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**REPORT ON LEGISLATION BY THE ARBITRATION COMMITTEE,
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE,
AND INSURANCE LAW COMMITTEE**

A.2301 (AM Dinowitz) / S.3208 (Sen. Comrie) – PROPOSED AMENDMENTS

Prohibits mandatory arbitration agreements in consumer and employment contracts

A.2656 (AM Lentol) – PROPOSED AMENDMENTS

Relates to prohibiting mandatory arbitration clauses in financial product or service contracts

A.3265 (AM Dinowitz) / S.3684 (Sen. Hoylman) – PROPOSED AMENDMENTS

Requires employment and consumer dispute arbitrations to be submitted to neutral third party arbitrators, and establishes prohibited arbitration agreements and provisions

A.3337 (AM Dinowitz) / S.5669 (Sen. Sepulveda) – OPPOSED

Relates to providing for vacation of an arbitration award on the ground that the arbitrator was affiliated with a party, or has a financial interest in a party or the outcome

A.5610 (AM Weinstein) / S.2396 (Sen. Hoylman) – OPPOSED

Authorizes the vacating of an arbitration award on the basis of arbitrator disregard of the law

A.5777 (AM Dinowitz) / S.3754 (Sen. Hoylman) – PROPOSED AMENDMENTS

Relates to prohibiting certain conditions or preconditions of employment

A.7572 (AM Dinowitz) / S.2630 (Sen. Lanza) – PROPOSED AMENDMENTS

Provides that arbitration awards in consumer and employment disputes, where the arbitration is conducted pursuant to a contract, shall include all issues in dispute and findings thereon

EXECUTIVE SUMMARY

These aforementioned bills are opposed because as currently drafted, the bills would (1) be ineffective in protecting employees and consumers in arbitration; and (2) have a substantially negative impact on New York's national and international leadership position in the competitive market for business-to-business arbitration. This Executive Summary provides an overview of the City Bar's opposition and recommendations for protecting consumers and employees in arbitration proceedings while avoiding unnecessary consequences. Please see the enclosed report "Recommendations Concerning Pending Legislation to Ensure New York Continues to Support Long-Established Practices of Business-to-Business Arbitration Proceedings" for more information.

CURRENT APPROACHES	RELATED BILLS	REASONS FOR OPPOSITION	RECOMMENDATIONS
Banning or limiting arbitration clauses in employment and consumer cases	A.2301/S.3208 A.3265/S.3684 A.2656	Legislation would be pre-empted by Federal law	
Amending CPLR Art. 75 to address perceived shortcomings in the arbitration process (<i>see below for specific changes being proposed</i>)	A.3337/S.5669 A.5610/S.2396 A.7572/S.2630 A.3265/S.3684	These types of amendments should be made to the General Business Law	
Permitting courts to vacate awards where “the arbitrator evidenced a manifest disregard of the law in rendering the award”	A.3265/S.3684 A.5610/S.2396	This is a judicially-created & often-criticized federal doctrine which New York courts have rejected; CPLR 7511 already includes “exceeding [the arbitrator’s] power” as a ground for setting aside an award; would ensure more litigation; is at least as likely to be invoked against consumers and employees as it is against businesses	
Require that all arbitrators be “neutral third-party arbitrator(s)”	A.3265/S.3684 A.3337/S.5669	Some industries have a long-established practice of “non-neutral” party-appointed arbitrators who together select a neutral chair (i.e. reinsurance contracts and maritime arbitration) & this requirement could undermine these practices & drive arbitrations to other venues; failing to limit the provision to non-negotiated arbitration agreements would go beyond the scope of protecting consumers and employees who lack bargaining power	Expressly limit to consumer and employment arbitrations as defined by the Fair Labor Standards Act (this approach is taken in A.3265/S.3684)

CURRENT APPROACHES	RELATED BILLS	REASONS FOR OPPOSITION	RECOMMENDATIONS
Permitting parties to delay the assertion of challenges until the eve of the arbitration hearing	A.3337/S.5669 A.3265/S.3684	Would disrupt the orderly administration of arbitrations; invite abusive use of challenges	
Allow vacatur of an award based on the mere fact that a challenge has been made to an arbitrator regardless of the outcome of the challenge	A.3265/S.3684 A.3337/S.5669	Increases the likelihood of the abusive use of challenge & objection procedures	No need for legislation. CPLR 7511 (b) (1) (ii) already authorizes courts to vacate arbitration awards based on a finding of “partiality of an arbitrator appointed as a neutral...”.
Requiring arbitration awards set forth the arbitrators “findings of fact and conclusions of law”	A.3265/S.3684	Would multiply costs & produce considerable delay; requirement would be particularly onerous for consumers & employees who have neither the resources nor the expertise to prepare	Relocate amendments to General Business Law; replace language with terminology that is recognized & has long been in use in the arbitration community (i.e. “the award shall state the issues in dispute and shall set forth an explanation of the reasons of the award. The award shall contain a decision on all issues submitted to the arbitrator”).

