

_____, 2009

Re: Arbitration Fairness Act of 2009, H.R. 1020 and Arbitration Fairness Act of 2007, H.R. 3010 and S. 1782

Dear _____:

This letter is submitted on behalf of _____ and its more than _____ members. We {describe organization or reason for interest}

Or

I submit this letter to express my concern {pick up with regarding below}

We write to express our concerns regarding the Arbitration Fairness Act of 2009, H.R. 1020 introduced in the 111th Congress. We also address a version of the Arbitration Fairness Act that was introduced in the 110th Congress since similar legislation may be reintroduced in the Senate and provisions which were deleted in the House of Representatives current bill may be reinserted in the course of the legislative process.

Arbitration is a dispute resolution process that has been used by civilized societies to resolve disputes for over 2,000 years. The growth of arbitration in the United States began with the passage of the Federal Arbitration Act (“FAA”) in 1925. Surveys and experience have repeatedly demonstrated that arbitration is the preferred dispute resolution mechanism in many commercial transactions as it typically resolves disputes flexibly, efficiently, privately and relatively amicably with the benefit of adjudicators with specific, relevant expertise. In international transactions, arbitration is the standard dispute resolution mechanism because it also allows parties to select a neutral forum and to enforce awards across borders much more easily than court judgments. Arbitration also relieves our increasingly overburdened and underfunded courts.

It is critical that any legislation enacted be carefully drafted to protect the classes Congress seeks to protect without inadvertently crippling arbitration as an effective national and international commercial dispute resolution process.

We write to suggest that the legislation as currently proposed would have profound and unintended consequences for all forms of domestic and international arbitration and could lead to grave and harmful impacts on U.S. activity in international commerce. It would cause untold delays and additional costs and alter the economics of commercial transactions. If the AFA becomes law, the U.S. will no longer be viewed as a friendly forum for international arbitration, as has already been noted by prominent foreign arbitration practitioners, see e.g., Emmanuel Gaillard, *International Arbitration Law*, New York Law Journal, April 4, 2008. Parties engaged in international commerce are likely to shun U.S. businesses for fear of being dragged into U.S. domestic courts or finding that their arbitration agreement is deemed to be invalid. In today’s world of globalization, U.S. companies can ill afford to be at such a competitive disadvantage. Both domestic and international arbitration would be chilled in a manner neither intended nor necessary to achieve Congressional objectives.

The concerns with regard to arbitration that Congress seeks to address have not gone unrecognized. Many consumer and employee plans already contain procedural safeguards. Institutional providers and concerned agencies have adopted protocols such as the Consumer Arbitration Due Process Protocol and the Employer-Employee Arbitration Due Process Protocol. The states and the courts continue to actively address concerns about arbitration fairness.

If Congress concludes that federal legislation is required to ensure arbitration protections for designated classes, such legislation can be crafted to both preserve commercial arbitration and afford such protection. We urge that Congress take care to do so. Such a remedy would at the same time avoid unnecessarily burdening the already overburdened courts who in the wake of the current economic crisis are already beginning to suffer budget cuts to already inadequate budgets.

Specific Objections to the AFA

1. **Sowing Confusion Regarding FAA Chapter One.** Since its enactment in 1925, Chapter One of the FAA has provided a stable and consistent legal framework for arbitration in the U.S. Chapter One has benefited from judicial construction, scholarly analysis and practical application. It sets out the United States' fundamental policy regarding arbitration. To avoid diluting this policy or creating confusion and unnecessary litigation regarding the interpretation of Chapter One in the large number of cases to which it applies, any caseload specific modifications or carve outs should be located elsewhere in the Code. This method has been utilized by Congress for similar legislation and allows for tailoring the legislation to address the needs of the specific class protected. *See, e.g.*, 15 U.S.C. § 1226 (motor vehicle franchises); 7 U.S.C. § 197c (poultry growers); and 10 U.S.C. §987 (credit for military personnel). Moreover, the legislative findings which now preface the AFA would undermine the rationale and deference accorded to arbitration generally and could be argued to call into question for all arbitrations the underpinning of established judicial precedents. Accordingly, we oppose the framing of legislation to protect discrete parties as an amendment of Chapter One of the FAA and strongly urge Congress to locate this legislation elsewhere in the Code, perhaps as Chapter 4 of the FAA. ***[A separate letter more fully addressing this point accompanies this letter.]***

