New York State Bar Association
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Memorandum in Opposition

DISPUTE RESOLUTION SECTION

DR # 3 April 20, 2018

A. 10393 By: M. of A. Weinstein
Assembly Committee: Judiciary

AN ACT to amend the civil practice law and rules, in relation to the appointment of an arbitrator

LAW AND SECTIONS REFERRED TO: Section 7504 of the civil practice law and rules

THE DISPUTE RESOLUTION SECTION OPPOSES THIS LEGISLATION

The Dispute Resolution Section submits this memoranda to emphasize that, despite problems that may exist with forced arbitration in the consumer or employment realm, this bill is overbroad so that it overrides freedom of contract for sophisticated businesses in business-to-business matters.

New York is one of the world's preeminent arbitration centers for commercial disputes and any legislation should consider its impact on New York's position.

We oppose this bill, which 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.

We also object to the proposed change to Section 7504 (c) (3) in that it may be read to preclude the current situation whereby the arbitration administrator (for example, the American Arbitration Association or JAMS) resolves objections by a party to any arbitrator being on the Panel. The proposed amendment unnecessarily puts into court a dispute regarding an arbitrator's disclosure that need not go to court but is currently resolved by the administrative agency. (See AAA Commercial Rule R-18 (c).

Also, proposed CPLR Section 7504 (c) (5) should read that waiver occurs prior to the commencement of the preliminary hearing, if not made. There is no rational reason to allow the parties to "hold" their objections until after all discovery has taken place, as a strategic move to upset the process and manipulate the composition of the panel.

In addition, we oppose the language 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. Also, many arbitrations do not involve legal issues (only factual disputes) so requiring conclusions of law may create unnecessary difficulties. In large, complex cases, arbitrators almost always provide a full explanation of reasons.

Further, we oppose the language 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.

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