OVERALL RECOMMENDATIONS

1. Enact due process principles into the General Business Law
2. Amend the General Business Law, not the Civil Practice Law and Rules
3. Avoid overbroad definitions of employment and consumer relationships
4. Limit enforcement rights to parties with a direct interest in the action or designated regulatory agencies

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**REPORT ON LEGISLATION BY THE
ARBITRATION COMMITTEE,
INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE,
AND INSURANCE COMMITTEE**

**RECOMMENDATIONS CONCERNING PENDING LEGISLATION TO ENSURE
NEW YORK CONTINUES TO SUPPORT LONG-ESTABLISHED PRACTICES OF
BUSINESS-TO-BUSINESS ARBITRATION PROCEEDINGS**

The New York City Bar Association is a voluntary organization of more than 24,000 New York attorneys and law students founded in 1870. The Arbitration, International Commercial Disputes, and Insurance Law Committees of the City Bar (the “Committees”) consist of lawyers, lawyer-arbitrators and law professors with a wide range of private practice, in-house, not-for-profit and academic experience who seek to educate the bar and the public about legal issues relating to arbitration and other forms of dispute resolution.

INTRODUCTION

A number of bills to change New York’s regulation of arbitration proceedings are pending before the New York State Legislature (the “Proposed Legislation”).¹ In our view, the bills pose a risk, perhaps inadvertently, to business-to-business arbitration and jobs in New York. This report describes those risks and suggests a path to achieve the desired result in consumer and employment arbitration while avoiding any negative impact on business-to-business and international commercial arbitration, where the same policy concerns do not exist.

The Proposed Legislation takes one or both of two general approaches:

1. Banning or limiting arbitration clauses in employment and consumer cases or in financial transactions with.² For example, some of the Proposed Legislation is intended to prevent consumers or employees from being required to agree to arbitration as a condition of purchase or employment. Others can be read to prohibit all pre-dispute arbitration agreements with these parties.

¹ The concerns expressed in this Report apply generally to any proposed legislation to enact wholesale regulation of arbitration in New York. To provide greater specificity, the Report provides examples from and suggests modifications to certain bills. Other bills may be introduced after this Report is finalized.

² See *i.e.* A.2301 (AM Dinowitz) / S.3208 (Sen. Comrie); A.3265 (AM Dinowitz) / S.3684 (Sen. Hoylman); A.2656 (AM Lentol) (NYS 2019).

2. Amending New York’s Civil Practice Law and Rules (“CPLR”) Article 75 to address perceived shortcomings in the arbitration process.³ For example, some of the bills would amend the standard of judicial review of arbitration awards by permitting courts to vacate awards where “the arbitrator evidenced a manifest disregard of the law in rendering the award,” a standard that no other state has adopted in its arbitration law. In another departure from New York law and established arbitration practice, some bills: (i) would require that all arbitrators be “neutral third-party arbitrator(s),” which threatens to render illegal in New York the long-established practice, in some industries important to New York like reinsurance, of using panels that include a neutral chair but a non-neutral arbitrator appointed by each side; (ii) could permit parties to delay the assertion of challenges until the eve of the arbitration hearing; and (iii) would allow vacatur of an award based on the mere fact that a challenge had been made to an arbitrator regardless of the outcome of that challenge. Finally, some of the bills would hurt consumers and employees in practice, substantially increasing the cost of arbitration in small and mid-sized disputes by requiring that arbitration awards set forth the arbitrators “findings of fact and conclusions of law”.

The Committees oppose these bills for at least two fundamental reasons:

1. They would be ineffective in protecting employees and consumers in arbitration.
2. They could have a substantially negative impact on New York’s national and international leadership position in the competitive market for business-to-business arbitration.

We do not question that members of the Legislature hold a sincere and justifiable concern for the rights of those who may be at a disadvantage with respect to bargaining power. That said, the Committees are confident that the proposed bills, as written, are not well-considered means to achieve these ends. The consequences (intended and otherwise) of the proposed bills could be far-reaching for other areas of law and business. This is especially true for commercial (i.e., business-to-business) arbitration, in which New York holds a hard-earned international regard. Proposed amendments to CPLR Article 75 that could make New York an unattractive forum for commercial arbitration are of particular concern.

The Committees believe that, *given an even playing field*, arbitration has many advantages for consumers and employees in terms of speed, cost and privacy. Several of the major arbitration institutions in New York have established due process principles to provide an even playing field and refuse to administer arbitrations where arbitration agreements fall short of these principles. However, corporations desiring to have an unfair advantage over consumers and employees may avoid these due process protections by declining to use these arbitral institutions. The Committees believe that the most effective reform that the Legislature could

³ See *i.e.* A.3337 (AM Dinowitz) /S.5669 (Sen. Sepulveda); A.5610 (AM Weinstein) / S.2396 (Sen. Hoylman); A.7572 (AM Dinowitz) / S.2630 (Sen. Lanza); A.3265 (AM Dinowitz) / S.3684 (Sen. Hoylman) (NYS 2019).

bring to consumer and employment arbitration would be to consider enacting due process principles into law.

The Committees offer below what we argue is a better, more effective approach for the Legislature to take in protecting the interests of individuals in arbitration and provide a summary of the reasons why the amendments proposed to the CPLR are unnecessary and counter-productive.

