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Anti-Arbitration Bills Imperil The Universal Benefits Of Consumer Arbitration

Kirk Knutson

NATIONAL ARBITRATION FORUM

Eighty-three years ago, Congress enacted the Federal Arbitration Act (“FAA”), giving Americans the right to contract to resolve their disputes through binding arbitration. The FAA established a strong federal policy favoring arbitration as an expeditious and cost-effective alternative to court. The full weight of this policy would not emerge until the 1980s and 1990s when the United States Supreme Court issued a series of decisions establishing the expansive reach of the FAA.¹

In the wake of those Supreme Court decisions, parties have been able to contract for arbitration of nearly all types of disputes. This ability may be in peril. The current session of Congress has witnessed the introduction of several bills that would limit the scope of the FAA and, in turn, erode the strong federal policy favoring arbitration. These limitations on the FAA would deprive Americans of a full opportunity to choose arbitration.

Anti-Arbitration Bills Introduced In Congress

Of the anti-arbitration bills introduced in the current session, the most far-reaching proposal is the so-called Arbitration Fairness Act (“AFA”), which has been introduced in both houses of Congress.² This bill would amend the FAA to provide that a pre-dispute arbitration agreement is unenforceable “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.” In other words, arbitration agreements would cease to be an option in at least three types of relationships: (1) employment; (2) consumer; and (3) franchise.

Most of the other anti-arbitration bills introduced this session have been focused on specific industries. The most recent bill, entitled the Fairness in Nursing Home Arbitration Act, would disallow pre-dispute arbitration agreements between nursing homes and their residents. Like the AFA, this bill has also been introduced in both houses of Congress.³

Another bill targets automobile dealerships. This bill, entitled the Automobile Arbitration Fairness Act, would disallow pre-dispute arbitration agreements between automobile dealerships and their customers. One industry-specific bill was enacted into

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law last May. Under this law, farmers must be given an opportunity to reject an arbitration provision in any livestock or poultry contract.⁴

In addition to the industry-specific bills, there is an anti-arbitration bill focused on the employment relationship. This bill, entitled the Civil Rights Act of 2008, would preclude the enforcement of any pre-dispute agreement that required an employee to arbitrate claims arising under federal law. Like the AFA and the nursing home bill, this bill has also been introduced in both houses of Congress.⁶

Some anti-arbitration bills reject an outright ban in favor of a more measured approach to regulating the use of arbitration. A bill entitled the Fair Arbitration Act⁷ would impose requirements on both the formation of an arbitration agreement and any arbitration proceedings. More specifically, this bill sets forth disclosure requirements (e.g., conspicuous typeface) and calls for various procedural protections, including a requirement that the arbitrator(s) issue a written explanation for their decision.

With the exception of the livestock and poultry bill that has been enacted into law, all of these anti-arbitration bills are still in the early stages of the legislative process. However, on July 15, three of the bills – the AFA, the nursing home bill, and the automotive bill – received, by a slim margin, a favorable report from the House Subcommittee on Commercial and Administrative Law. Also, if the number of co-sponsors is any indication, these bills are gaining slight momentum. For example, as of July 15, the AFA had 100 co-sponsors in the House of Representatives and six in the Senate, while the nursing home bill had 12 co-sponsors in the House and four in the Senate.

Though still in the early stages of the legislative process, most of these bills have been the subject of a committee or subcommittee hearing. Unfortunately, those hear-

ings were clouded by the myths and misinformation that are frequently used to bolster the anti-arbitration agenda. The remainder of this article is focused on dispelling those myths and outlining the universal benefits of consumer arbitration.

Myths And Misinformation About Consumer Arbitration

The arbitration debate should always begin with this central premise: Studies have consistently shown that where similar subject matter is at issue, arbitration produces the same outcomes as court but in less time and at less expense.⁸ This empirical reality refutes the allegation that arbitrators are biased in favor of business entities because of the so-called “repeat player” effect.

