

Current Trends and Developments in International Arbitration: The Arbitration Fairness Act and Other Developments

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I. Arbitration Fairness Act –House versus Senate Versions

A. Current Language of the Federal Arbitration Act (FAA)

- a. Ch. 1 General Provisions
 - i. § 2: “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
- b. Ch. 2 incorporates the New York Convention
 - i. Adopted by the United Nations in 1958
 - ii. Requires signatory states to give effect to arbitration clauses and enforce foreign arbitral awards.
 - iii. Adopted in 144 countries.
- c. Ch. 3 incorporates the Panama Convention
 - i. Applies mainly to the United States and Latin America,
 - ii. Requires signatory states to give effect to arbitration clauses and enforce arbitral awards rendered in other signatory states.
 - iii. Where distinctions arise between the Panama Convention and the New York Convention, the Panama Convention generally governs.

B. H.R. 1020

- a. Amends § 2 of Ch. 1 by adding:
 - i. “No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of- (1) employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.” And
 - ii. “An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law . . .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 . . .”
- b. Amends the definitional section of Ch. 1 by defining:

- i. "Employment dispute," as "a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act";
- ii. "Consumer dispute," as "a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit"; and
- iii. "Franchise dispute," as "a dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which-
 - 1. a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;
 - 2. the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and
 - 3. the franchisee is required to pay, directly or indirectly, a franchise fee."

C. S. 931

- a. Adds a new Chapter (Chapter 4) to the FAA which includes two sections, "definitions" and "validity and enforceability."
- b. Validity and Enforceability:
 - i. "Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute."
 - ii. "An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies 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."
 - iii. By adding an entirely new chapter, legal changes to separability and competence-competence would be applicable only to the protected classes identified in the new chapter, rather than to all arbitrations (as is the case in H.R. 1020).
- c. Definitions:
 - i. Defines:
 - 1. "Civil rights dispute," as a dispute arising under the U.S. Constitution, any state constitution, as well as federal and

state statutes that prohibit discrimination on the basis of race, sex, disability, religion, national origin, etc.

2. “Consumer dispute,” “employment dispute,” with language that is virtually identical to that of H.R. 1020.
3. “Franchise dispute” more narrowly than H.R. 1020, limiting application to only franchisees “with a principal place of business in the U.S.”

II. Current Exceptions to the FAA

A. The FAA (itself)

- a. 9 U.S.C. § 1 provides that the FAA’s scope does not extend to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”
- b. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), the U.S. Supreme Court held that the section one exception applies only to transportation workers.

B. The Automobile Dealers’ Day in Court Act

- a. The Act’s arbitration provisions were added in 2002.
- b. 15 U.S.C. § 1226 provides that arbitration is permissible to resolve a dispute arising from a “motor vehicle franchise contract” only if all parties to the controversy “consent in writing to the use of arbitration” after the controversy arises.
- c. Section 1226 applies only to car manufacturers and car dealers.

C. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents

- a. 10 U.S.C. § 987(e), enacted in 2006, provides that it is unlawful to extend credit to a member of the armed services if the extension would require the “borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute.”
- b. Further, 10 U.S.C. § 987(f)(4) provides that “Notwithstanding [the FAA] . . . no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any [person who was a member of the military or a dependent of such a member when the agreement was made].”

D. Limitations on Mandatory Arbitration Requirements in Poultry and Livestock Production Contracts

- a. 7 U.S.C. § 197c(a), enacted in 2008, provides that poultry and livestock contracts that require arbitration must “contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.”

E. McCarran-Ferguson Act

- a. 15 U.S.C. § 1012(b) provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.”

- b. Section 1012(b) has been interpreted to permit state law to invalidate arbitration clauses in insurance contracts despite the FAA. See, e.g., Standard Sec. Life Ins. Co. of New York v. West, 267 F.3d 821 (8th Cir. 2001) (prohibition against arbitration clauses in insurance contracts involves business of insurance and is not preempted by FAA).
- c. McCarran-Ferguson’s “inverse-preemption” operates as a bar to application of the FAA when a state statutory provision is enacted for the purpose of regulating the “business of insurance,” and the FAA would invalidate or impair the state statutory provision, which is aimed at regulating insurance.

F. Department of Defense Appropriations Act, 2010

- a. This Act was passed into law on December 19, 2009 (H.R. 3326 and S. 976).
- b. Section 8115 of the Act prohibits certain defense contractors from entering into or enforcing arbitration clauses in employment agreements.
- c. The prohibition applies to claims by employees against defense contractors under Title VII of the Civil Rights Act of 1964 and certain torts related to sexual assault.
- d. The Secretary of Defense is authorized, under the Act, to waive the arbitration prohibition when he believes that the restriction may compromise national security.
- e. Also, the prohibition does not apply to employment contracts that cannot be enforced in a United States court.
- f. The Appropriations Act (including this amendment) will expire at the end of the fiscal year (Sep. 30, 2010), unless renewed.

