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April 29, 2011

The Honorable Hank Johnson
U.S. House of Representatives
Washington, D.C. 20515

Re: ABA's Concerns Regarding the Proposed "Arbitration Fairness Act" and
Suggested Revised Technical Amendments

Dear Representative Johnson:

On behalf of the American Bar Association, I write to express our concerns regarding certain specific language in the previous version of the "Arbitration Fairness Act" (H.R. 1020) introduced during the 111th Congress which, unless corrected, could have certain profound and unintended negative consequences. While the ABA has not taken a position for or against the overall bill, we are concerned about language in the legislation that could inadvertently void many existing international commercial arbitration agreements, add significant costs and delays to the commercial arbitration process, and potentially discourage international commercial parties from engaging in commerce with U.S. companies. We are also concerned that this language in the bill could put the U.S. at risk of breaching the spirit—if not the letter—of longstanding treaty obligations.

In the event that you decide to reintroduce the Arbitration Fairness Act during the current 112th Congress, the ABA urges you to consider adopting several specific technical amendments to the bill that would avoid these unintended consequences and preserve the benefits of international commercial arbitration, while still protecting the consumers, employees, franchisees, and civil rights claimants that the bill is designed to help.

Attached for your consideration are the ABA's suggested redlined technical changes to H.R. 1020 and a brief summary and explanation of these proposed changes. Please note that while the enclosed suggested technical changes are substantially similar to those that we provided to you and the other members of the House Judiciary Committee in July 2010, we have made several significant new changes to clarify that the legislation is not intended to overturn key provisions in Chapters 2 or 3 of Title 9.

Specifically, we propose rewording Section 3 of the revised bill to state that "Notwithstanding any provision **of Chapter 1 of this title**" [i.e., Title 9, Chapter 1 of the U.S. Code], no pre-dispute agreement to arbitrate an employment, consumer, franchise, or civil rights dispute shall be enforceable. This new language would replace our previous suggested revisions that said "Notwithstanding any provision **of this title**" [i.e., the entire Title 9], no such pre-dispute arbitration agreement shall be enforceable.

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This new change is necessary in order to prevent the legislation, if enacted, from inadvertently overriding key provisions of Title 9, Chapter 2 (i.e., the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”) or Title 9, Chapter 3 (i.e., the “Inter-American Convention on International Commercial Arbitration”). We also propose adding a new subsection (d) to Section 3 of the revised bill to assure clarity on this point by stating: “Nothing in this chapter shall apply to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration as provided in section 202 and section 302 of this title, respectively.”

We urge you to consider incorporating these new suggested changes into any future version of the Arbitration Fairness Act that you may decide to reintroduce, as well as our other previously suggested technical changes contained in the attached redline version of the legislation.

Thank you for considering the ABA’s views on these important issues. If you have any questions regarding our concerns or our suggested technical changes to the proposed Arbitration Fairness Act, please ask your staff to contact me at (202) 662-1765 or our senior legislative counsel, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Susman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas M. Susman

Attachments

SUMMARY AND EXPLANATION OF THE AMERICAN BAR ASSOCIATION'S PROPOSED TECHNICAL AMENDMENTS TO THE "ARBITRATION FAIRNESS ACT" (H.R. 1020; 111th Congress)

Overview

- **International commercial arbitration is important.** International arbitration is a highly-effective means of resolving business disputes in the cross-border context. Requiring parties to travel to a court in another country to seek redress in an unfamiliar legal system may effectively deny any legal remedy to the parties. Likewise, the rights of a defendant in a foreign court may not be adequately protected. International commercial arbitration allows for the selection of neutral decision makers who can address cross cultural differences and offers enforcement under the New York Convention in over 140 countries, an enforcement framework not available for court judgments.
- **Consequences of the proposed legislation.** The Arbitration Fairness Act (AFA), introduced in the House during the 111th Congress as H.R. 1020, would have profound and unintended consequences. It would (a) void many existing international commercial arbitration agreements and alter the economics of numerous transactions; (b) provide an avenue for a dilatory route to court in virtually all arbitrations and thus add significant costs and delays; (c) potentially discourage international commercial parties from engaging in commerce with U.S. companies, which could cost many U.S. jobs and harm U.S. companies in today's global economy; and (d) put the U.S. at risk of breaching the spirit, if not the letter, of longstanding treaty obligations.
- **Legislation to meet all interests is possible.** By adopting several modest technical amendments to H.R. 1020, Congress can both preserve international commercial arbitration and afford the additional protections provided by the bill for those involved in consumer, employment, franchisor/franchisee, or civil rights disputes. **It is critical that any legislation enacted be carefully drafted to protect the specific types of claimants Congress seeks to protect without inadvertently crippling arbitration as an effective international commercial dispute resolution process.**