2. **Overruling Settled Law Balancing Roles.** The AFA's section 2(c) would alter settled law that balances arbitrator and court roles and makes arbitration possible. 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, viewed as the conceptual cornerstones of arbitration, promote efficiency in the arbitration process by providing arbitrators with the first opportunity to decide jurisdictional challenges that are not based specifically on the arbitration clause itself. *See, e.g., Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 (1967), *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006). Yet the AFA would invest the U.S. courts with sole authority to determine the validity of arbitration agreements, "irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement." This would be a monumental change in arbitration law. As a practical matter, it would mean that the arbitrator would have to halt the proceedings if a party merely alleged that the contract was for any reason—fraud, duress, incapacity, breach or any other of the many grounds frequently raised in a contract dispute—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. The AFA would thus make the courts the gatekeepers of virtually all arbitrations as parties that consented to arbitrate when entering into the contract, when faced with an actual dispute, choose to delay the

proceedings. The AFA would inflict a tremendous additional burden on the courts and frustrate the efficiency for which the parties contracted.

3. Overbroad Invalidation of Arbitration Agreements. The AFA's proposed amendment to section 2(b)(2) of the FAA would void any pre-dispute arbitration agreement if it requires arbitration of a "dispute arising under a statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power." The AFA does not specify which statutes this language implicates. It arguably includes multiple U.S. and even foreign statutes. While H.R. 1020, as introduced in the 111th Congress deleted the reference to "parties of unequal bargaining power," the continued inclusion of "civil rights statutes" may enable creative litigants to assert a claim under a statute argued to fall within this rubric and gain the consequences of the AFA. Under the AFA, a litigant's mere invocation of such a statute—even if the statutory claim is without merit—would apparently invalidate an otherwise fully enforceable arbitration clause.

4. Invalidation of Franchise Arbitration Agreements. The AFA would invalidate pre-dispute arbitration clauses in franchise disputes. Franchises constitute a vast sector of both domestic and international businesses. Many franchising relationships are substantial in size with sophisticated parties on both sides. Arbitration can be essential to maintain the quality and integrity of the franchise brand for the benefit of both franchisor and franchise. In the international arena arbitration is particularly critical to protect U.S. franchisors from being forced into unfamiliar foreign courts that may favor the local party.

5. Invalidation of Consumer Arbitration Agreements— We are mindful of the desire to promulgate legislation that is tailored to protect consumers. However, we urge that careful consideration be given to all potential remedies to arrive at the optimal solution and that in addition to invalidation consideration be given to (i) providing for fairness through procedural safeguards, which could include adequate notice, an equal voice in the selection of neutral and impartial arbitrators, responsibility only for limited and reasonable costs of the arbitration, arbitrations that take place at a locale near the consumer and reasonable discovery, (ii) providing consumer opt-outs or opt-ins, (iv) establishing a monetary threshold, or other means. We urge that the review include an analysis of (a) whether the courts are already adequately dealing with the issue, (b) the ability of the courts to absorb the increased case loads, (c) whether increased funding would be required for the courts, and (d) the impact of the legislation on other matters before the courts not subject to arbitration.

6. Invalidation of Employee Arbitration Agreements – Although we are also mindful of the desire to promulgate legislation intended to protect employees, we oppose Section 2(b)(1) because it is overbroad as currently drafted in its application to all employment agreements, an area in which arbitration has historically played a significant and socially useful role. The AFA would invalidate pre-dispute arbitration provisions in employment agreements between sophisticated parties with significant bargaining power who actively negotiate and freely enter into agreements containing arbitration provisions. For example, it is commonplace in mergers and acquisitions, closed family corporations, professional practices and cross border employment agreements to include a negotiated arbitration clause. It is urged that the AFA be altered so as not to encompass such situations and that the analysis urged for consumers be conducted to arrive at the optimal solution for appropriate classes of employees.

Alternative Approaches

While the AFA aims to protect domestic consumers and employees, as drafted it threatens far-reaching and significant damage to U.S. interests. U.S. businesses engaged in a

domestic dispute will suffer from an inability to effectively exercise contractual rights to arbitrate. U.S. parties engaged in international commerce may find themselves at a competitive disadvantage and increasingly forced to accept foreign law in contracts and non-U.S. court forums to resolve disputes as the U.S. becomes known to be hostile to arbitration. It need not be this way. Legislation appropriately drafted outside Section One of the FAA could accomplish the AFA's goals without any these grave and harmful consequences.

The _____ [I] appreciate[s] this opportunity to share its [my] concerns regarding the AFA and similar legislation. If you or your staff have any questions or would like to meet and discuss these issues, please call _____ or e-mail _____. Thank you for your consideration.

Respectfully submitted,
