Arbitration Under Attack

Improving Process Better than Uncertainty, Costly Litigation

Arbitration is an alternative forum to resolve disputes outside of civil court. There is no question that arbitration is more efficient and less costly for both parties, because the rules of evidence and procedure are less formal than in civil litigation, meaning the setting is less intimidating for individuals who may not be represented by legal counsel.

Both the Federal Arbitration Act (FAA) and California law favor the use of arbitration, and the FAA broadly protects against any state judicial or legislative effort to invalidate arbitration agreements.

BACKGROUND

Each year, special interests attack arbitration with legislation to prohibit the enforcement of arbitrated agreements. Trial attorneys and organized labor sponsor or support these measures for separate reasons.

The trial lawyers oppose the quicker and more efficient resolution of cases, which reduces the opportunity to generate attorney's fees. Since arbitration agreements also contain class action waivers (meaning the claim must proceed individually rather than as a class of plaintiffs), the consumer attorneys generate fewer fees.

Even though organized labor widely utilizes mandatory arbitration clauses in collective bargaining agreements, it opposes extending this tool to private employers in a non-union setting.

FEDERAL PREEMPTION

The FAA was enacted in 1925, re-enacted in 1947, and precludes any limitation on arbitration. Since 1984, the U.S. Supreme Court has time and again explicitly declared that any state statute which seeks to ban, limit, preclude, discriminate against, or interfere with the use of arbitration agreements is preempted under the FAA.

As clarified by Justice Elena Kagan in a 2017 Supreme Court decision, *Kindred Nursing Centers Ltd. Partnership v. Clark*, the FAA not only enshrines the enforcement of existing arbitration agreements, but also protects against rules that interfere with how those agreements are made.

POLICY ARGUMENTS REGARDING ARBITRATION

Given the decade-long legislative debate over arbitration, the policy arguments have been fully aired. Here are the main charges against arbitration and the well-documented responses:

• **Arbitration Denies Employees and Consumers Substantive Rights**.

False. Opponents make this argument ad nauseum, substituting repetition for accuracy. Courts have repeatedly and consistently stated that an arbitration agreement which seeks to waive any substantive right (such as a right to equal pay, protection from discrimination or harassment, or exemption from a statute of limitations) is invalid and unenforceable.

• **Arbitration Is Biased against Consumers and Employees**.

False. Opponents of arbitration argue that the deck is stacked against plaintiffs, and employers are more likely to win. Studies on this issue are mixed, some suggesting employees/consumers do the same if not better in arbitration than they do in civil litigation, while others disagree. Often overlooked, however, is that individuals can have better access to arbitration than to civil litigation. Studies have consistently found that low-wage workers and minorities face a significant challenge in finding legal representation for civil litigation. Without arbitration, many individuals in disadvantaged groups would not have access to justice at all.

• **Arbitrators are Paid by the Company and Are Therefore Biased**.

False. California law requires any employer that requires arbitration as a condition of employment to pay for the arbitration. You can't have it both ways—requiring employers to pay for the forum

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and then criticizing them for following the law. Also, each party in arbitration is given the same opportunity to pick the arbitrator after the arbitrator makes extensive disclosures regarding his or her background, unlike civil litigation, where a judge is assigned.

• **Arbitration Does Not Have the Same Rules as Court**.

True—but that's a good thing. Arbitration is less formal than civil litigation, but this does not necessarily benefit or disfavor either party. An unrepresented party in arbitration may be able to more easily navigate those rules than complex statutory rules of evidence and civil procedure.

• **Arbitration Cannot Be Appealed**.

Sometimes true. Arbitration awards cannot be appealed on the same grounds as a court decision, but may be appealed for the following reasons:

- the award was procured by corruption, fraud, or other undue means;

- corruption by the arbitrator;

- if misconduct by the arbitrator substantially prejudiced the rights of the party;

- the arbitrator exceeded his/her powers and it affected the merits of the decision;

- the rights of the party were substantially prejudiced due to the arbitrator's refusal to postpone a hearing or consider evidence; or

- the arbitrator failed to make a timely disclosure. The limited grounds for appeal ensure that arbitration is an efficient forum that provides a quicker and definitive resolution so that both parties are not stuck in civil litigation for years.

LEGISLATIVE ATTACKS IN 2019

Despite the strong federal preemption in this policy area, the 2019 Legislature will inevitably propose banning, limiting, or interfering with arbitration agreements. Given the political power of the arbitration opponents, these bills may pass the Legislature. If signed, such proposals will be challenged immediately and likely meet the same fate as previous attempts to limit arbitration.

For example, AB 2617 (Weber; D-San Diego) was signed into law in 2014 and prohibited mandatory arbitration agreements for certain civil rights violations. It was deemed unconstitutional and preempted in 2018 by *Saheli v. White Memorial Medical Center*.

CALCHAMBER POSITION

Legislation seeking to limit, interfere with, or prohibit arbitration agreements violates federal law and is counterproductive to protecting the rights of consumers and employees. Rather than offering any useful protections or reforms, such legislation on the contrary creates uncertainty and ultimately costly litigation. Stakeholders should instead consider legislation that improves the arbitration process for all parties without running afoul of federal law.

Staff Contact
Jennifer Barrera
Executive Vice President

jennifer.barrera@calchamber.com
January 2019