Arbitration Changes Brewing In Congress

'This Will Be The Kiss Of Death,' Predicts Arbitration Honcho

By Matt Masich
LAW WEEK COLORADO

DENVER — Companies often see arbitration as a faster, cheaper and confidential alternative to litigation. Some of the top commercial arbitrators fear that a bill introduced in the U.S. Congress this year would nullify those advantages by changing federal arbitration law.


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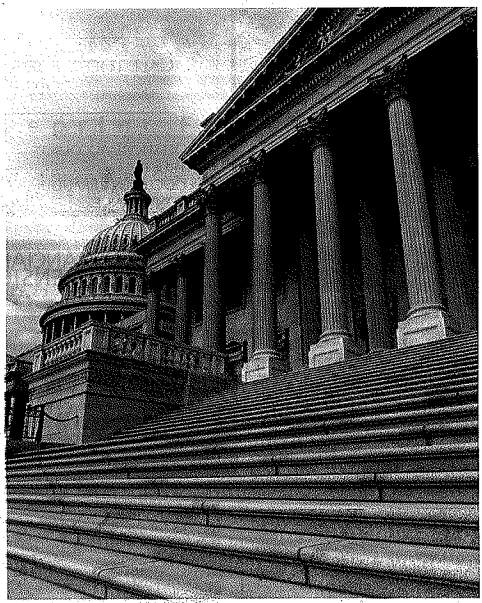
For years, consumer advocates have pushed legislation that would ban pre-dispute mandatory binding arbitration clauses in consumer contracts. These clauses are buried in the fine print of most contracts for credit cards, cell phone service, and other staples of modern life.

Under the current law, consumers who have signed contracts with mandatory arbitration provisions can't litigate a dispute. Critics say that because consumers have less bargaining power than large companies, they are being coerced into choosing between giving up their right to a trial or doing without a credit card, cell phone, etc. They also claim that the cost of arbitration is prohibitive for most consumers, and that arbitration firms are likely to side with companies that are repeat customers.

In February, Rep. Hank Johnson, D-Georgia, introduced the Arbitration Fairness Act of 2009 in the House of Representatives, with a Senate version expected soon. The bill would change the 84-year-old Federal Arbitration Act, or FAA, to invalidate mandatory arbitration clauses in consumer, employment and franchise disputes. It would also give courts, not arbitrators, authority to decide whether an arbitration agreement is valid.

Versions of the bill introduced earlier this decade have died in committee, but with a strong Democratic majority in Congress and a new administration in office, there is talk of this year's bill passing. That prospect doesn't sit well with some arbitrators who say the amendments designed to help consumers would have a profoundly negative effect on commercial arbitration.


At the U.S. Capitol, Congress is considering a change in the nation's arbitration laws.

'Decades and decades of precedent'

Michael Williams is a Denver attorney specializing in dispute resolution and a member of the prestigious College of Commercial Arbitrators.

"The trigger for the Arbitration Fairness Act is consumer arbitration, which probably does need some reform," said Williams. "Many companies are getting very, very close to the edges of fairness in what they stick on consumers. But the language of this bill is likely to create real problems for commercial arbitration between people who know what they're doing."

Arbitrator Russel Murray, director of the Colorado Bar Association's dispute resolution section, said the bill would make all arbitration clauses harder to enforce.

"Arbitration under the FAA has been developed for 80 years," Murray said. "This act would overturn decades and decades of precedent. For 80 years, the only thing a court has looked at when a contract has an arbitration clause is whether the parties agreed to arbitrate. Once the court decides that, everything else is decided by the arbitrator. The Arbitration Fairness Act turns all of that on its head."

Were the bill to pass, a court would rule on the enforceability of an arbitration clause if either party objects to any part of the contract — even if the objection doesn't deal with the arbitration clause.

"It's going to run up the costs, extend the time period and create uncertainty in the international arena," Murray said.

The potential effect on international arbitration is particularly disturbing to Richard Naimark, senior vice president of the American Arbitration Association. When foreign companies do business with American companies, they most often include arbitration agreements in their contracts, Naimark said.

"If word [about this change to the FAA] has gotten around in international circles, this will be the kiss of death for international arbitration for the U.S., which is a serious issue, because in international cross-border trade disputes, arbitration is pretty much the system everybody around the world uses," Naimark said.

"In other countries, people have written that it looks like the U.S. is developing as a jurisdiction that is hostile to arbitration. It's very bad for business," he said.

Challenging the argument

The proponents of the Arbitration Fairness Act, however, believe it is about restoring people's right to a jury trial.

Personal injury attorney Kyle Bachus is a board member of the Colorado Trial Lawyers Association and one of two Colorado representatives on the American Association for Justice's board of governors. He is a strong supporter of the bill.

"I think it's great. Frankly, I think it's long overdue. It is a good step forward in reclaiming some of our civil rights in this country that have been tread upon slowly but steadily over the years," Bachus said.

Bachus is not persuaded by the argument that subjecting arbitration agreements to the scrutiny of a court would dissuade foreign companies from doing business.

"I would challenge the arbiters who raise that concern to look at history. This country has become the wealthiest country in the entire world, and has done so by protecting its citizens, protecting their safety and allowing disputes to be determined in open courtrooms where juries can make decisions," he said.

The bill should be passed exactly as it is currently written, Bachus said. He proposed an experiment to illustrate why it is needed.

"Go into the mall to buy a telephone. Ask them to pull up the contract and say, 'I want to buy it, but I want to strike this mandatory arbitration provision out of the contract. I want to bargain with you.' And you see whether you have disparate bargaining power or not," he said.

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The American Arbitration Association has agreed that there are valid concerns about the fairness of mandatory arbitration clauses for consumers, Naimark said, but said there is a way to address those concerns without changing the law for all arbitration.

"If they need to do some federal legislation, rather than changing chapters one and two of the FAA, we propose that they write a new chapter four dealing specifically with consumer arbitration," Naimark said.

'Bigger fish to fry'

It's still far from certain that the Arbitration Fairness Act will pass, or what form it would be in if it does. Included in the 2007 version of the bill, but not in the present House version, was language that would have invalidated mandatory arbitration provisions in "contracts or transactions between parties of unequal bargaining power."

Because "unequal bargaining power" is such a vague term, arbitrators said this could be used to invalidate an arbitration agreement between any two differently-sized companies.

Naimark said he thinks this language could reappear in this year's Senate version of the bill. Murray said it is likely to stay out.

Professor Amy Schmitz, who teaches arbitration law at the University of Colorado School of Law, has been following the successive failed attempts to get the Arbitration Fairness Act passed in Congress.

"Every year it gains more and more momentum. With the changes in Congress this year, there is some buzz going around that this is the year," Schmitz said.

"But I think Congress has bigger fish to fry right now. I don't know how much time is going to be devoted to the Arbitration Fairness Act with everything else that's going on."

If the bill were to pass, Murray said, it would change a Colorado tradition. Unlike most state constitutions, Colorado's specifically protects arbitration, a practice that dates back to the mining camps of Colorado's early days. The miners, having no courts or judges in their camps, established their own arbitration systems to settle disputes.

"Arbitration has a long history in Colorado," Murray said. "This would be a pretty dramatic change."