AGENDA

ACR Teleconference on
Arbitration under Attack: What is its Future and How Can We Make a Difference?
(Thursday, April 24, 2014, between 3:00 & 4:30 p.m. EDT)

Patrick R. Burns, Minneapolis
Richard Fincher, Phoenix
Joseph Stulberg, Columbus
James A. Rosenstein, Philadelphia (Moderator)

Subject	Presenter	Time
Welcome, including brief outline of what we hope to cover, our proposed format*, and introducing the panel.	Rosenstein, with a couple of minutes for each panelist to share their background as it relates to this workshop.	10 minutes
The perspective of someone who both represents parties in arbitration and is an arbitrator about the perception in many quarters that arbitration's benefits and advantages are being lost; and what can be done to reverse this trend.	Burns, with input from other panelists.	20 minutes
Current trends in arbitration under state law, including the advantages and disadvantages of the RUAA compared to the UAA, the resistance in some states to adoption of the RUAA, the opposition to use of pre-dispute arbitration clauses in contracts, etc.; and what might be done to improve this situation.	Fincher, with input from other panelists.	20 minutes
Recent decisions in federal and state courts that could restrict or bar the use of arbitration; trends in court-mandated & other types of mandated arbitration; the potential impact of the federal Fairness in Arbitration Act (if enacted); and what each of us might do to overcome these hurdles.	Stulberg, with input from other panelists.	10 minutes
Apparent decreasing opportunities for non-lawyer arbitrators, even in disputes where specialized knowledge is desirable or necessary (such as construction, labor/employment and complex investment vehicles); and what might be done to change this situation.	Stulberg, with input from other panelists	10 minutes
Q & A and wrap up	Rosenstein & Mossman, with input from the audience and panelists.	20 minutes

REFERENCES THAT MAY BE OF INTEREST TO YOU

1. ***Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations,*** Thomas J. Stipanowich and J. Ryan Lamare

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471

2. **ARBITRATION: THE "NEW LITIGATION"**

Thomas J. Stipanowich

http://www.utexas.edu/law/centers/cppdr/portfolio/2010%20Symposium/Stipanowich%20New%20Litigation%20Final.pdf

3. **New AAA Commercial Arbitration Rules**

http://go.adr.org/commercialrules

4. **Some relevant U.S. Supreme Court Cases** (listed in chronological order, older to most current):

. (a) Stolt-Nielsen SA v. AnimalFeeds, 559 U.S. 662 (2010)

(b) ATT& T Mobility v. Concepcion - 563 U.S. 321 (2011)

(c) Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013)

(d) American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)

5. **Proposed Arbitration Fairness Act**

S.878 -- Arbitration Fairness Act of 2013 (Introduced in Senate - IS)
S 878 IS

IN THE SENATE OF THE UNITED STATES

May 7, 2013
Mr. FRANKEN (for himself, Mr. LEAHY, Ms. WARREN, Mr. BLUMENTHAL, Mr. WHITEHOUSE, Ms. HIRONO, Mr. SANDERS, Mr. UDALL of New Mexico, Mr. HARKIN, Mr. MENENDEZ, Mr. SCHATZ, Ms. HEITKAMP, Mr. BROWN, Mrs. BOXER, Mr. WYDEN, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary
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A BILL
To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Arbitration Fairness Act of 2013'.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) In General- Title 9 of the United States Code is amended by adding at the end the following:

`CHAPTER 4--ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

`Sec. 401. Definitions

`In this chapter--

`(1) the term `antitrust dispute' means a dispute--

`(A) involving a claim for damages allegedly caused by a violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12)) or State antitrust laws; and

`(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

`(2) the term `civil rights dispute' means a dispute--

`(A) arising under--

`(i) the Constitution of the United States or the constitution of a State; or

`(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

`(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual;

`(3) the term `consumer dispute' means a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

`(4) the term `employment dispute' means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203); and

`(5) the term `predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

`Sec. 402. Validity and enforceability

`(a) In General- Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

`(b) Applicability-

`(1) IN GENERAL- An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an 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.

