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May 12, 2011

The Honorable Al Franken
United States Senate
Washington, D.C. 20510The Honorable Richard Blumenthal
United States Senate
Washington, D.C. 20510The Honorable Hank Johnson
U.S. House of Representatives
Washington, D.C. 20515

GOVERNMENTAL AFFAIRS OFFICE

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

Dear Senators Franken and Blumenthal and Representative Johnson:

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On behalf of the American Bar Association, I write to express our concerns regarding certain specific language in the recently revised draft legislation known as the "Arbitration Fairness Act" that we understand you plan to reintroduce soon in the Senate and the House. While the ABA has not taken a position for or against the overall bill, we are concerned that certain language in the draft legislation could inadvertently void existing international commercial arbitration agreements and potentially discourage international commercial parties from engaging in commerce with U.S. parties. We are also concerned that this language could put the U.S. at risk of breaching the spirit—if not the letter—of longstanding treaty obligations. In addition, we believe that the bill's definition of "civil rights dispute"—and related language in the bill dealing with "collective bargaining agreements"—is overly broad and ambiguous and would lead to extensive litigation and significant costs and delays in the commercial arbitration process.

In order to address these concerns while still fully protecting the consumers, employees, and civil rights claimants that the bill is designed to help, the ABA urges you to consider adopting several specific technical amendments to the draft bill, either before it is introduced or prior to any future markup. Enclosed for your consideration is a brief summary and explanation of each of the ABA's suggested technical amendments, along with a copy of the draft bill showing our proposed changes in redline format.

May 12, 2011

Page 2

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 draft bill, 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, reading "Thomas M. Susman" with a long horizontal flourish extending to the right.

Thomas M. Susman

Enclosures



**SUMMARY AND EXPLANATION OF THE AMERICAN BAR
ASSOCIATION'S PROPOSED TECHNICAL AMENDMENTS TO THE DRAFT
ARBITRATION FAIRNESS ACT ("AFA")**

Proposed Technical Amendment 1: Clarify the second “finding” in Section 2 of the bill

Summary of the proposed change: On page 2, line 4 of the draft bill, the ABA recommends clarifying the second congressional finding by deleting “changed the meaning of” and inserting “interpreted”.

Reason: Although it is true that the U.S. Supreme Court has issued a series of written opinions over the years interpreting key aspects of the Federal Arbitration Act, 9 U.S.C. Chapter 1 (the “FAA”), including the extent to which the FAA covers consumer and employment disputes, the Supreme Court’s opinions have not changed the meaning of the FAA in the technical sense but rather have interpreted or reinterpreted particular provisions of the FAA (whether correctly or incorrectly). Therefore, we recommend rewording the second finding in Section 2 of the bill accordingly.

Proposed Technical Amendment 2: Simplify and clarify the definition of “civil rights dispute”

Summary of the proposed change: On pages 3 and 4 of the draft bill, the ABA recommends replacing the overly broad, complex and ambiguous definition of “civil rights dispute” that parties could no longer agree to arbitrate in advance under the bill with a more straightforward and precise definition, i.e., “a dispute involving a claim 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.”

Reason: Section 3 of the draft bill would void any pre-dispute arbitration agreement if it requires arbitration of a “civil rights dispute.” The draft bill then goes on to define that term very broadly to include any dispute brought by at least one individual arising from (1) the U.S. Constitution, (2) a state constitution, or (3) a federal or state statute “that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination)...”.

This definition is overly broad and ambiguous in several respects. First, many potential disputes arising under the U.S. Constitution—for example, those involving ambassadors, other public ministers, and consuls (Article III, Section 2), the right to keep and bear arms (Second Amendment), a state’s obligation to give full faith and credit to public acts of other states (Article IV, Section 1), and many others—have little or nothing to do with discrimination or civil rights as those terms are commonly understood. The U.S. Constitution’s grant of a right to a jury trial (Seventh Amendment) also could cause confusion and lead to extensive litigation if the current definition in the bill is utilized. In addition, many state constitutions are lengthy, detailed, legislative-type documents that contain numerous provisions having nothing to do with discrimination or civil rights. For example, the Texas Constitution contains provisions banning garnishment of wages (Article 16, Section 28),

granting detailed property and homestead exemptions to debtors (Article 16, Sections 49-52), and granting mechanics and contractors the right to place liens on property (Article 16, Section 37).

