New York State Bar Association
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Memorandum in Opposition

DISPUTE RESOLUTION SECTION

DR # 2 March 22, 2018

THE DISPUTE RESOLUTION SECTION OPPOSES THIS LEGISLATION

A. 9505-C **By: BUDGET**
Assembly Committee: Ways and Means

S. 7848-A, Part B **By: BUDGET**
Senate Committee: Rules

We oppose the language in Section 6 that would amend CPLR 7504 (1), regarding the appointment of an arbitrator, because we believe that this area should be controlled by the contract between the parties to the arbitration.

Parties to an arbitration agreement, especially in the insurance industry, typically want to have two non-neutral arbitrators and a neutral Umpire, and specify such in their contractual agreement. They should be free to make that provision, as a business decision.

In addition, we oppose the language in Section 8 that would amend CPLR 7507 (a), requiring that the arbitrator shall, in writing, "state the issues in dispute and contain the arbitrator's findings of fact and conclusion of law. Such award shall contain a decision on all issues submitted to the arbitrator…."

Parties to an arbitration contract may not want to bear the extra expense of having arbitrators draft findings of fact and conclusions of law in all matters, especially consumer cases and those of lesser dollar value. Parties should be free to choose what type of award they wish. Requiring arbitrators to separate out fact findings and legal conclusions will lead to high costs, delay; that is contrary to what the parties bargained for, especially in low value cases. In large, complex cases, arbitrators almost always provide a full explanation of reasons.

Further, we oppose the language in Section 9, regarding CPLR 7511, providing that "the arbitrator evidenced a manifest disregard of the law in rendering the award."

"Manifest disregard of the law" is a much-maligned standard for vacating an arbitration award. The Uniform Arbitration Act eliminated this standard and virtually no states use it. New York would become an outlier if it adopted this provision. It is a vague and imprecise criterion that can mean different things to different people. The New York Court of Appeals recognizes that the limited scope of this federal doctrine applies in New York state courts (*Wien & Malkin LLP v. Helmsley-Spear,Inc.*, 6 N.Y.3d 471, 481 (2006). The U.S. Court of Appeals for the Second Circuit sitting in New York has virtually eliminated this doctrine as a way to overturn an arbitration award—*See, Zurich American Insur. v. Team Tankers*, 811 F.3d 584, 589 (2d Cir. 2016). Adding a state ground to the accepted federal ground could only lead to uncertainty that is inimical to parties' interests in arbitration.

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S. 7848-A, Part B **By: BUDGET**
Senate Committee: Rules

We oppose the current bill language proposed § 398-f (c), which states, "The term 'prohibited clause' shall mean any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parities submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice or sexual harassment." The language should provide for instances where such clause is inconsistent with federal law. This will make the Senate bill mirror the Assembly language on this subject (see, proposed CPLR amendment for § 7511) and ensure that a Federal Court does not declare this section of the law invalid see (*Kindred Nursing Ctr.s Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017)).

Based on the foregoing, the Dispute Resolution Section OPPOSES this legislation.