Technical Corrections Urged

- **Chapter 1 of Title 9—known as the Federal Arbitration Act (FAA)—should not be altered.** Since its enactment in 1925, the FAA, which governs ALL arbitrations including international business disputes, has provided a stable and consistent legal framework for arbitration in the United States. The FAA has benefited from judicial construction, scholarly analysis and practical application and sets out the United States' fundamental policy regarding arbitration. Unfortunately, H.R. 1020 would add a series of carve-outs in the FAA, which could inadvertently unravel the reliability and predictability of business dispute resolution and create confusion and unnecessary litigation regarding its interpretation. Therefore, while the ABA has taken no position for or against the overall legislation, the ABA believes that any special arbitration rules for particular types of disputes—such as those involving consumers and employees—should be located outside of the FAA to avoid undermining decades of judicial precedents. Our proposed technical corrections address this concern by providing for a new Chapter 4 to Title 9—instead of amending Chapter 1 of Title 9—thus clearly applying the proposed changes in the arbitration law only to the specific types of disputes that the bill seeks to address.
- **Chapter 2 of Title 9 (the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards") and Chapter 3 of Title 9 (the "Inter-American Convention on International Commercial Arbitration") should not be superseded.** For decades, U.S. courts have had original jurisdiction to enforce international commercial arbitration agreements and arbitral awards by virtue of the Senate's ratification of these two treaties and the subsequent enactment by Congress of Chapters 2 and 3 of Title 9 as a means of enforcing and implementing the treaties. Unfortunately, the carve-outs in H.R. 1020 for particular categories of arbitration agreements could inadvertently override key provisions of these two important conventions. In order to avoid this problem, the ABA's proposed technical corrections would add a new subsection to the bill clarifying that the

legislation does not apply to international commercial arbitration agreements falling under either of the two conventions.

- **Preserve balance between courts and arbitrators for other cases.** Although H.R. 1020 is only intended to cover predispute agreements to arbitrate consumer, employment, civil rights and franchisee/franchisor disputes, Section 4 of the bill includes a new paragraph that applies to **ALL** arbitrations and alters settled law that balances the roles of arbitrators and courts and enables litigants to divert virtually all arbitrations to a side trip to the courts. Decades of U.S. Supreme Court precedents, as well as arbitration statutes and institutional rules in use throughout the world, recognize the principles of “separability” and “competence-competence.” These principles mean that while it is appropriate for a court to determine if there is a valid agreement to arbitrate, it is for the arbitrators to decide if a contract is otherwise valid. These principles are viewed as the conceptual cornerstones of arbitration.

As a practical matter, since allegations that a contract is void or unenforceable for some reason—such as lack of consideration, fraud, or other grounds—arise in virtually every contract dispute, language in Section 4 of H.R. 1020 would require the arbitrator to halt the proceedings if a party merely alleged that a contract involving parties of any description was for any reason invalid or unenforceable, even if that party had no specific objection to the arbitration clause itself and does not dispute that there was an agreement to arbitrate. H.R. 1020 would thus make the courts the gatekeepers of virtually all arbitrations as parties that consented to arbitrate as part of their contract, when faced with an actual dispute, choose to delay the proceedings. This, in turn, could mark the U.S. as a jurisdiction no longer considered a friendly forum for arbitration, as prominent foreign practitioners have already begun to note. For these reasons, the ABA urges that H.R. 1020 be revised to create a new Chapter 4 to Title 9 as outlined in its proposed technical amendments—rather than amending Chapter 1 of Title 9 (the FAA)—so that the change in these fundamental principles is clearly applicable only to the particular types of disputes that the bill is intended to cover.

- **Specify statutes intended.** Section 4 of H.R. 1020 would void any predispute arbitration agreement if it requires arbitration of a “dispute arising under a statute intended to protect civil rights.” Unfortunately, the term “civil rights” is not a phrase easily defined and various courts and others have interpreted it to include all rights protected by the U.S. Constitution and the right to obtain other benefits set out by law. H.R. 1020 is ambiguous in this regard as it does not specify which statutes are intended to be covered and would appear to include multiple U.S. and even foreign statutes. To eliminate this ambiguity, the ABA proposes that the language be limited to statutes that directly address the problem of discrimination. In particular, the ABA recommends that the definition of “civil rights dispute” in the legislation be clarified to include all discrimination claims “as defined by 26 U.S.C. 62(e) or any other statute enforced by the Civil Rights Division of the Department of Justice.” Although this proposed definition is appropriately broad and comprehensive, it is also much clearer than the current definition in the bill.
- **Preserve arbitration for international franchises.** Many franchising relationships are both international in scope and substantial in size. Illustrative of global franchise operations are McDonalds, Burger King, Hilton, Intercontinental, Athlete’s Foot and UPS Stores. Disputes between franchising enterprises and their franchisees are often cross-border disputes between sophisticated parties and do not present the kind of circumstance in which predispute arbitration agreements should be *per se* invalid. Moreover, international arbitration can be essential to protect U.S. franchisors and franchisees from being forced into unfamiliar foreign courts that offer fewer due process protections than American courts and that may favor the local party. Unfortunately, because H.R. 1020 contains a sweeping prohibition against all predispute agreements to arbitrate franchisor/franchisee disputes, it does not currently protect the rights of U.S. franchisors or franchisees to use arbitration in their non-U.S. related operations. If legislation relating to franchises is to be enacted, the ABA urges that the legislation exclude all international franchise operations from the coverage of the bill, where the franchisor or the franchisee is foreign, as would be accomplished by the ABA’s proposed technical amendments.