In addition, the definition of “civil rights dispute” in the draft AFA is vague and ambiguous to the extent that it would include “a Federal or State statute that prohibits discrimination on...any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government...” The term “invidious basis” is very unclear and imprecise and is likely to result in extensive litigation to determine the meaning and scope of that standard unless it is further clarified.

To eliminate these ambiguities, the ABA proposes that the definition of “civil rights dispute” in the draft AFA be limited to a specific—but comprehensive—list of the statutes and types of federal, state and local claims that directly address the problem of discrimination. In particular, the ABA recommends that the definition 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.”

The definition of “discrimination claims” in Section 62(e), which the IRS uses to help determine the adjusted gross income of plaintiffs who have successfully brought discrimination claims, includes not only a complete list of all significant federal anti-discrimination statutes, but also a catch-all category comprised of “any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law...providing for the enforcement of civil rights, or...regulating any aspect of the employment relationship...” This language from 26 U.S.C. 62(e), combined with DOJ Civil Rights Division’s broad enforcement jurisdiction, would provide an appropriately broad and comprehensive definition of “civil rights dispute” that is significantly clearer and less ambiguous than the current definition in the draft bill.

Proposed Technical Amendment 3: Clarify that the AFA would not inadvertently override the two key international commercial arbitration treaties referenced in Chapters 2 and 3 of Title 9

Summary of the proposed change: On page 4, lines 22 and 23 of the draft bill, the ABA recommends striking “other” and inserting “Chapter 1 of” so that provision would read “Notwithstanding any provision of Chapter 1 of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.” In addition, the ABA recommends adding the word “arbitration” before “agreement” on page 5, line 8 and adding a new subsection (3) titled “Foreign Arbitral Awards and International Commercial Arbitration” at the bottom of page 5 that would state: “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.” Finally, the ABA recommends striking the language contained on page 6, line 9 through page 7, line 8.

Reason: The ABA is concerned that as currently written, these provisions in the draft legislation could conflict with two important commercial arbitration treaties known as the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” and the “Inter-American Convention on International Commercial Arbitration.” 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 the

draft AFA for particular categories of arbitration agreements could have the unintended consequence of inadvertently overriding key provisions of these two important conventions.

In order to avoid this problem, the ABA's proposed technical corrections would slightly change the language on page 4 of the draft bill to clarify that the prohibition on pre-dispute agreements to arbitrate employment, consumer, or civil rights disputes would be adopted "notwithstanding any other provision of Chapter 1" (i.e., the Federal Arbitration Act), as opposed to the current language of the bill which would adopt the prohibition "notwithstanding any other provision of this title" (i.e., all of Title 9, which includes not just Chapter 1 dealing with the FAA but also Chapters 2 and 3 dealing with the two international commercial arbitration treaties). To further clarify this important point, the ABA recommends adding the new subsection (3) to the bottom of page 5 of the bill, which states that the legislation does not apply to international commercial arbitration agreements falling under either of the two conventions. The ABA also recommends striking the language from page 6, line 9 through page 7, line 8, to further clarify that the bill would not change any of the existing provisions of Chapters 2 or 3 of Title 9 or otherwise interfere with international commercial arbitration or the two treaties.

Proposed Technical Amendment 4: Clarify the extent to which collective bargaining agreements would not be covered by the legislation

Summary of the proposed change: The ABA recommends revising and clarifying the collective bargaining agreements exception on page 5 of the draft bill to read as follows: "Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial resolution of a civil rights dispute."