When confronted with the reality of similar outcomes, the critics of arbitration often resort to the argument that post-dispute arbitration agreements are superior to pre-dispute arbitration agreements because after the dispute has arisen, the parties are supposedly better situated to choose between arbitration and litigation. Post-dispute arbitration agreements are not a viable alternative, however, because the occurrence of the dispute creates enmity between the parties and alters the strategic calculus such that one of the parties is likely to enjoy a tactical advantage by keeping the dispute in the court system.⁹

Another myth bandied about by critics of arbitration is the claim that arbitration shields wrongdoing from the public view. Arbitration proceedings are generally confidential. However, this confidentiality does not preclude public disclosure of the underlying dispute because confidentiality attaches to the arbitration proceeding, not to any injurious conduct. Moreover, the outcome of an arbitration proceeding necessarily becomes part of the public record whenever a party seeks judicial confirmation of an arbitration award.¹⁰

An especially popular myth among arbitration critics is the notion that the drafting party gets to choose the arbitrator. Typically, the drafting party will name an arbitration administrator within the arbitration agreement, but the administrator – akin to a court clerk – is not the decision maker. Moreover, leading arbitration administrators, including the National Arbitration Forum, have adopted rules that give both parties a say in the process of arbitrator selection.

If a drafting party reserved the right to select the arbitrator, the agreement would likely be unenforceable in the face of an unconscionability or public policy challenge¹¹ because the FAA allows courts to apply state contract law to protect parties from unfair or unreasonable arbitration agreements. These existing protections against unfair arbitration agreements often get lost in the debate over arbitration, as arbitration critics ignore these protections

Roundtable: ADR Programs – What To Look For When Selecting A Neutral And Measuring Results

The Editor interviews **The Hon. William A. Dreier**, Partner, Norris, McLaughlin & Marcus, P.A.; **Judge Curtis H. Meanor**, Member, Podvey Meanor Catenacci Hildner Cocozziello & Chattman P.C.; **Brian Rauer**, Executive Director and General Counsel, The Better Business Bureau; **Kevin R. Casey** and **Lee A. Rosengard**, Partners, Stradley Ronon Stevens & Young, LLP.

Editor: What should corporate counsel look for when selecting a neutral?

Dreier: Experience. The mediator should have a proven track record aiding parties to settle matters similar to yours. Also, inquire concerning any special expertise required for the subject matter in a particular case. Remember that an adversary's respect for the mediator can facilitate a settlement. Arbitrators should additionally have a reputation for fairness, decisiveness and cost cutting.

Pre-vetting. Check that the neutral is accepted by some recognized ADR organizations, as this can save time-consuming inquiries.

Compatibility with Corporate Goals. The neutral's techniques should not leave the adverse party – possibly a continuing or potential customer, supplier, or employee – harboring ill will towards your company.

Ingenuity. Find a mediator with the ability to formulate outside-the-box solutions. Often, non-cash elements can satisfy both parties.

Brand Protection. When the issue involves an attack on the company's product or public image, the neutral should take care that the image is not tarnished.

Decision Issues. The mediator must be familiar with and be willing to work within the corporate decision-making structure and be flexible with scheduling and adjournments to permit decision makers to analyze proposals. An arbitrator should render clear, speedy and reasoned decisions.

Meanor: If a case is technically complicated, corporate counsel should seek a neutral with qualifications in the subject matter involved. If the case also contains issues of more than elementary law, then a three-neutral panel should be considered with at least one of the neutrals a lawyer.

Editor: How should corporate counsel measure the results of their client's ADR program?

Casey: There is no absolute quantitative measure by which corporate counsel can gauge the effectiveness of an ADR program. Reducing litigation resolution risks and costs, reducing outside counsel fees and in-house resources expended are all variables that float independently based on external factors over which a corporation may have little or no control. Corporate counsel will be well served by considering the ability (through screens or early case assessments) to direct the dispute to the best dispute resolution modality (mediation, arbitration, litigation, etc.). She will witness the positive results (relationships preserved, innovative solutions fashioned, internal clients satisfied) that are achieved through ADR. In essence, the measure of an effective program is qualitative, rather than quantitative. Of course, corporate counsel will be able to see a marked reduction in time and money devoted to defending claims against the company. The main marker of an effective program, however, will be the preservation of relationships that would be destroyed in no-holds-barred litigation and the development of creative solutions to problems. Moreover, the feedback that corporate counsel receive from their constituents will be an

expression of those constituents' satisfaction with the company's ADR policy and, ultimately, the most effective measure of its ADR program.