This Report highlights the importance of not damaging New York's standing as a national and international center of commercial arbitration (Part I), and suggests alternative legislative approaches that would better achieve the Legislature's goals of protecting consumers and employees while avoiding unintended consequences (Part II).

ARGUMENTS

I. Legislation Should Be Carefully Drafted so as to Avoid Damaging New York's Standing as a National And International Center for Business-to-Business Arbitration

New York is one of the world's premier domestic and international arbitration centers, particularly for business-to-business commercial, financial, intellectual property, maritime and insurance disputes.⁴ In a recent survey of where practitioners prefer to hold their arbitrations within the United States, two thirds (66.26%) chose New York, with no other U.S. city receiving more than 15.47% of the votes.⁵ In a survey of international practitioners, New York was the only U.S. venue to make the list, ranked sixth in the world for international arbitrations.⁶

New York's pivotal role in commercial arbitration traces its origins to New York's early adoption of and support for arbitration as an alternative dispute resolution mechanism. New York passed the first arbitration law in the country in 1920,⁷ five years before Congress enacted the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA").⁸ A few years later, in 1926, the American Arbitration Association ("AAA"), began its operation in New York City. Rejecting a challenge to the constitutionality of New York's arbitration statute, the New York Court of Appeals, in an opinion by Judge Cardozo, noted that an agreement to arbitrate neither unlawfully

⁴ See, e.g., "New York Tops Popularity Ranking as Seat for International Arbitration," May 5, 2016, *available at* <https://nyiac.org/nyiac-news/new-york-tops-popularity-ranking-as-seat-for-international-arbitration/> ("New York City is the fifth most popular venue for international arbitration under the Rules of Arbitration of the International Chamber of Commerce ('ICC') after Paris, London, Geneva and Singapore")(all websites in this report were last visited May 23, 2019).

⁵ See "Arbitration in the Americas: Report on a Survey of Arbitration Practitioners," October 11, 2018, *available at* <https://www2.le.ac.uk/departments/law/research/arbitration/files/arbitration-in-the-americas-report-on-a-survey-of-arbitration-practitioners>.

⁶ Report, "2018 International Arbitration Survey: The Evolution of International Arbitration" (University of London School of International Arbitration and White & Case LLP, 2018) at 9.

⁷ New York Arbitration Law, L.1920, ch.275.

⁸ See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

deprives litigants of access to the court nor divests them of the constitutional right to trial by jury. With this stamp of approval, New York became, and has remained since then, a staunch supporter of commercial arbitration.⁹

Today, New York is home to many experienced domestic and international arbitrators, law firms (large and small) active in the field, and respected arbitration institutions, including the AAA, the CPR Institute for Dispute Resolution (“CPR”) and JAMS.¹⁰ Domestic arbitrations seated in New York are used to resolve a full panoply of disputes arising from commercial relationships, including construction projects, real estate transactions, sales agreements, joint ventures, licensing agreements, securities and the like. International arbitrations seated in New York may involve similar commercial issues, regardless of whether the parties are New York residents.

New York is also home to several international arbitration institutions, including the AAA’s International Center for Dispute Resolution (“ICDR”), the CPR International Institute for Conflict Prevention and Resolution, JAMS International and SICANA, Inc., an office of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (“ICC/SICANA”). The presence of these international institutions reflects New York’s reputation as a venue that is receptive to, and supportive of arbitration to resolve both domestic and global business-to-business disputes.

Given the sophistication and development of New York law in commercial matters, New York is a natural venue for commercial arbitration among parties that are not based in New York or may not even reside in the United States. In addition, New York’s General Obligations Law (“GBL”), which permits non-residents and persons with no connection to New York to adopt New York law to govern their agreements, encourages parties to hold such arbitration in New York.¹¹ This can result in additional, ancillary benefits for New York, including a continued influx of business and travelers who seek to avail themselves of New York law or dispute resolution in New York through their arbitration agreements. Moreover, New York’s robust commercial arbitration business eases the burden that New York courts would have if disputes would instead be brought in court.

As the nation’s leading arbitration forum, it has been New York’s policy “to interfere as little as possible with the freedom of consenting parties” to arbitrate their disputes. When parties agree to arbitration, “they in effect select their own forum. Their quest is . . . for a non-judicial tribunal that will arrive at a private and practical determination with maximum dispatch and minimum expense.”¹² The late Chief Judge Judith Kaye, a guiding force behind creation of the New York International Arbitration Center, Inc. (“NYIAC”) and NYIAC’s independent hearing

⁹ *Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 273-76, 130 N.E. 288, 291-92 (1921).

¹⁰ The Financial Industry Regulatory Authority (“FINRA”) operates as the largest securities dispute resolution forum in the United States, and provides arbitration and mediation services to resolve securities and other business-related disputes between and among investors, brokerage firms and individual brokers. FINRA, *Arbitration and Mediation* (last visited April 2, 2019), available at <https://www.finra.org/arbitration-and-mediation>.

¹¹ N.Y. Gen. Oblig. Law §§ 5-1401.

