New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 25
MONDAY, FEBRUARY 8, 2016

Perspective

Expert Analysis

Proposed Legislation Undermines Business to Business Arbitration

BY NEAL EISEMAN

Last November, The New York Times ran three front-page articles and a follow-up editorial excoriating companies who force their customers and employees to waive their right to proceed in court and instead have their disputes decided in arbitration proceedings where the deck is stacked against them. The articles brought to light that in certain cases the arbitrators who issued final and binding decisions had financial ties to those businesses and, as such, were anything but neutral—something prohibited by the policies and rules of legitimate dispute resolution providers.[1]

The problem is, portions of the Times articles were written so broadly that they criticized arbitration in general, including what is commonly known as "business to business" arbitrations.

Each year, thousands of sophisticated commercial parties voluntarily decide to arbitrate their disputes because arbitration better suits their needs than litigation. They believe, as the Federal Arbitration Act promotes, that a properly administered arbitration (i) saves time and money; (ii) allows someone with expertise in the field of the dispute to decide it; and (iii) provides finality as the award is generally unappealable. It's a quintessential "win-win" because arbitration assists the courts in reducing their heavy caseload and allows businesses to resolve their disputes efficiently and privately.

Now, in an apparent attempt to prevent the type of things reported by the Times, the pendulum is swinging too far and proposed legislation is pending in the New York State Assembly that, as written, goes well-beyond trying to protect consumers and employees from unfair business practices.

Whether intended or not, the proposed bill undermines arbitration as a whole, including "business to business" arbitration. This movement started years ago with a proposed federal legislation known as the "Arbitration Fairness Act" which, as originally drafted, would needlessly have crippled sophisticated parties' freedom to arbitrate.

Business arbitration is often a quintessential "win-win" because arbitration assists the courts in reducing their heavy caseload and allows businesses to resolve their disputes efficiently and privately.

The proposed bill has been submitted to the Assembly Judiciary Committee.[2] Among other things, it seeks to amend New York's Arbitration Statute, CPLR §7500:

- To require the New York State Attorney General to promulgate "regulations" governing all arbitrations.
- To require in all arbitrations that the arbitrator's award contain "findings of fact and conclusions of law."
- To allow a court to vacate an arbitration award where "the arbitrator evidenced a manifest disregard of the law."

Clearly, on their face, these proposals threaten the very form of arbitration that has been legislatively and judicially encouraged and applauded for the last century. Compiling a list of why the bill, as written, is ill-conceived would take pages, but four points immediately come to mind:

- The revisions require our state government to interject itself where it ought not to, and where there is no "public policy" reason to do so.
- They undermine the goals of the Federal Arbitration Act which preempts state law as it applies in the vast majority, if not all, commercial arbitrations in New York.[3]
- They disregard and eviscerate private parties' contractual right to agree upon the type of proceeding and the form of the award they desire.
- Assuming arguendo the bill emerged from the Judiciary Committee and ultimately was enacted with any of these provisions intact, they would be litigated ad nauseam—precisely what arbitration, as a means of alternative dispute resolution, is intended to avoid.

We need to be very careful. Let's not forget that our own Court of Appeals recognizes the long and strong public policy favoring arbitration and promotes it as a way to conserve the time and resources of the courts and the contracting parties.[4]

As part of an effort to eradicate what many consider to be "forced arbitration" imposed by businesses upon consumers and employees, please, let's be careful not to throw the baby out with the bath water.

1. Arbitration provider organizations such as the American Arbitration Association and JAMS promulgate rules to ensure the process is fair for consumers. For example, the American Arbitration Association has rules governing consumer arbitrations to guarantee fairness and impartiality. See e.g., American Arbitration Association's "Consumer Arbitration Rules," Amended and Effective September 1, 2014.

2. The bill (A08191) was introduced on June 11, 2015 by Assemblyman Matthew J. Titone. It would amend CPLR §7500 not only to include new provisions relating to consumers and employees, but it would revise and negatively affect provisions relating to all types of arbitrations, as discussed herein.

3. See e.g., *Cusimano v. Schnurr*, 26 N.Y.3d 391 (2015) (where it was noted that "The Supreme Court has made it abundantly clear that the FAA's reach is expansive" and applies whenever "the particular economic activity at issue affects interstate commerce").

4. See e.g., *Smith Barney Shearson Inc. v. Sacharow,* 91 N.Y.2d 39 (New York 1997) (noting New York Courts interfere "as little as possible with the freedom of consenting parties" to submit disputes to arbitration).

NEAL EISEMAN, *an arbitrator and mediator, is a partner at Goetz Fitzpatrick specializing in construction and real estate law.*