Dreier: Overall cost benefit. To assess a comprehensive ADR program, your company should measure the total direct and indirect costs of mediation versus arbitration or litigation, and of arbitration versus litigation.

Reduce strain on corporate personnel. Mediation or arbitration should substantially reduce the lost personnel time, attorneys' fees, expert fees, and other discovery costs, as well as the anxiety of corporate personnel. Verify that your mediator or arbitrator is substantially reducing discovery and accelerating the decision-making process.

Good will. Withdrawing disputes from a litigation mode should help the company preserve customer, supplier or personnel relationships. Check that your mediator or arbitrator is attuned to this process. You can achieve equitable results while minimizing the destruction of relationships.

Meanor: Clients use arbitrations primarily for privacy, economy and efficiency. Arbitrations should be swifter than litigation. Even paying a neutral for his or her services should not lead to an arbitration that even approaches the cost of litigation. Is discovery kept to a minimum and only allowed to the extent that a fair hearing is ensured? It goes without saying that an arbitration should be kept private unless, unfortunately, there happens to be a judicial challenge that is reported.

Rauer: There is no single measure of effectiveness for a given DR program. The interplay of multiple factors gauges effectiveness. Of prime import should be party perception (and, of course, existence) of complete neutrality and an unbiased process. The key is credibility; all participants must believe in the DR process itself, the chosen forum, and the competence and ethics of their neutral roster. Even should they disagree with the specific outcome (e.g., an arbitral decision failing to award the relief sought), they should retain confidence in the process, their ability to have fairly and accurately presented the facts of their position and at least understand the rationale and basis for the ultimate determination. In a mediation or conciliation setting, often parties may not reach agreement upon all issues in dispute, but may still feel positive about the process, trust in the forum and recognize potential progress that may have been achieved. Simply stated, it's not just about the resolution rate (which itself is not always a definitively measurable statistic); there are myriad factors that must be considered when assessing such figures. This is not to imply that a mediation program with a 20 percent resolution rate is without flaws; pragmatically, such a statistic would certainly warrant close scrutiny and assessment of the neutrals and process employed. Statistics, however, are not the exclusive measuring stick and not necessarily indicative of the true success of a DR program. While I am certainly proud that our New York Better Business Bureau (BBB) has long maintained quite a notable resolution rate, this is but one of many factors that we must continually monitor as we reassess our own effectiveness and assistance to the consumer-business community. We will seek and internally assess party feedback following the close of a hearing, continue to closely track the quality of our neutral roster (providing retraining, if necessary) and monitor our internal structure and policies to ensure optimal efficiency. In our commercial setting, where specifically quantifiable settlements are the norm, it's heartening to assist parties in

achieving mutually acceptable resolution and often preserving – and, at times, even enhancing – consumer-business (or business-to-business) relationships in the process. This is bolstered by a streamlined process, limited time investment for the parties, belief in our neutrality and the quality of our DR services, and a consistent willingness of our parties to participate in good faith. Successful programs are able to effectively combine all such factors and instill such confidence; the results naturally follow. Bottom line: It's not merely the resolution rate, but how you achieve it, how parties consistently perceive the fairness, expediency and organization of the program – and the attendant competence of the neutral roster, and whether they would use or recommend such services again.

Rosengard: One of the main advantages of ADR is the parties' ability to select an unbiased neutral – perhaps with relevant legal, industry and subject matter expertise – to either decide the dispute (e.g., binding arbitration) or help the parties resolve their dispute (e.g., mediation). The importance of

selecting a good neutral cannot be overstated; the quality of the neutral may be the single most important factor dictating the perceived or actual success of the proceeding. Many organizations, including private ADR providers, bar associations, and others, provide lists of qualified neutrals as well as lists of suggested selection criteria. A partial list of criteria to consider when selecting a neutral includes: (1) training and experience in the ADR proceeding; (2) stature and record (e.g., the number of prior mediations conducted and their outcomes); (3) availability and lack of conflict; (4) favorable references; (5) costs and fee structure; and (6) personal characteristics such as demeanor, discretion and personality (e.g., if there are difficult personalities involved, a strong mediator who can be assertive without offending might be selected). Although these criteria apply regardless of the proceeding, additional criteria are specific to the ADR type. Thus, the mediator's style (evaluative, facilitative, transformative) and the arbitrator's approach to discovery (liberal versus restricted) may be important criteria.