Reason: The ABA recommends revising the second portion of subparagraph (2) of page 5 of the draft bill so that it will more clearly and effectively implement the apparent goal of the provision, i.e., to not exempt collective bargaining agreements from the bill's ban on pre-dispute agreements to arbitrate employment disputes when a civil rights dispute is involved. The current language of subparagraph (2) states that no arbitration provision in a labor agreement shall waive the right of an employee "to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom" (i.e., language that partially parallels the draft bill's overly broad definition of "civil rights dispute").

As explained under Proposed Technical Amendment 2 above, this language is excessively broad and ambiguous because contrary to the overall intent of the subparagraph, it would eliminate the collective bargaining agreement exception in the bill for virtually all employment disputes by allowing employees to bring unlimited court actions under any federal or state statute (or to assert any federal or state constitutional claim), regardless of whether it involved a violation of a claimant's civil rights. Based on the apparent intent of the bill's sponsors to only carve out civil rights disputes from the bill's general exemption for collective bargaining agreements, the ABA recommends that the subsection be revised accordingly.

Suggested Technical Amendments to the Arbitration

Fairness Act

HEN11163

S.L.C.

(Revised: 5/12/11)

112TH CONGRESS
1ST SESSION

S. _____

To amend title 9 of the United States Code with respect to arbitration.

IN THE SENATE OF THE UNITED STATES

Mr. FRANKEN introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 9 of the United States Code with respect to arbitration.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Arbitration Fairness
5 Act of 2011".

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) The Federal Arbitration Act (now enacted
9 as chapter 1 of title 9 of the United States Code)
10 was intended to apply to disputes between commer-

1 cial entities of generally similar sophistication and
2 bargaining power.

3 (2) A series of decisions by the Supreme Court
4 of the United States have ~~changed the meaning of~~ ^{interpreted the}
5 the Act so that it now extends to consumer disputes
6 and employment disputes.

7 (3) Most consumers and employees have little
8 or no meaningful choice whether to submit their
9 claims to arbitration. Often, consumers and employ-
10 ees are not even aware that they have given up their
11 rights.

12 (4) Mandatory arbitration undermines the de-
13 velopment of public law because there is inadequate
14 transparency and inadequate judicial review of arbi-
15 trators' decisions.

16 (5) Arbitration can be an acceptable alternative
17 when consent to the arbitration is truly voluntary,
18 and occurs after the dispute arises.

19 **SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, AND**
20 **CIVIL RIGHTS DISPUTES.**

21 (a) **IN GENERAL.**—Title 9 of the United States Code
22 is amended by adding at the end the following:

1 **"CHAPTER 4—ARBITRATION OF EMPLOY-**
 2 **MENT, CONSUMER, AND CIVIL RIGHTS**
 3 **DISPUTES**

"Sec.
 "401. Definitions.
 "402. Validity and enforceability.

4 **"§ 401. Definitions**

5 "In this chapter—

6 "(1) the term 'civil rights dispute' means a dis-
 7 pute—

8 "(A) ~~arising under~~ *involving a claim alleging unlawful*

9 ~~"(i) the Constitution of the United~~
 10 ~~States or the constitution of a State, or~~

11 ~~"(ii) a Federal or State statute that~~
 12 ~~prohibits discrimination on the basis of~~
 13 ~~race, sex, disability, religion, national ori-~~
 14 ~~gin, or any invidious basis in education,~~
 15 ~~employment, credit, housing, public accom-~~
 16 ~~modations and facilities, voting, or pro-~~
 17 ~~gram funded or conducted by the Federal~~
 18 ~~Government or State government, includ-~~

19 ~~ing any~~ statute enforced by the Civil
 20 Rights Division of the Department of Jus-
 21 tice; ~~and any statute enumerated in section~~
 22 ~~62(e) of the Internal Revenue Code of~~
 23 ~~1986 (relating to unlawful discrimination);~~
 24 and

discriminating as defined by 26 U.S.C. 62(e) or any other

1 “(B) in which at least 1 party alleging ^{such unlawful}
 2 ~~violation of the Constitution of the United~~
 3 ~~States, a State constitution, or a statute pro-~~
 4 ~~hibiting~~ discrimination is an individual;