SUGGESTED TECHNICAL CHANGES TO THE ARBITRATION FAIRNESS ACT
(REVISED: 4/29/11)

Arbitration Fairness Act of 2009 (Introduced in House)

H.R. 1020 IH

111th CONGRESS

1st Session

H. R. 1020

To amend ~~chapter 1 of~~ title 9 of United States Code with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

February 12, 2009

Mr. JOHNSON of Georgia (for himself, Mr. MILLER of North Carolina, Ms. SCHAKOWSKY, Mr. BISHOP of Georgia, Ms. LEE of California, Mr. LOEBSACK, Mr. NADLER of New York, Mr. CHANDLER, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. SCOTT of Virginia, Mr. PASTOR of Arizona, Mr. LATOURETTE, Mr. DOGGETT, Mr. CONYERS, Mr. DELAHUNT, Mr. STUPAK, Ms. WASSERMAN SCHULTZ, Ms. MCCOLLUM, Mr. COURTNEY, Ms. BALDWIN, Mr. DEFAZIO, Mrs. LOWEY, Mr. HIGGINS, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. GUTIERREZ, Mr. BRALEY of Iowa, Mr. MARKEY of Massachusetts, Mrs. MALONEY, Mr. WATT, Mr. CARSON of Indiana, Mr. GEORGE MILLER of California, Ms. JACKSON-LEE of Texas, Mr. BOSWELL, Mr. SKELTON, Mr. BARROW, Mr. STARK, and Ms. LINDA T. SANCHEZ of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend ~~chapter 1 of~~ title 9 of United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Arbitration Fairness Act of 2009'.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have ~~interpreted~~ ~~changed the meaning of~~ the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in

deference to ~~thea supposed~~ Federal policy favoring arbitration ~~over the~~ constitutional rights of individuals.

SEC. 3. DEFINITIONS.

~~Section 1 of title 9, United States Code, is amended—~~

~~(1) by amending the heading to read as follows:~~

~~`Sec. 1. Definitions';~~

~~(2) by inserting before `Maritime' the following:~~

~~`As used in this chapter--';~~

~~(3) by striking `Maritime transactions' and inserting the following:~~

~~-(1) `maritime transactions';';~~

~~(4) by striking `commerce' and inserting the following:~~

~~-(2) `commerce';~~

~~(5) by striking `, but nothing' and all that follows through the period at the end, and inserting a semicolon; and~~

~~(6) by adding at the end the following:~~

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE AND CIVIL RIGHTS DISPUTES.

Title 9 of the United States Code is amended by adding the following after Chapter 3:

`CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE AND CIVIL RIGHTS DISPUTES';

`Sec. 401. Definitions';

As used in this chapter--

~~(13)~~ `employment dispute', as herein defined, means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203);

~~(24)~~ `consumer dispute', as herein defined, means 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;

`(35) `franchise dispute', as herein defined, means a dispute between a franchisor and franchisee, both of whom are either a resident citizen of the United States if an individual, or incorporated or having its principal place of business in the United States if an organization, and that arising out of or relating to a contract or agreement by which—

`(A) 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;

`(B) 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

`(C) the franchisee is required to pay, directly or indirectly, a franchise fee; and

`(4) `civil rights dispute', as herein defined, means a dispute involving a claim by an individual alleging unlawful discrimination as defined by 26 U.S.C. 62(e) or any other statute enforced by the Civil Rights Division of the Department of Justice;

`(56) `pre-dispute arbitration agreement', as herein defined, means any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement; and—

`(6) `organization', as herein defined, means any sole proprietorship, and a person other than an individual.'

`Sec. 402. Validity and enforceability'~~SEC. 4. VALIDITY AND ENFORCEABILITY.~~

~~Section 2 of title 9, United States Code, is amended—~~

~~(1) by amending the heading to read as follows:~~

~~`Sec. 2. Validity and enforceability',~~

~~(2) by inserting `(a)' before `A written';~~

~~(3) by striking ', save' and all that follows through 'contract', and inserting 'to the same extent as contracts generally, except as otherwise provided in the title'; and~~

~~(4) by adding at the end the following:~~

~~(a)~~ Notwithstanding any other provision of Chapter 1 of this title, no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—

~~(1) an employment, consumer, ~~or~~ franchise, or civil rights dispute; ~~or~~~~

~~(2) a dispute arising under any statute intended to protect civil rights.~~

~~(b)~~ An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. ~~Except as otherwise provided in this chapter, The applicability of this chapter to an agreement to arbitrate and the validity ~~and~~ enforceability of an agreement to arbitrate 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.~~

~~(c)~~ Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.'

(d) Nothing in this chapter shall apply to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration as provided in section 202 and section 302 of this title, respectively.

SEC. 45. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.