

## Client Alert

### Federal Legislation Rendering Certain Arbitration Clauses Unenforceable

Any business that uses arbitration clauses in employment, consumer, and franchise contracts or agreements should be aware that legislation is pending in both the United States House of Representatives and Senate which would render certain predispute arbitration agreements unenforceable. If enacted, such legislation could cause great uncertainty with regard to the method of dispute resolution to be used in certain disputes or claims and could increase litigation expenses for those businesses that utilize arbitration. Specifically, this legislation would amend the Federal Arbitration Act<sup>1</sup> to invalidate and render unenforceable any predispute arbitration agreement requiring the arbitration of an employment,<sup>2</sup> consumer,<sup>3</sup> or franchise dispute.<sup>4</sup>

H.R. 3010, the "Arbitration Fairness Act of 2007" introduced by Rep. Hank Johnson of Georgia has 70 cosponsors including the Chairman of

the House Committee on the Judiciary, the Committee of jurisdiction in the House of Representatives. Sen. Russell Feingold has introduced companion legislation (S. 1782) in the Senate which has six cosponsors including the Chairman of the Senate Committee on the Judiciary, the Committee of jurisdiction in the Senate. The Subcommittee on Commercial and Administrative Law (CAL) held a hearing on H.R. 3010 on October 25, 2007.

In his testimony before the CAL Subcommittee, Professor Peter Rutledge, Associate Professor of Law at the Columbus School of Law, Catholic University of America, concluded that H.R. 3010's enactment "likely would increase the costs of dispute resolution, and a portion of these costs would be passed onto employees (in the form of lower wages), consumers (in the form of higher prices) and investors (in the form of lower share prices)." Various business groups, including the U.S. Chamber of Commerce and the International Franchise Association, oppose this legislation, while various consumer groups, such as Public Citizen, and employee rights groups, such as the National Employment Lawyers Association, support this legislation.

<sup>1</sup> 9 U.S.C. §2 provides that "a written provision . . . in any contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."

<sup>2</sup> An "employment dispute" is defined as "a dispute between an employer and employee arising out of the relationship of employer and employee as defined in the Fair Labor Standards Act".

<sup>3</sup> A "consumer dispute" is defined as "a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit".

<sup>4</sup> A "franchise dispute" is defined as "a dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which –

"(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

"(B) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

"(C) the franchisee is required to pay, directly or indirectly, a franchise fee".

This document, released on 02/19/08, is intended to provide you with general information about issues related to federal legislation rendering certain arbitration clauses unenforceable. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed below or your regular Brownstein Hyatt Farber Schreck, LLP, attorney. This communication may be considered advertising in some jurisdictions.

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