Anti-Arbitration

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whenever they trumpet the mischief of far-flung venues¹² and one-sided arbitration agreements.¹³

The Universal Benefits Of Consumer Arbitration

Dispelling the myths about arbitration is necessary for an evenhanded debate, but it's equally important to have a full understanding of the benefits of arbitration. Arbitration is beneficial for the parties because the simplicity of the proceedings enables the parties to resolve a dispute with minimal attorney fees. The simplicity and informality is especially beneficial for consumers because it enables them to prosecute or defend a claim without the aid of an attorney, whereas court proceedings entail a labyrinth of rules and procedures that are essentially un navigable for a pro se party. The flexibility of arbitration is also a boon for consumers. For example, arbitration allows for document hearings, which means that consumer parties can argue their case without missing work or incurring travel expenses.

These benefits to the parties can be thought of as direct benefits. Arbitration also has benefits that extend to non-parties, and these indirect benefits are often overlooked in the debate over arbitration. Both the court system and parties proceeding within the court system enjoy indirect benefits from the use of arbitration, because resolving disputes outside of the court system alleviates the burden on overcrowded dockets and frees up judicial resources for criminal matters and other proceedings of obvious public concern.

Similarly, the taxpayers enjoy indirect benefits from the use of arbitration because resolving disputes in a private forum (i.e., without the consumption of judicial resources) reduces the burden on the taxpayers. The aggregate savings to the taxpayers are substantial because studies have shown that, on average, court-based resolution of a civil dispute costs the taxpayers approximately \$3,000.¹⁴

Finally, the marketplace is also an indirect beneficiary because the use of arbitration enables companies to reduce their attorney fees, and through the operation of mar-

ket forces, these savings are necessarily passed along to consumers in the form of lower prices. Thus, consumers benefit from the use of arbitration not just as parties but also as non-parties.

Conclusion

With these anti-arbitration bills circulating through Congress, all of these benefits are in peril. It is in everyone's interest, if only as taxpayers, to oppose these bills and preserve arbitration as a viable alternative to court. Disallowing pre-dispute arbitration agreements, whatever the context, will only stifle innovation in the area of dispute resolution while depriving Americans of the far-reaching benefits of arbitration.

¹ See *Allied-Bruce Terminix Companies, Inc. v. Dobsen*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

² See S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007).

³ See S. 2838, 110th Cong. (2008); H.R. 6126, 110th Cong. (2008).

⁴ See H.R. 5312, 110th Cong. (2008).

⁵ See H.R. 2419, 110th Cong. § 11005 (2007).

⁶ See S. 2554, 110th Cong. (2008); H.R. 5129, 110th Cong. (2008).

⁷ S. 1135, 110th Cong. (2007)

⁸ For information on these studies, please visit <http://www.adforum.com/BenefitsOfArbitration>.

⁹ A recent article in the *Washington Post* illustrates these tactical advantages in claiming that "corporate defendants are routinely allowed to manipulate the judicial process with an endless stream of motions, depositions and appeals." Steven Pearlstein, *Altering the Economics of Civil Litigation*, *WASH. POST*, July 4, 2008, at D1.

¹⁰ Accordingly, Rule 4 of the National Arbitration Forum Code of Procedure expressly provides that arbitration awards are not confidential.

¹¹ See, e.g., *Hooters of America, Inc. v. Phillips*, 39 F.Supp.2d 582, 614 (D.S.C. 1998) (refusing to enforce an arbitration agreement that allowed the drafting party to control the pool of arbitrator candidates).

¹² See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1292 (9th Cir. 2006) (refusing to enforce an arbitration agreement based partly on its provision placing venue a far distance from the non-drafting party).

¹³ See, e.g., *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 173-74 (Wis. 2006) (refusing to enforce an arbitration agreement that allowed the drafting party to seek relief in court).

¹⁴ See *Mark Fellows, Limits on Arbitration Would Burden Courts and Taxpayers*, *METROPOLITAN CORPORATE COUNSEL*, Dec. 2007, at 8.

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