

Naimark Draft 2-24-09- re amending the Arbitration Fairness Act – letter limited to addressing not amending the Federal Arbitration Act

_____, 2009

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

_____:

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

Or

I submit this letter to express my concern with regard to legislation concerning arbitration. {pick up below]

Arbitration for decades has been a mainstay of the business community for the resolution of business disputes. The FAA was promulgated in 1925 to formalize a business dispute resolution practice dating to pre-revolutionary times. In the ensuing decades, Federal Courts have filled out the contours of the use and enforceability of arbitration through a series of significant decisions, reaffirming a strong national policy of favoring arbitration for business disputes. So important is the precedent and legal reasoning related to the FAA that it is widely recognized domestically and emulated internationally, viewed as a testament to a successful collaborative functioning of courts and the arbitration process.

Several bills introduced in the last session of Congress with the intent of providing protection for consumers and employees, if passed into law in their current form would amend the Federal Arbitration Act. This would be a serious mistake and could cause harm to 80-plus years of thoughtfully developed federal law and impact the fundamental use of arbitration. By amending the Federal Arbitration Act (FAA), these bills would strike an economic blow to the USA, by disrupting a reliable and trusted business dispute resolution system. The legislative findings critical of arbitration which now preface these bills could 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. The Arbitration Fairness Act of 2009, H.R. 1020, introduced in the 111th Congress, the Arbitration Fairness Act of 2007, H.R. 3010 and S. 1782 and the Fairness in Nursing Home Arbitration Act of 2008, S. 2838 and H.R. 6126, bills introduced during the last Congress, could accomplish their goals without damage to the body of law surrounding the Federal Arbitration Act, through codification in a separate Chapter 4 within Title 9 of the U.S. Code, a chapter which would be dedicated exclusively to the use of arbitration for consumer, employment, and healthcare disputes.

Amending the FAA has the potential to unravel the reliability and predictability of business dispute resolution in this country and create confusion and unnecessary litigation regarding the interpretation of Chapter One in the large number of cases to which it applies. Surveys and experience have repeatedly demonstrated that arbitration is the preferred dispute resolution mechanism in many commercial transactions. Arbitration typically resolves disputes flexibly, efficiently, privately and relatively amicably. It enables parties to choose adjudicators with specific, relevant expertise.

In international transactions amending the FAA will be particularly harmful as it will send a message to foreign investors and businesses that the U.S. is becoming a jurisdiction hostile to arbitration. This would be an economic blow as businesses conducting cross-border transactions rely heavily on arbitration to resolve disputes. Arbitration permits parties from different countries to choose a neutral forum, and may be the only way in which U.S. parties can avoid having disputes resolved in foreign courts that may be biased against them. Furthermore, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the “New York Convention”) makes arbitration awards far more enforceable than court judgments. By amending Chapter One of the FAA the United States would not only stop being the world leader, but would effectively remove itself from the international business dispute resolution community and U.S. businesses may be hampered in their ability to successfully compete against foreign entities.

Consumer and employment (non-collective bargaining) arbitration are a relatively recent phenomenon, which have given rise to concerns about imposed contract language which in some instances may be viewed as disadvantaging consumers and employees. The legal dynamic is distinct from business to business matters. Yet because they are currently processes described as “arbitration” subject to the FAA, they cause tension for the integrity of a balanced arbitration law in the business context. We must face the reality that business arbitration is markedly different from consumer and employment arbitration.

The easiest way to protect the Federal Arbitration Act from these unintended consequences is the creation of a new, separate chapter within Title 9 of the U.S. Code, as noted above. This “Chapter 4 solution” would simply codify the legislation differently, without having a direct impact on the substance of any bill. This approach would be consistent with Congressional enactments in other circumstances and would allow for legislation specifically tailored to address the needs of the specific class to be protected. *See, e.g.*, 15 U.S.C. § 1226 (motor vehicle franchises – opt in and tailored due process provisions); 7 U.S.C. § 197c (poultry growers- opt-out and opt-in and tailored due process provisions); and 10 U.S.C. §987 (credit for military personnel – invalidates pre-dispute arbitration agreements).

While the substance and merits of various legislative proposals related to the use of arbitration in consumer, employment and healthcare can be argued, there is no compelling rationale to amend the core FAA in Chapter One. Indeed it may be argued that a separate Chapter 4 would be a stronger protection for consumers and employees in the event of passage because consumer and employee arbitration would have their own, separate, dedicated statute, unadulterated by tangential business dispute resolution law and decisions.

We ask that you work with other members of Congress to ensure that any language introduced would instead be codified in a new Chapter 4 of Title 9, and that if any legislation is introduced and moves forward through subcommittee or committee, that you seek to amend the bills to ensure such codification.

The _____ appreciates this opportunity to share its concerns regarding this arbitration legislation. If you or your staff have any questions or would like to meet and discuss these issues, please call _____ Thank you for your consideration.

Respectfully submitted,