ADHESION ARBITRATION AGREEMENTS AND THE RUAA

Introduction

Encouraged by recent Supreme Court and appellate court opinions broadening federal arbitration law under the Federal Arbitration Act (FAA), many businesses have incorporated arbitration provisions in customer, employment and franchise contracts. Binding arbitration clauses are now a common feature of banking, credit card, financial, health care, insurance, and communication service agreements, and agreements for the sale of consumer goods. Such agreements often do not involve arm's-length negotiation, but consist of terms presented on a take-it-or-leave-it basis -- a classic indicium of the contract of adhesion. Boilerplate arbitration provisions raise particular fairness concerns, since they replace the right to go to court with a private adjudication system of which the consumer or employee may be unaware until she seeks legal redress. While "the speed and economy of arbitration ... could prove helpful to all parties," a private arbitration process may also fall short of parties' reasonable expectations of fairness and have a dramatic impact on consumers' substantive rights and remedies. The range of concerns raised by arbitration agreements in consumer or employment transactions include awareness of the arbitration agreement and of waiver of the right to trial; access to information about the arbitration program; the independence and impartiality of decision-makers, and of the administering institution, if any; the quality of the process and the competence of arbitrators; the cost, location, and time frame of arbitration; the right to representation; the fundamental fairness of hearings; access to information (discovery); the nature of arbitral remedies, including the availability of punitive damages in cases where they would be available in court; the availability of class actions, and the scope of judicial review of arbitration awards. On another level, some express alarm at the possibility that whole categories of contract-related disputes, including statute-based claims, will disappear from the court system into a private realm of justice and prevent further evolution of the law and effective oversight of decisions.

Such concerns are increasingly reflected in decisional law. While courts often sublimate such concerns to the principles of freedom of contract and "ascribed intent," a growing number appear to more closely scrutinize arbitration agreements in consumer and employment contracts.[1]/ Some arbitration providers and other groups have responded by promulgating rules that are designed to regulate arbitration and ADR procedures in special contexts. A growing trend is the evolution of fundamental due process standards for arbitration through the consensual efforts of broad-based groups representing affected public and private interests.[2]/

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[1]/ *See, e.g.,* Palladino v. Avnet Computer Tech, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns Int'l Security Serv., 105 F.3d 1465 (D.C. Cir. 1997); Broemmer v. Abortion Serv. of Phoenix. Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992); Engalla v. Permanente Med. Grp., 938 P.2d 903 (Cal. 1997).

[2]/ *See* Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship; National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems (May 21, 1997); National Consumer Disputes Advisory Committee, Due Process Protocol for Mediation and Arbitration of Consumer

Response of Drafters of the RUAA

In revising the Uniform Arbitration Act, the Drafting Committee's options were significantly limited due to the preemptive effect of the Federal Arbitration Act, (FAA),[3]/ which governs arbitration agreements in the vast range of transactions involving interstate commerce. The FAA provides that "a written provision ... to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[4]/ It preempts conflicting state law respecting the enforceability of agreements to arbitrate,[5]/ and, as such, dramatically limits meaningful choices for drafters addressing adhesion contracts under the UAA.[6]/ Legislation establishing enhanced formal requirements for arbitration agreements also runs afoul of the FAA. In Doctor's Associates. Inc. v. Casarotto, *supra*, the Supreme Court enforced an arbitration agreement under the FAA, preempting a Montana statute which required that "[n]otice that a contract is subject to arbitration ... shall be typed in underlined capital letters on the first page of the contract." 517 U.S. at 688. Therefore, the enforceability of arbitration agreements cannot be treated any differently from the enforcement of contracts generally under state contract law.

The Drafting Committee avoided specific references to consumer, employment or adhesion contracts in the RUAA. However, the Committee did elect to make certain rights non-waivable, such as the right to be represented by an attorney prior to the proceeding or hearing.[7]/ Section 6 of the RUAA encourages courts on a case-by-case basis to deny enforcement to arbitration agreements on "grounds that exist at law or in equity for the revocation or invalidation of any contract." At the Committee's direction, the Reporter added a lengthy Comment to section 6, which describes court decisions which void contracts of adhesion on the ground of unconscionability. Additionally, the Comment cites various due process protocols negotiated by affected public and private industry groups that are available to courts in addressing the unconscionability of contracts of adhesion.[8]/

Disputes (1998); Due Process Protocol for Mediation and Arbitration of Health Care Disputes (1998).

[3]/ 9 U.S.C. §§ 1-16.

[4]/ *See id., §* 2.

[5]/ *See* Doctor's Associates v. Casarotto, 116 S.Ct. 1652, 1656 (1996); Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995); Perry v. Thomas, 482 U.S. 483 (1987).

[6]/ The U.S. Supreme Court has declared that the FAA preempts state legislation excluding or denying enforcement to arbitration agreements. See Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 281 (1995)(FAA preempts Alabama law denying enforcement to pre-dispute arbitration agreements).

[7]/ " See RUAA § 27, Tentative Draft of May, 1999.

[8]/ I See note 2 *supra.*