¹² *Siegel v. Lewis*, 40 N.Y.2d 687, 689, 389 N.Y.S.2d 800, 801, 358 N.E.2d 484, 485 (1976).

center, frequently emphasized that New York courts may be relied upon to support “the important role arbitration plays in the resolution of commercial disputes.”¹³ Just last year, the Appellate Division, First Department, took cognizance of the concern that in deciding the case before it, “[a]ny suggestion that New York courts will review the arbitrators' factual and legal determinations, as if on appeal . . . will discourage parties from choosing New York as the place of arbitration.”¹⁴

Parties’ preferences for an arbitration venue are primarily determined by the venue’s “general reputation and recognition” of arbitration, followed by “formal legal infrastructure” which indicates whether “the local legal apparatus provides [parties] with sufficient assurances that they will be treated neutrally and impartially by its courts and that their recourse to arbitration will be unhindered.”¹⁵ Despite increasing competition from other venues around the world, New York has maintained its role as a favored arbitral seat because New York law is highly predictable to business, and New York courts are experienced and deferential to the parties’ agreed-upon arbitration process.¹⁶ Therefore, any changes to the laws that undermine the predictability and established procedure of New York arbitration will cause parties and their counsel to look elsewhere.

a. The All Neutral Proposal

The Proposed Legislation includes language requiring that all arbitrators, including party-appointed arbitrators, be “neutral third-party arbitrators.” Some of the proposals properly limit this provision to consumer contracts as defined within the proposal, and employment contracts as defined by the Fair Labor Standards Act;¹⁷ however at least one proposal imposes no such limitation.¹⁸

The Committees oppose this change to New York’s Arbitration Law. Broadly requiring all arbitrators to be “neutral third party arbitrators” threatens to disrupt standard and well established practices in industries which are vital to New York’s position as an arbitration center. While arbitration tribunals are typically required to be neutral, in some industries there is a long-established practice of “non-neutral” party-appointed arbitrators who together select a neutral chair. For example, in arbitrations under reinsurance contracts (between primary insurers and reinsurers or among reinsurers) the ARIAS-US Rules widely used in domestic reinsurance arbitration provide that each party may appoint a “disinterested” arbitrator who may not be under

¹³ Judith S. Kaye, *New York and International Arbitration: A View from the State Bench*, 9 NYSBA N.Y. Dispute Resolution Lawyer 1, 24 (Spring 2016).

¹⁴ *Daesang Corp. v. The NutraSweet Co.*, 167 A.D.3d 1, 4 n.1, 85 N.Y.S.3d 6, 9 n.1 (1st Dep’t 2018).

¹⁵ Report, “2018 International Arbitration Survey: The Evolution of International Arbitration” (University of London School of International Arbitration and White & Case LLP, 2018) at 9 – 11.

¹⁶ See Global Arbitration Review, *New York – Seat Index* (last visited April 3, 2019), available at <https://globalarbitrationreview.com/benchmarking/gar-ciarb-seat-index/1176965/new-york> (noting that New York is a favored forum for arbitration because of the New York judiciary’s sophistication, experience and support of arbitration, as well as these bodies’ willingness to enforce arbitration proceedings, among other factors).

¹⁷ See A.3265/S.3684.

¹⁸ See A.3337/S.5669.

the control of either party or have a financial interest in the outcome, but who is not required to be “impartial,” as the third “neutral umpire” must be. (ARIAS-US Rules R. 6.1.) New York has become the situs of choice for reinsurance arbitration in the US, and ARIAS U.S., the only insurance/reinsurance arbitration trade group in the country, is based in New York.

Should New York seek to impose an all-neutral panel on an industry that relies on industry experts to resolve disputes on the basis of industry standards and practices, it could undermine New York as the center for reinsurance dispute resolution proceedings, deprive US insurers of a reliable national forum, and drive much of this arbitration business to non-US venues such as London or Bermuda.

Maritime arbitration in New York also could be adversely affected by the Proposed Legislation. The Society of Maritime Arbitrators (the “SMA”) provides a model arbitration clause by which all disputes arising out of maritime and commercial agreements are to be arbitrated in New York.¹⁹ As in reinsurance, maritime arbitrations are typically conducted by two party-appointed, non-neutral arbitrators and a neutral chair. Requiring all neutral arbitrators could undermine this practice and drive maritime arbitration to other venues, such as London.

More broadly, in recognition of the traditional use of non-neutral party-appointed arbitrators in a variety of areas, the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, as well as a number of other arbitration rules, recognize that “parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral” and provide special rules and ethical considerations to govern their conduct. Enacting an amendment requiring the appointment of “neutral third-party arbitrators” without limiting the provision to non-negotiated arbitration agreements would go beyond the scope of protecting consumers and employees who lack bargaining power, and could prevent parties with equal bargaining power from negotiating such industry-specific procedures. This could cause them to avoid arbitration in New York to the detriment of New York’s status as a leading national and international center for arbitration.

The Committees believe that any requirement limiting the ability to utilize non-neutral arbitrators should be expressly limited to consumer and employment arbitrations.²⁰

b. The Manifest Disregard Proposal

The mere possibility that an arbitral award could be vacated on the ground that it reflected a “manifest-disregard-of-law” (as suggested in the Proposed Legislation) could disadvantage New York as a place for both domestic and international arbitrations.²¹ A change

¹⁹ Society of Maritime Arbitrators, *SMA Model Arbitration Clause* (last visited April 2, 2019), available at <http://www.smany.org/sma-model-arbitration-clause.html>.