5 “(2) the term ‘consumer dispute’ means a dis-
 6 pute between an individual who seeks or acquires
 7 real or personal property, services (including services
 8 relating to securities and other investments), money,
 9 or credit for personal, family, or household purposes
 10 and the seller or provider of such property, services,
 11 money, or credit;

12 “(3) the term ‘employment dispute’ means a
 13 dispute between an employer and employee arising
 14 out of the relationship of employer and employee as
 15 defined in section 3 of the Fair Labor Standards
 16 Act of 1938 (29 U.S.C. 203); and

17 “(4) the term ‘predispute arbitration agree-
 18 ment’ means any agreement to arbitrate a dispute
 19 that had not yet arisen at the time of the making
 20 of the agreement.

21 **“§ 402. Validity and enforceability**

22 “(a) IN GENERAL.—Notwithstanding any ~~other~~ ^{Chapter 1 of} pro-
 23 vision of this title, no predispute arbitration agreement
 24 shall be valid or enforceable if it requires arbitration of

1 an employment dispute, consumer dispute, or civil rights
2 dispute.

3 "(b) APPLICABILITY.—

4 "(1) IN GENERAL.—An issue as to whether this
5 chapter applies to an arbitration agreement shall be
6 determined under Federal law. The applicability of
7 this chapter to an agreement to arbitrate and the
8 validity and enforceability of an ^{arbitration} agreement to which
9 this chapter applies shall be determined by a court,
10 rather than an arbitrator, irrespective of whether the
11 party resisting arbitration challenges the arbitration
12 agreement specifically or in conjunction with other
13 terms of the contract containing such agreement.

14 "(2) COLLECTIVE BARGAINING AGREEMENTS.—

15 Nothing in this chapter shall apply to any arbitra-
16 tion provision in a contract between an employer and
17 a labor organization or between labor organizations,
18 except that no such arbitration provision shall have
19 the effect of waiving the right of an employee to
20 seek judicial ^{resolution of a civil rights dispute.} enforcement of a right arising under a
21 ~~provision of the Constitution of the United States, a~~
22 ~~State constitution, or a Federal or State statute, or~~
23 ~~public policy arising therefrom."~~

24 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

→ "(3) Foreign Arbitral Awards and International
Commercial Arbitration.— 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.

1 (1) IN GENERAL.—Title 9 of the United States
2 Code is amended—

3 (A) in section 1, by striking “of seamen,”
4 and all that follows through “interstate com-
5 merce”;

6 (B) in section 2, by inserting “or as other-
7 wise provided in chapter 4” before the period at
8 the end;

9 (C) in section 208—

10 (i) in the section heading, by striking
11 **“Chapter 1; residual application”**
12 and inserting **“Application”**; and

13 (ii) by adding at the end the fol-
14 lowing: “This chapter applies to the extent
15 that this chapter is not in conflict with
16 chapter 4.”; and

17 (D) in section 307—

18 (i) in the section heading, by striking
19 **“Chapter 1; residual application”**
20 and inserting **“Application”**; and

21 (ii) by adding at the end the fol-
22 lowing: “This chapter applies to the extent
23 that this chapter is not in conflict with
24 chapter 4.”.

25 ~~(2) TABLE OF SECTIONS.~~

1 (A) CHAPTER 2.—The table of sections for
 2 chapter 2 of title 9, United States Code, is
 3 amended by striking the item relating to section
 4 208 and inserting the following:

“208. Application.”

5 (B) CHAPTER 3.—The table of sections for
 6 chapter 3 of title 9, United States Code, is
 7 amended by striking the item relating to section
 8 307 and inserting the following:

“307. Application.”

9 (2) (3) TABLE OF CHAPTERS.—The table of chap-
 10 ters for title 9, United States Code, is amended by
 11 adding at the end the following:

“4. Arbitration of employment, consumer, and civil rights disputes 401”.

12 SEC. 4. EFFECTIVE DATE.

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