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American Anti-Arbitration Legislation – A Threat?

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Just over one week ago, two pieces of anti-arbitration legislation – the Arbitration Fairness Act of 2009 (H. R. 1020) and the Consumer Fairness Act of 2009 (H. R. 991) – were formally introduced in the U.S. House of Representatives. Both acts would limit the ability to arbitrate consumer disputes, and the Arbitration Fairness Act also would limit the ability to arbitrate employment disputes, franchise disputes, and disputes arising under statutes designed to protect civil rights. Nearly identical versions of these acts were introduced in 2007 but failed to make it past the committee stage. The introduction of these acts has led many members of the international arbitration community to ask whether they are likely to pass this year and, if so, what implications this would have for international commercial arbitration.

The Arbitration Fairness Act of 2009 would amend the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to invalidate arbitration agreements requiring the arbitration of (1) employment disputes, (2) consumer disputes, (3) franchise disputes, or (4) disputes arising under any statute intended to protect civil rights. Section 4(4) of the Act would also amend the Federal Arbitration Act to state that "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement." Unlike the 2007 version, this Act does not cover all disputes arising under statutes that "regulate contracts or transactions between parties of unequal bargaining power" (a controversial provision that could have extended its scope significantly). At present, the Act has 36 co-sponsors, of which only one is a Republican. Other representatives, especially Democrats, likely will join as co-sponsors in the coming months, as the nearly identical Arbitration Fairness Act of 2007 had 103 co-sponsors (99 Democrats and four Republicans).

The Consumer Fairness Act of 2009 also targets arbitration clauses in consumer contracts. Specifically, it would amend the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., to prohibit the use of arbitration clauses in consumer contracts. This would include boilerplate arbitration clauses in consumer contracts and arbitration clauses that both parties specifically agreed to at the request of one of the parties to the transaction. Representative Luis Guitierrez (D–Illinois), the sponsor of the Consumer Fairness Act of 2009, framed the Act as a weapon against predatory lending when he introduced it, stating that "[t]his legislation will help to level the playing field in the fight against predatory lending practices by giving consumers access to the courts and to class action lawsuits in order to address these unfair practices in an environment free of bias."

So do these acts stand a better chance of passing this year than in 2007? Almost certainly yes. First, the Democrats now control both the executive and legislative branches of the U.S. government, and these bills likely will benefit from strong Democratic support. While President Obama's position on these acts is unclear, as a senator he co-sponsored several pieces of legislation that contained anti-arbitration language similar to some of the language found in the Arbitration Fairness Act of 2009 (e.g., the Servicemembers Access to Justice Act of 2008 and the Civil Rights Act of 2008), so it is conceivable that he might support this legislation. Second, the global economic crisis and resulting anti-corporatism have created a political atmosphere where it is more likely than in the past that legislation designed to level the playing field between individuals and corporations, especially with respect to practices like predatory lending, will pass.

If they pass, will these acts have a significant impact on international commercial arbitration? That remains to be seen and will depend on the acts' final text. The acts themselves do not cover traditional disputes between sophisticated commercial parties, so at first blush their potential impact on international commercial arbitration does not appear to be drastic. That said, as Roger Alford pointed out in an earlier post, some commentators are worried about the effect that legislation of this sort could have on the separability and kompetnz-kompetnz doctrines (and on U.S. Supreme Court precedent like Buckeye Check Cashing). The language of Section 4(4) of the Arbitration Fairness Act of 2009 is particularly troubling in this regard.

In their current form, the Arbitration Fairness Act of 2009 and the Consumer Fairness Act of 2009 betray a skepticism about the arbitral process that is out of step with several decades of developments internationally and in the U.S. and that contradicts the New York Convention. More nuanced alternative legislation could be drafted to accomplish some of the goals of these acts without undermining key arbitral doctrines in the process. A first step in this direction would be the elimination of Section 4(4) of the Arbitration Fairness Act of 2009 (or, at a minimum, limiting it to the types of disputes covered by the Act and to domestic arbitration). If members of the international arbitration community make our voices heard and educate Congress, changes of this sort might be made and better legislation may emerge.

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