²⁰ For example, we recommend that the proposed definition of “Arbitration” as it appears in A.3265/S.3684 be eliminated or, alternatively, revised to eliminate the term “neutral” (§ 7500 (a) “Arbitration” means a form of dispute resolution that is an alternative to litigation, in which the parties agree to be bound by the determination of a neutral third party arbitrator.”) The Committees similarly oppose A.3337/S.5669 as overbroad in scope.

²¹ See Richard W. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT’L ARB. 45, 47-48 (2011).

in New York law along these lines would increase the number of cases in which parties seek judicial review of arbitral awards, not only prolonging and increasing the cost and uncertainty of the arbitration process but adding significantly to the burdens on our courts.

A number of bills in the Proposed Legislation would amend the CPLR to authorize courts to deny enforcement of arbitration awards when the court finds that “the arbitrator evidenced a manifest disregard of the law in rendering the award.”²² Two proposed bills are dedicated exclusively to this amendment.²³ Two other bills amend the CPLR to include this proposal as part of a larger effort to place limitations on “consumer” and “employment” arbitration,²⁴ however, the bill text does not limit courts’ use of the “manifest disregard” standard to “consumer” or “employment” contracts.²⁵ Further, the term “consumer dispute” is not defined to ensure that commercial disputes are excluded.²⁶

The Committees oppose engrafting on to New York law this judicially-created and often-criticized federal doctrine. New York courts have not adopted the “manifest disregard” standard. “Manifest disregard” is a judge-made gloss on the FAA provision that permits an award to be set aside where “the arbitrators have exceeded their powers.” *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960). This doctrine, when properly applied, is exceedingly narrow. *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (a court must find “both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case”). A challenge to an award on this basis has succeeded only rarely.²⁷

CPLR 7511 already includes “exceeding [the arbitrator’s] power” as a ground for setting aside an award, and the New York Court of Appeals has rejected the “manifest disregard” standard in cases governed by the CPLR.²⁸ *See Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 155 (1995); *Banc of Am. Sec. v. Knight*, 4 Misc. 3d 756, 759 (Sup. Ct. N.Y. Co. 2004) (“although the New York Court of Appeals recognizes ‘irrationality’ as a non-statutory

²² *See* A.3265/S.3684; A.5610/S.2396.

²³ *See* A.5610/S.2396.

²⁴ *See* A.3265/S.3684.

²⁵ *See id.* at page 4:7-8.

²⁶ *See id.* at page 4:12-16.

²⁷ “The ‘Manifest Disregard of Law’ Doctrine and International Arbitration in New York,” at 6 (Aug. 2012), available at <https://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf>. The Reporters of the Restatement of the U.S. Law of International Commercial Arbitration have also criticized the doctrine because it “causes uncertainty about the enforceability of arbitral awards and discourages parties from choosing the United States as an arbitral seat.” In revising the Uniform Arbitration Act in 2000, the Uniform Law Commissioners voted not to include the standard, noting its vagueness and uncertain status in federal law. The Uniform Law Commissioners further noted that no state had codified this judge-made standard.

²⁸ In cases governed by the FAA, the FAA applies and “manifest disregard” preempts New York law’s “irrationality” standard. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 480 (2006).

ground for setting aside an arbitral award under New York law, it does not recognize any independent ‘manifest disregard’ ground.”).

Amending the CPLR to add the “manifest disregard” standard would all but ensure more litigation as losing parties grasp at straws to postpone having to pay awards. Indeed, this doctrine is at least as likely to be invoked against consumers and employees as it is against businesses, thus defeating the apparent intention of the Legislature to create a level playing field for these litigants. The litigation and uncertainty created by this standard would burden our courts, delay pay days for successful claimants, and discourage parties, both domestic and international, from arbitrating their disputes in New York.

c. Proposal to Allow Parties to Unduly Delay Challenges to Arbitrators and Vacate Awards Based on Challenges

The Proposed Legislation would appear to permit a party to raise a challenge to an arbitrator at any time “prior to the commencement of the arbitration hearing,” arguably even if the challenge is based on grounds disclosed long before by the arbitrator.²⁹ If enacted, these proposals would disrupt the orderly administration of arbitrations and invite the abusive use of challenges. For this reason, the Committees oppose them.

The arbitration hearing occurs near the end of the arbitration process, which can take place months or, in complex cases, a year or more after the arbitrators are appointed. In the period prior to the hearings the arbitrators typically rule on procedural issues, discovery matters and, if appropriate, interim relief. The proposal to allow last minute challenges could enable a party to hold back a challenge for strategic reasons to see whether the arbitrator in question makes rulings to that party’s liking. Under the proposed change a party might then bring an eleventh-hour challenge that inevitably would cause delay, even if the challenge is ill-founded, and would result in wasted time, effort and expense for all parties if the last-minute challenge were successful.

