

Arbitration Fairness Act

Lawyers ID disadvantages in Arbitration Act
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The policymaking body of the American Bar Association has passed an important report and recommendation on the proposed Arbitration Fairness Act of 2009.

The bill legislatively attempts to correct perceived disadvantages faced by consumers and employees in arbitration. The action by the ABA's House of Delegates means the group's government affairs office now can lobby for changes to the AFA. The report was sponsored by the ABA's international law section and supported by the ABA's litigation section.

The AFA was introduced in the U.S. House couched as an amendment to Chapter 1, Section 2 of Title 9 of the Federal Arbitration Act. If passed, it would invalidate preexisting arbitration agreements for consumers, employees and franchisees, and disputes arising under any statute intended to protect civil rights.

The bill goes even further, however, to venture into commercial and international arbitration. It purportedly would have a court determine the validity or enforceability of any agreement to arbitrate, irrespective of whether the party resisting arbitration challenges the arbitration clause specifically or in conjunction with the rest of the agreement. These concepts, known as competence-competence and separability of the arbitral clause, serve as the cornerstones of international and commercial arbitration.

A parallel version of the bill has been introduced in the U.S. Senate, which would make consumer arbitration unenforceable while protecting international arbitration and creating a new Chapter 4 in Title 9 of the FAA. Many of these positive changes are a direct result of the Senate sponsor, Russell Feingold, D. Wis., working with international arbitration leaders. The Senate version provides:

- Language dealing with competence-competence and separability would relate only to the protected classes;
- Civil rights claims brought only by individuals rather than organizations would be protected; and
- The law would apply to franchisees only in the U.S.

The House version, which was the subject of a subcommittee hearing in mid-September, primarily would amend the FAA to require a litigant to go to court to enforce any arbitration agreement in which there are allegations that a contract is void or unenforceable, which frequently arises in disputes, whether the arbitration qualified as international or not. Such a result could wreak havoc in our already overburdened court systems.

As noted in the ABA report, creating "a series of exceptions in the body of Chapter 1 to the general rule that arbitration agreements are to be enforced according to the same terms as contracts generally" would be a recipe for disaster.

Beyond that is the fact that arbitration is the primary method of dispute resolution for transnational disputes, where the users of international arbitration tend to be more sophisticated. The concerns expressed by legislation like the AFA, such as the protection of parties of unequal bargaining power from mandatory arbitration clauses, does not apply to international disputes in which the parties' contractual selection of arbitration as a method of dispute resolution has proven to be effective and widely used.

In the international context, the United States is a party to two international commercial arbitration conventions: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration. Each convention is incorporated into U.S. law through Chapters 2 and 3 of the FAA.

The parties to transactions governed by the conventions agree any dispute involving the underlying contract will be resolved by international arbitration rather than in national courts in large part because international arbitration eliminates



many of the difficulties associated with litigating international commercial disputes in court and allows the parties to establish a neutral format that minimizes conflicts in legal culture. Undoubtedly, international commerce is important to the United States, and there is a need to assure that American businesses have arbitration as a means of resolving international disputes outside foreign judicial systems when the parties agree.

But the current House version of the AFA would impede that.

It is not clear when the AFA will be taken up by Congress with the intense focus on a health-care overhaul. It also is unclear how recent developments in consumer arbitration will affect the situation. The National Arbitration Forum, a major forum for credit-card arbitrations, decided in August to cease administering all consumer arbitrations nationwide as part of a settlement reached with the Minnesota attorney general, will affect the situation.

What is clear is international arbitration is not the “arbitration” that AFA sponsors are concerned about. International arbitration is a transnational method of dispute resolution agreed to in advance by sophisticated parties with the goal of achieving a speedy, effective and reliable conclusion to their dispute outside foreign judicial systems, with which the parties may be unfamiliar. That is why a vigilant eye is required to ensure international arbitration is protected. Much work remains to be done.

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