`(2) COLLECTIVE BARGAINING AGREEMENTS- Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

6. 2010 Legislative Briefing Report re Amendments to the Arizona State Arbitration Act (ARS 12-1501) and Richard Fincher's Comments re Same

Objective: Amend the current statute to modernize its procedure and fill in major gaps (Title 12-Courts and Civil Proceedings, Chapter 9-Special Actions, Article 1-Arbitration)

Fiscal impact on budget: None
Anticipated effective date: January 1, 2011

Prior legislative action-Arizona passed a modified Uniform Arbitration Act of 1955 (UAA), in the 1962 legislative session. It has never been amended. The UAA is law in 49 jurisdictions.

Current national amendments to original UAA-Twelve states have modernized their UAA statutes, with eleven states pending action

What is commercial arbitration and its advantages?-Arbitration is a private adjudicative process that is a binding alternative to court litigation. The core advantages to arbitration are a) timeliness to hearing, b) less trial costs, c) substantive expertise of the Arbitrator, and d) privacy of adjudication.

Since 1962, what has changed in Arizona?
a) The business and legal community have broadly accepted commercial arbitration as a preferred dispute resolution process
b) State and federal courts have uniformly embraced the fairness and efficiency of arbitration
c) The volume of "interstate commerce" flowing through Arizona has increased exponentially.

Why should Arizona amend the arbitration statue?
a) Modernize the rules of commerce for Arizona
b) Promote interstate commerce and tax revenue
c) Efficiently fill the gaps in current arbitration agreements

d) Provides sensitivity to specific commercial practices (e.g.-construction),
e) Provide guidance to the judiciary
f) Honor party choice to arbitrate commercial disputes
g) Adopt rules to minimize arbitration costs

Will these amendments "change" precedence or direction of arbitration in Arizona?
No. these amendments "fills the gaps" in the original state act, provides certain procedural protections, and modernizes the practice of commercial arbitration for the business and consumer community.

What were the three drafting principles of these amendments?
1. Arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as agreements conform to notions of fundamental fairness.
2. The law should maintain the underlying reasons parties choose arbitration (relative speed, lower cost, and efficiency)
3. Maintain the finality of arbitral decisions, with minimal court involvement absent clear unfairness or a denial of justice.

Abridged Text
Why Should Arizona Adopt the Revised Uniform Arbitration Act?

Submitted by:
Richard Fincher
Workplace Resolutions LLC

Given current state law, why should Arizona enact the RUAA?
Arizona should enact the RUAA because it a) promotes interstate commerce, b) efficiently fill the gaps in current arbitration agreements, c) provides sensitivity to specific commercial practices (e.g.-construction), d) provides guidance to the judiciary, e) honors party choice to arbitrate commercial disputes, f) adopts rules to minimize arbitration costs, and g) modernizes the rules of commerce for Arizona

What prompted development of the Revised Uniform Arbitration Act of 2000?
The UAA of 1955 did not address many issues that arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold pre-hearing conferences and otherwise manage the arbitration process.

The UAA of 1955 did not address (9) when a court may enforce a pre-award ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney's fees, punitive damages or other exemplary relief; (11) when a court can award attorney's fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney's fees and costs to a prevailing party in an appeal of an arbitrator's award; and (13) which sections of the UAA

would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process. The Revised Uniform Arbitration Act (RUAA) examines all of these issues and provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.

Is the RUAA perfect?

No uniform act includes every possible issue. The RUAA does not clarify the law of vacatur, does not refer to international issues, and does not add to the developing law of unconscionable contracts of adhesion. The RUAA does not resolve the question of allowing contractual provisions for "opt-re" review of challenged arbitration awards, which could permit parties to contractually render arbitration decidedly non-final and non-binding. The RUAA leaves these issues to the developing case law under the FAA and state arbitration statutes. Parties remain free, within the constraints imposed by the existing and developing law, to agree to contractual provisions for arbitral or judicial review of challenged awards.