Widely accepted arbitration rules recognize these issues and provide for a clear and defined period in which to raise any challenge. This defined period usually commences on the date when the party learned facts that a reasonable person would consider likely to affect the impartiality of the arbitrator. For example, the CPR Non-Administered Arbitration Rules provide for a period of fifteen days for a party to make a challenge after learning the facts on which it is based. (R. 7.6.)³⁰

²⁹ See A.3337/S.5669 and A.3265/S.3684. For example, A.3265/S.3684 § 2 reads “Upon disclosure pursuant to section seventy-five hundred five-a of this article, a party shall be deemed to have waived any objection to the arbitrator or composition of any arbitration panel, by failing to raise same prior to the commencement of the arbitration hearing.”

³⁰ See also International Center for Dispute Resolution of the American Arbitration Association, Arbitration Rules, amended and effective 1 June 2014, Rule 14(2) (allowing a party to challenge an arbitrator “whenever circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence . . . within 15 days after the circumstances giving rise to the challenge become known to that party.”); International Chamber of Commerce, International Court of Arbitration, Arbitration Rules, Rule 14(1)-(2), amended and effective 1 March 2017 (allowing a party to challenge an arbitrator “whether for an alleged lack of impartiality or independence, or otherwise . . .

For similar reasons, the Committees oppose the provisions in the Proposed Legislation that could be interpreted to allow a court to vacate the final arbitral award on the sole basis that either party challenged the arbitrator.³¹ This proposed amendment could increase the likelihood of the abusive use of challenge and objection procedures. If the mere fact that one party objected to an arbitrator is grounds for vacatur, regardless of whether the challenge was meritorious, then parties may raise challenges to undermine the arbitration procedure.

Under most arbitration rules, the institution or appointing body designated by the parties hears and decides challenges. For example, under the CPR Non-Administered Arbitration Rules, when an arbitrator is challenged, CPR gives each party and the arbitrator an opportunity to comment and – unless the parties agree to remove the arbitrator or the arbitrator voluntarily resigns – CPR decides pursuant to its Challenge Protocol whether “circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator’s independence or impartiality.” (R. 7.5.) If the challenge to the arbitrator is meritorious, then the arbitrator is removed and replaced. (R. 7.8.)³² The Committees believe that allowing the mere fact that a party objected to an arbitrator to be a ground for vacating an award, regardless of whether the challenge was successful, would seriously undermine the predictability and finality which parties expect under New York Arbitration Law. To address this problem, the Proposed Legislation could be amended to provide that a *meritorious* objection may be a ground for vacating an award made by the arbitrator.³³

d. The “Findings of Fact and Conclusions of Law” Proposal

It is understandable that employees and consumers generally would like to know why the arbitrator decided as he or she did. Accordingly, many arbitration rules covering such cases call for the arbitrator to issue a reasoned award. For instance, the Employment Arbitration Rules of the American Arbitration Association provide that, “The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise.” (AAA Employment Arbitration Rule R. 39(c)). There is, however, a major difference between providing a reasoned explanation and providing findings and conclusions, which require many more hours of work that would add no clarity or other practical value in all but the most complex, high-stakes cases.

within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based”).

³¹ See A.3265/S.3684 and A.3337 S.5669. For example, A.3265/S.3684, § 3, provides: "If an arbitrator discloses a fact required by subdivision (a) or (b) of this section and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground for vacating an award made by the arbitrator."

³² See also AAA/ICDR Arbitration Rules, amended and effective June 2014, Rule 14(2)-(4); ICC Arbitration Rules, Rule 14(3).

³³ Similarly, proposed CPLR 7505(d) in A.3265/S.3684, addressing failure to disclose by an arbitrator, should be limited to read the court may vacate an award based on a material non-disclosure.

The federal courts have extensive experience with findings and conclusions, which are required of a judge who tries a case without a jury. That experience is that findings and conclusions multiply costs and produce considerable delay. Findings and conclusions require an extensive recital of all pertinent facts and applicable legal principles set forth in numbered paragraphs, even facts which are not central to the dispute. Parties typically are put to great expense preparing proposed findings and conclusions, after which courts struggle to prepare the final findings and conclusions, often months after the trial.³⁴

A findings-and-conclusions requirement would be particularly onerous for consumers and employees, who have neither the resources nor the expertise to prepare proposed findings and conclusions and would be outgunned by corporate adversaries.

The Committees oppose the provisions in the Proposed Legislation which would require arbitration awards to include “findings of fact and conclusions of law”³⁵ as such a requirement would protract arbitration proceedings and substantially increase the expense to the parties. Low cost, efficiency, and speed are arbitration’s core strengths, particularly in comparison to litigation.³⁶

As explained in more detail below, the Committees recommend that any provisions to protect the interest of consumers and employees in arbitration be made in the General Business Law rather than in the CPLR. Subject to that reservation, the Committees further propose that, to avoid uncertainty and confusion, the language of the proposals regarding “findings of fact and conclusions of law” be replaced with terminology that is recognized and has long been in use in the arbitration community.³⁷ For example, the reference to “findings of fact and conclusions of law” in proposed CPLR 7507(b) in A.3265/S.3684 could be relocated to the General Business Law and amended to read:

³⁴ This can reach absurd lengths. When the judge had not filed findings and conclusions for 3 ½ years after a four day trial over which insurer had the coverage of the sinking of a ship, the plaintiff had to petition the court of appeals for an order requiring him to decide. *In Re China Union Lines*, No. 84-3006 (2d Cir. Feb. 7, 1984).

