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The Future of International Arbitration Under the FAA

Roger Alford (General Editor) (Notre Dame Law School) · Friday, February 6th, 2009

Questions regarding the future of the FAA are no longer of passing concern. With a Democratic President and a Democratic Congress, there is a significant likelihood that some version of the proposed "Arbitration Fairness Act" will become law. As one prominent academic said to me this weekend, "The worst part about Obama getting elected is that he's going to destroy the FAA."

So what exactly is at stake? Berkeley law professor David Caron does a nice job in the most recent issue of World Arbitration and Mediation Review discussing the future of international arbitration under the Federal Arbitration Act if the proposed legislation becomes law. In his article, Caron argues that the language in the proposed legislation arguably would overturn the severability doctrine and undermine the doctrine of *kompetenz-kompetenz*.

Although Caron outlines how these changes might be interpreted to exclude international arbitration, he nonetheless concedes that absent an express carve-out, we face a potential future in which the United States will no longer be viewed as a favorable venue for international arbitration. "[D]espite its aims of reforming domestic arbitration, a 2009 Fairness in Arbitration Act could discourage the growth and use of the United States as a seat of international commercial arbitration and diminish the competetive advantages of American firms transacting abroad."

While the solution may be an international arbitration carve-out, I have my doubts that such an exception will be easily accepted. The forces of globalization are such that consumer groups fear unequal bargaining power wherever they see it, and from their perspective a generic exclusion for all international commercial arbitration could create a giant loophole that virtually any drafter of an adhesion contract could exploit. For example, Dell currently has an arbitration clause in its Terms and Conditions of Sale providing for arbitration of any dispute regarding the sale of its computers with the arbitration proceedings to be held in Austin, Texas and subject to the laws of Texas. But if the proposed changes to the FAA go into effect with an international carve-out, what is to prevent Dell from simply modifying its terms and conditions and specifying that arbitration shall be held in Vancouver, Canada and governed by the laws of British Columbia? Wouldn't such an arbitration fall under an international arbitration carve-out, and if so won't consumer groups fight tooth and nail against any effort to include such an exception?

If the momentum for proposed changes to the FAA continues, the real question may be how we can preserve the status quo for arbitrations created pursuant to negotiated international transactions, while not creating an exception that swallows the rule.

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