III. Other Recent Proposals to Restrict Arbitration

A. Fairness in Nursing Home Arbitration Act (H.R. 1237 and S. 512)

- a. The Act would amend Ch.1 of the FAA to invalidate predispute arbitration agreements between a long-term-care facility and a resident of such a facility, and would require disputes to be settled in court rather than by arbitrators.
- b. The last major action on this bill in the House was referral to the Subcommittee on Crime, Terrorism and Homeland Security on July 23, 2009.
- c. The last major action in the Senate was referral to the Committee on the Judiciary on March 3, 2009.
- d. The sponsors are Representative Linda T. Sanchez (California) and Senator Mel Martinez (Florida).

B. Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)

- a. The Act would establish a Consumer Financial Protection Agency as an independent executive agency to regulate consumer financial products and services.

- b. The Act would provide the Agency with authority to impose “restrictions and limitations” on mandatory arbitration between consumers and financial institutions.
- c. The Act would also amend the Securities Exchange Act of 1934 by providing the SEC with authority to prohibit or “impose conditions or limitations” on the use of arbitration agreements that require customers of “any broker, dealer or municipal securities dealer to arbitrate” any future dispute arising under federal securities law.
- d. The Act passed in the House on December 11, 2009, and has been sent to the Senate for consideration.
- e. Representative Barney Frank (Massachusetts) is the sponsor.

C. Mortgage Reform and Anti-Predatory Lending Act (H.R. 1728)

- a. The Act would prohibit inclusion of terms that require arbitration or “any other non judicial procedure” as a method of dispute resolution at any time for residential mortgage loan agreements (including extension of credit under an open end consumer credit plan secured by a primary residence of a consumer).
- b. This bill passed in the House on May 7, 2009, and has been received by the Senate.
- c. The last major action was referral to the Senate Committee on Banking, Housing, and Urban Affairs on May 12, 2009.
- d. Representative Brad Miller (North Carolina) is the sponsor.

D. Consumer Fairness Act of 2009 (H. R. 991 and S. 257)

- a. The Act would amend the Consumer Credit Protection Act would consider arbitration clauses that are unilaterally imposed on consumers as deceptive trade acts under both federal and state law.
- b. The Act would apply to all “consumer contracts” (defined as any “written, standardized form contract between the parties to a consumer transaction”), but not to post-dispute agreements to arbitrate.
- c. The last major action on this bill in the House was referral to the Committee on Financial Services.
- d. The last major action in the Senate was referral to the Committee on the Judiciary.
- e. The sponsors are Representative Luis V. Gutierrez (Illinois) and Senator Sheldon Whitehouse (Rhode Island).

E. Non-Federal Employee Whistleblower Protection Act of 2009 (S. 1745)

- a. This Act would expand whistleblower protections to non-federal employees whose disclosures involve misuse of federal funds.
- b. The Act would prohibit predispute agreements to arbitrate claims of reprisal by non-federal whistle-blowers.
- c. The last major action on the bill was its referral to the Committee on Homeland Security and Governmental Affairs on October 1, 2009. Senator Claire McCaskill (Missouri) is the sponsor of the bill.

IV. Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010

A. Passage

- a. The Act was passed into law on December 16, 2009 (Public Law No: 11-117).

B. General Provisions

- a. Section 747 of the Act provides that automobile manufacturers that received financial assistance under the Emergency Economic Stabilization Act of 2008 (General Motors and Chrysler) are required to enter into arbitration with terminated dealerships to determine whether the dealerships should be reinstated.
- d. Specifically, the Act provides that dealerships that were wrongfully terminated under applicable state law on or before April 29, 2009, may seek relief in arbitration.

C. Decision Criteria

- a. In deciding whether the dealership should be reinserted into the manufacturer's dealer-network, the arbitrator must consider the following factors:
 - 1. the dealership's profitability from 2006-2009;
 - 2. the manufacturer's business plan;
 - 3. the dealership's economic viability;
 - 4. the dealership's performance under the prior franchise agreement;
 - 5. the characteristics of the dealership's geographic and demographic market;
 - 6. the criteria used by the manufacturer to decide whether to terminate a dealership's franchise agreement; and
 - 7. the dealership's length of experience in the industry.

D. Results

- a. If the arbitration results in a finding that the dealership should be reinstated, the dealership will be entitled to receive a letter of intent to enter into a dealership agreement from the manufacturer.

E. Discovery

- a. Depositions are prohibited, and discovery is limited to document production relating to the terminated dealership.

F. Costs

- a. The Parties are responsible for their own costs and fees; the parties are to split the arbitrator's fees, as well as the administrative costs of the arbitration.