³⁵ For example, A.3265/S.3684 § 5 reads: “In a matter involving a consumer arbitration or an arbitration between an employer and an employee, as defined in section three of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203), where arbitration was held pursuant to a contract, the award shall state the issues in dispute and shall contain the arbitrator's findings of fact and conclusions of law. The award shall contain a decision on all issues submitted to the arbitrator.”

³⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *Mitsubishi Motors*, 473 U.S., at 628, 105 S.Ct. 3346; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, —, 129 S.Ct. 1456, 1463–65, 173 L.Ed.2d 398 (2009) (“Parties generally favor arbitration precisely because of the economics of dispute resolution”).

³⁷ When an arbitrator is required to provide reasons and fails to do so, courts will remand the case back to the arbitrator to provide reasons. See *Smarter Tools, Inc. v. Chongqing Senci Import & Export Trade Co., Inc.*, 2019 WL 1349527, at * 3-5 (S.D.N.Y. Mar. 26, 2019).

(b) . . .the award shall state the issues in dispute and shall set forth an explanation of the reasons for the award. The award shall contain a decision on all issues submitted to the arbitrator.

This recommended language is consistent with recognized best practices and with the due process protocols that the leading arbitral institutions have developed to train and guide arbitrators.³⁸

e. Any Proposed Legislation Should Amend the General Business Law, Not the CPLR

Recognizing that consideration is being given to addressing consumer and employment arbitration characterized by disparate bargaining power, any legislation adopted should be carefully drawn so as to achieve its intended purpose. Care should be given to avoid adverse consequences to New York's standing as a leading forum for arbitration of domestic and international disputes between businesses. The CPLR is known to be the predecessor and inspiration for the Federal Arbitration Act that generally governs international arbitration. For New York to take a very different tack in the CPLR would raise questions on the global stage regarding New York's receptiveness to business-to-business arbitration. In light of the fact that N.Y. Gen. Bus. Law §399 currently addresses arbitration clauses in consumer contracts, any such doubts would be allayed if any legislation related specifically to employment and consumer arbitration were to be enacted as part of the GBL, not the CPLR.

f. Any Proposed Legislation Should Avoid Overbroad Definitions of Employment and Consumer Relationships

While the Committees appreciate the efforts in some of the bills to tailor the Proposed Legislation to consumer and employment agreements, several of the legislative proposals that are designed to be limited to adhesion consumer and employment contracts inadvertently encompass several categories of agreements that are typically negotiated by parties with equal bargaining power and equal access to legal counsel. Employment agreements are defined in A.3265/S.3684 as follows:

"Employment" means a relationship between an employer and an employee as defined in section three of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203)

This is an extremely broad definition which may also encompass executive employment contracts whose terms are in fact negotiated by sophisticated parties with the assistance of counsel.³⁹ A definition such as the following would better focus the legislation on the types of agreements it is targeting:

³⁸ See e.g. AAA Consumer Due Process Protocol Statement of Principles, Principle 15.3 (“*Explanation of Award.* At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.”)

³⁹ On occasion, a sophisticated party may have the opportunity to be represented by counsel at the arbitration, but decides to proceed without counsel. Or, the party may use counsel to negotiate the employment agreement but not

“Employment” means a relationship between an employer and an employee who is neither an officer nor an executive of the employer.

A.2656, which seeks to amend the GBL to ban mandatory arbitration in consumer contracts, if it moves forward, should be amended to make clear that it would not apply to financial products marketed to corporations for financial transactions that are entered into after meaningful negotiation with attorney representation on both sides. This can be remedied by adopting the definition of “Employment” above and by amending subpart c(xii) to read:

(xii) The term "financial product or service" shall not include any such financial product or service (a) where the terms of such financial product or service are materially negotiated between the Covered Person and the purchaser of such product or service; or (b) regulated under the exclusive jurisdiction of a federal agency or authority, or where rules or regulations promulgated by the attorney general on such financial product or service would be preempted by federal law.

Other bills, such as A.2301/S.3208, may be better targeted to legislative concerns regarding adhesion contracts with consumers and employees by adopting the definitions of “Employment” proposed above.

g. Any Proposed Legislation Should Limit Enforcement Rights to Parties with a Direct Interest In the Action or Designated Regulatory Agencies

Some of the Proposed Legislation includes language creating enforcement rights in private persons and enforcement agencies. While the Committees do not oppose vesting enforcement responsibilities in state enforcement agencies, the legislation could be clearer regarding which enforcement agency would have such responsibility. More problematically, § 8 of A.3265/S.3684 provides that “Any private person.... may bring suit for injunctive relief against an entity that violates such provisions.” This could be interpreted to suggest that the legislation creates a private right of action for a person lacking standing, or someone who is a complete stranger to the facts underlying the arbitration. Under New York law, however, only parties who have suffered an “injury in fact” and “concrete interest in prosecuting the action” may bring lawsuits in New York courts.⁴⁰ Therefore, we suggest that the section read “Any injured private person... ”.

during the arbitration itself. For purposes of our suggested language above, we see no distinction between access to counsel and acceptance of counsel; the relevant distinction pertains to those employees who are officers and executives of the employer.

