Recommendations Regarding the Arbitration Fairness Act of 2009, H.R. 1020

July 16, 2010

The New York City Bar Association has expressed concerns regarding the Arbitration Fairness Act of 2009 (H.R. 1020). While arbitration may not be well suited for resolving disputes involving consumer finance and civil rights matters, the AFA as drafted would have much broader impact, undermining the consistent legal framework that the Federal Arbitration Act has provided since 1925. The AFA would create confusion and needless, excessive litigation, lead to reduced use of arbitration in business settings where it has proven to be highly effective in dispute resolution, and discourage international entities from relying on arbitration remedies in their dealings in the U.S., thus affecting U.S. involvement in international commerce. We set forth our views in the attached memorandum, dated October 2009, which is attached here for your reference http://www.nycbar.org/pdf/report/uploads/20071812-StatementreArbitrationFairnessActof2009.pdf. .

As the Judiciary Committee is about to consider H.R. 1020, we want to present four suggestions that we believe would address our concerns.

1. We believe that the provisions regarding consumers, employees and franchisees should be set forth in a new chapter to Title 9 rather than as an amendment to Chapter 1 of the Federal Arbitration Act (FAA). This would address the types of cases the Arbitration Act seeks to encompass but would avoid changing the framework of Chapter 1 of the FAA, as H.R. 1020 would currently do, and therefore would keep in place the reliable framework under which an enormous number of business disputes are resolved today.

2. While it is for a court to determine if there is a valid agreement to arbitrate, we recommend that H.R. 1020 be amended to leave with the arbitrators the decision as to whether the contract which is the subject of the arbitration is valid. H.R. 1020 would have the courts adjudicate issues regarding the validity of the contract, thereby opening the door to costly litigation and delay regarding matters which the parties have long expected arbitrators to resolve. Arbitrators should be allowed to fill their long-established role, well understood by the parties, of determining the validity of contracts.

3. A more precise definition of what constitutes a civil rights claim should be provided. As H.R. 1020 is now drafted, there would be no certainty as to whether a civil rights claim

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would come within the purview of the Act, and its scope, which could reach to foreign claims or state statutory claims, could take years to resolve. This concern should be addressed by limiting the application to federal and state constitutional claims that prohibit discrimination.

4. Pre-dispute arbitration clauses in franchise disputes should be invalidated under H.R. 1020 only where both parties to the dispute are located in the U.S. This would preserve the notion of excluding smaller or localized disputes from the compulsion of arbitration clauses but would not affect arbitration regarding disputes that are international in scope, which generally involve substantial entities, and thus would avoid discouraging international companies from engaging in franchise operations in the U.S.

We appreciate the Judiciary Committee's consideration of these recommendations.