitration for discrete categories of disputants.<sup>3</sup> If such a separate statute is enacted, it would be clear that existing commercial arbitration

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<sup>3</sup> See e.g. arbitration provisions relating to motor vehicle franchises at 15 U.S.C. § 1226; poultry growers at 7 U.S.C. § 197c and credit extension to members of the armed service at 10 U.S.C. § 987.

agreements would continue to be valid and enforceable and the fundamental doctrines of competence-competence and separability would continue to be applicable with respect to all arbitrations not covered by the new statute.

Regardless of whether the Arbitration Bill is enacted as a separate statute or a new section of the FAA, it should be redrafted and clarified. For example, Congress should consider specifying that the amendments apply only to arbitrations concerning the designated classes and not to other disputes, eliminating or at least clearly defining the vague terms used in the Arbitration Bill and imposing a minimum dollar threshold with regard to arbitrable disputes as is done with respect to consumer claims in other countries. *See e.g.* England Arbitration Act of 1996 § 91. Other less problematic legislation is undoubtedly possible to address the concerns. However, without significant revision, the Arbitration Bill is likely to have far reaching harmful consequences.

The FAA has functioned effectively for over 80 years and can now be applied with the benefit of decades of Supreme Court and lower court precedents. Addressing certain issues of concern with an amendment to the FAA, as the Arbitration Bill does, would likely lead to confusion in the courts as to what aspects of the amendments are applicable to commercial disputes, and to years of expensive and extensive litigation as those issues are clarified. While careful drafting might conceivably accomplish all of the goals sought through an amendment to the FAA, the risks associated with such an amendment cause us to urge that any legislation introduced be crafted as a separate statute.

In short, careful drafting can prevent the creation of problems for commercial arbitration, but without careful redrafting the Arbitration Bill is likely to have broad unintended negative consequences for businesses, courts and litigants.

Respectfully submitted,

Dispute Resolution Section