⁴⁰ See *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772–773, 570 N.Y.S.2d 778, 573 N.E.2d 1034 (1991).

II. A More Promising Alternative

As noted in the introduction, the Proposed Legislation falls into two categories: ban or limits on consumer and employment arbitration and amendments to the CPLR to address perceived problems. In Section I of this report, the Committees addressed the proposals in the second category. Here, we propose that the legislature consider alternatives to bans or limits, because under controlling Supreme Court precedent they are clearly preempted by federal law and as a practical matter would be of no force and effect. In Section A, we show how the ban proposals could not survive federal preemption; instead, the Committees suggest the consideration of alternatives as discussed in section B below.

a. Legislation that Would Ban or Refuse Enforcement of Arbitration Agreements Would be Pre-empted by Federal Law

The FAA requires that arbitration agreements be treated on equal footing with other contracts and requires enforcement of arbitration agreements with employees or consumers according to their terms, if the agreement or contract is covered by the FAA.⁴¹ The FAA therefore preempts local laws prohibiting enforcement of arbitration agreements between companies and their employees and consumers.⁴²

b. Any Proposed Legislation to Protect Consumers and Employees in Arbitration Should Address Due Process Concerns

The Committees believe that a more effective way to protect consumers and employees in arbitration is to consider enacting due process provisions into the GBL. The major arbitration forums in New York, AAA, CPR, and JAMS already include these due process protections in their rules and these could easily be incorporated into the Proposed Legislation.

All three of these major arbitral forums require that any arbitration clause that seeks to be enforced must adhere to basic standards of procedural and due process fairness in both the employment and consumer settings.⁴³

⁴¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁴² Indeed, *Ayzenberg v. Bronx House Emanuel Campus, Inc.*, 941 N.Y.S.2d 106, 108 (1st Dep't 2012) held that to the extent GBL § 399-c may prohibit the subject arbitration clause, it is preempted by federal law. See also *Schiffer v. Slomin's, Inc.*, 11 N.Y.S.3d 799 (N.Y. App. Term. 2015). State arbitration law (both statutory and common law) is "pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). For example, the Supreme Court found preempted a state statute prohibiting waiver of rights under the statute, construed to preclude arbitration of statutory claims. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). But state laws that regulate how arbitration may proceed are not preempted. See *Volt*, 489 U.S. at 479 (allowing arbitration to be stayed under state law even where arbitration would proceed under federal law).

⁴³ See, AAA Consumer Due Process Protocol Statement of Principles, [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, effective July 15, 2009, <https://www.jamsadr.com/files/Uploads/Documents/JAMS->

Both the AAA and JAMS will decline the administration of a consumer arbitration demands if the arbitration clause or agreement contains violations of their due process standards. (CPR does not administer consumer disputes). The following standards are contained within the JAMS and AAA protocols; the use of independent, impartial and competent neutrals; independent administration standards for the selection of neutrals with established disclosure and disqualification protocols to prevent conflicts of interest; and reasonable costs to consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the consumer to pay (otherwise the expense would be borne by the provider of goods and services). Remedies that would otherwise be available to a consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court. The arbitration agreement must be reciprocally binding on all parties such that (a) if a consumer is required to arbitrate his or her claims or all claims of a certain type, the company is so bound; and, (b) no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction. The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear. The consumer must have a right to an in-person hearing in his or her hometown area. The clause or procedures must not discourage the use of counsel.

Similarly, in the employment context, all three of the major arbitral forums will decline to administer an employment arbitration if certain minimum due process standards are not contained within the arbitration clause or agreement that was signed by an employee as a condition of employment.

The following protections are included in the abovementioned protocols. These include but are not limited to arbitrator neutrality; all remedies that would be available under the applicable law in a court proceeding, including attorneys' fees and exemplary damages, as well as statutes of limitations, must remain available in the arbitration and post-arbitration remedies, if any, must remain available to an employee; the ability to be represented by counsel; the ability to engage in discovery and the exchange of information; both employer and employee must be able to present evidence and cross-examine witnesses; the employer must bear all costs except for initial filing fees; the location of the proceeding must accommodate the needs of the employee; and the availability of a written reasoned award, if one side requests it.

[Rules/JAMS_Consumer_Min_Std-2009.pdf](#); CPR Employment Dispute Arbitration Procedure, Participation as Administrator, <https://www.cpradr.org/resource-center/rules/pdfs/CPR-Employment-Arbitration-Procedure.pdf>; JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, effective July 15, 2009, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf; American Arbitration Association Employment Due Process Protocol, 1998, https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf.

Because the major arbitration institutions have already implemented these protections, action by the Legislature may not be necessary where arbitrations are administered by these institutions. However, if the Legislature believes it advisable and necessary to amend the GBL to protect consumers and employees, it should consider these protocols, which have already been tested, as a useful template for its action.

Thank you for your consideration.

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