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International Arbitration Practice
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Pending Bills Threaten International Arbitration

A subcommittee of the Judiciary Committee of the US House of Representatives approved three bills on July 15, 2008, that would amend or restrict the Federal Arbitration Act. The proposed legislation is of significant concern to companies that rely on international arbitration to ensure a neutral forum to resolve international commercial and investment disputes.

Of these bills, the most far-reaching and threatening to international arbitration is the so-called Arbitration Fairness Act (H.R. 3010/S. 1782). The proposed legislation is troubling in several respects. First, the bill would eliminate pre-dispute agreements to arbitrate "employment," "consumer" and "franchise" disputes—thus affecting a broad swath of the US economy. Moreover, it would invalidate pre-dispute arbitration clauses relating to disputes involving "any statute" that "regulate[s] contracts or transactions between parties of unequal bargaining power," an even broader and more poorly defined category of disputes with potentially serious adverse consequences for US companies engaged in international trade and investment.

The particular thrust of the Arbitration Fairness Act is to invalidate pre-dispute agreements to arbitrate the disputes to which it applies, and to reserve to the courts, and not to arbitrators, the exclusive jurisdiction to determine "the validity or enforceability of an agreement to arbitrate." If applied to an agreement to arbitrate that is subject to the New York Convention or similar treaties, these provisions would risk violating longstanding treaty obligations of the United States and ensure that every arbitration is a complex and inefficient mix of litigation and arbitration.

The availability of a neutral forum, free from the local bias assumed in national courts, and the ability to invoke well-established law to enforce arbitral awards in most countries has made arbitration an essential tool of globalized commerce. The Arbitration Fairness Act threatens that tool. Among other things, it risks invalidating international arbitration agreements retroactively, and places the determination of whether arbitration agreements may be enforced in the hands of the very courts whose role arbitration was designed to minimize.

The Arbitration Fairness Act is extremely broad in scope. By its terms, it applies directly to international franchise agreements, making it impossible for parties to agree on a neutral forum for such arrangements. The reference to "any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power," however, is even broader (though less clear). It is possible that such language might be interpreted to ban arbitration of some antitrust claims, thus abrogating *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), which approved of the arbitration of antitrust claims in the international context. As a consequence, the Arbitration Fairness Act could lead to parallel, and highly inefficient, litigation and arbitration of contract claims answered by an antitrust defense. Moreover, the vagueness of the reference to "contracts or transactions between parties of unequal bargaining power" could jeopardize arbitration clauses between many multi-national corporations

and state or private counter-parties around the world. Disruption of the private dispute-resolution system that has evolved over decades to smooth the functioning and reduce the risks inherent in international dealings could have a severe and immediate impact on the ability of US companies to compete in world markets.

By comparison, the other two bills are of less concern because they are confined to more narrow subject matter. H.R. 5312, for example, applies only to disputes involving consumers who buy or lease automobiles, and H.R. 6126 applies to nursing home admission agreements. As such, they are of only limited impact on users of international arbitration. However, like the Arbitration Fairness Act, the measures embodied in these two bills – invalidation of pre-dispute arbitration clauses and vesting of jurisdiction in the courts to determine whether a claim is arbitrable – if applied more generally, could reduce or eliminate the utility of arbitration for US companies and undermine their ability to compete in international commerce.

These three bills will next be considered by the full House Judiciary Committee. Parallel bills for the Arbitration Fairness Act (S. 1782) and the nursing home arbitration legislation (S. 2838) are pending in the Senate. Those two bills have been the subject of Senate committee or subcommittee hearings, and the nursing home bill is expected to be "marked up" by the full Senate Judiciary Committee this month. These developments pose a serious threat to arbitration in general, and to international arbitration in particular. All those concerned with the protection and growth of international arbitration as a tool of global commerce would do well to watch the development of these initiatives carefully in the coming months.

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