New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Opposition

Dispute Resolution Section

Dispute Resolution #4 June 7, 2012

A. 7002-C By: M. of A. Titone
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to grounds for vacating an arbitration award on the basis of partiality of the arbitrator.

LAW AND SECTION REFERRED TO: Section 7500 et seq of the Civil Practice Law and Rules

NYSBA DISPUTE RESOLUTION SECTION OPPOSES LEGISLATION THAT WOULD CREATE UNCERTAINTY AND CONFUSION AS TO THE VALIDITY OF NEW YORK ARBITRATION AWARDS AND MAKE NEW YORK STATE A LESS DESIRABLE VENUE FOR RESOLUTION OF ARBITRATED DISPUTES

The Dispute Resolution Section previously submitted a memorandum in opposition to an earlier version of this bill. We appreciated the opportunity given to Section representatives to communicate our concerns to the Bill's sponsors. We were also pleased to note that some undesirable features of the earlier version were eliminated and improvements made. We must still express our strong opposition to the revised Bill since use of arbitration as a reliable means of dispute resolution is highly important for reasons of both economics and justice and the Bill would make ill-conceived changes to the entire fabric of New York State's arbitration statute, leading to uncertainty as to the validity of New York arbitration awards and, in turn, requiring years of litigation before our already overburdened courts could establish a new understanding of our arbitration law. As a result of the ensuing uncertainty, parties concluding international and interstate contracts calling for resolution of disputes through arbitration could consider that New York State had become a less desirable venue for arbitration (as opposed to other states or countries), and could take measures available to them to ensure that New York arbitration law does not apply to their commercial dealings.

To cite some of the flaws we perceive in the Bill:

Section 7500 (a) defines arbitration as "a form of dispute resolution…in which the parties agree to be bound by the determination of a neutral third party arbitrator." Arbitration has been known and practiced in New York at least since enactment of Article 75's predecessor statute in 1920. There is no need for such a definition. In any case the definition is inaccurate

and would lead to uncertain results as arbitration could involve more than one arbitrator and clearly could proceed without unfairness in circumstances where, after a dispute has arisen, the parties may agree to submit to decision of an arbitrator who, while not strictly neutral, is trusted by both sides to make a fair decision in the context of a given dispute.

Section 7500 (b) is also flawed as it defines "neutral third party arbitrator" as "an arbitrator or panel of arbitrators each of whom does not have" a material interest or relationship that would be inconsistent with neutrality, whereas it is traditional and fairly common for parties to agree to submit disputes to an arbitral panel composed of three arbitrators, one appointed by each side, who need not be neutral, and a third, the only neutral, appointed by agreement of the parties or their party-appointed arbitrators. This traditional method of arbitration is common throughout the United States, is not unfair, and there is no need for New York to outlaw it.

Section 7501 provides that an arbitration agreement calling for arbitration by a non-neutral third party arbitrator "shall be deemed void", and yet it "shall be deemed valid" to the extent of requiring arbitration, even though the choice of arbitrator is void. Possibly the intent of the sponsors is that, in such circumstances the court on application of a party should appoint a neutral arbitrator under existing CPLR section 7504, but if this is the intention it is not articulated. The new section goes on to indicate that, although the choice of non-neutral arbitrator is void, any party waives its objection to the void selection if, after the lack of neutrality is revealed, it fails to assert such objection "prior to the commencement of the arbitration hearing." It is highly inefficient if, after disclosure of the void nature of the arbitrator's appointment, the parties are allowed to wait until the commencement of the arbitral fact-finding hearing to state their objections, as months of discovery and other arbitration work may be required before the arbitration hearing is held, all of which work would be "void" if such a tardy objection is permitted. Moreover, since the choice was "void," presumably both parties would have to waive objection to validate the original choice of non-neutral arbitrator, thus either party could wait until the eve of the arbitration hearing to announce its objection and thus nullify all the arbitration work that had gone before, requiring that the process be commenced de novo.

Section 7505 would impose specific disclosure requirements upon the chosen arbitrators, corresponding to the disclosure obligations imposed by states that have adopted the Revised Uniform Arbitration Act ("RUAA"). Such disclosure obligations would be better imposed by adoption of the RUAA itself, since that would make relevant the extensive learning and textual commentary of the National Conference of Commissioners on Uniform State Laws that developed the RUAA. Under present practice, these disclosures are usually made pursuant to agreement of the parties, in accordance with the rules of an arbitration provider organization, such as the AAA, which, if chosen by the parties to administer the arbitration, may invite broader disclosure than that required by the Bill and also reserve authority to pass on any objection to the arbitrator's service arising from such disclosures. This section is flawed by omission of the RUAA provision (maintained in a prior version of the Bill) that would recognize the parties' right to adopt procedures of such an arbitration organization and, in such

case, require compliance therewith. By limiting the matter to be disclosed to "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator", which is substantially equivalent to the grounds that would be relied on by a court to invalidate the award, the Bill would also tend to inhibit disclosure by suggesting that if an arbitrator did make any disclosures she would be conceding that they concerned matters that a reasonable person would deem to justify disqualification, whereas it is better policy to encourage broader disclosure that would allow the parties to draw their own conclusions in this regard.

CONCLUSION

The core purpose of the Bill is suggested in the Section 7500 provision defining arbitration as a process of decision by a neutral arbitrator and the Section 7501 provision that would void and invalidate party agreements to refer future disputes to a non-neutral arbitrator. However, as shown above, these provisions as drafted are flawed and would fail to achieve a clear objective. The Section is sensitive to the Sponsors' concern that in situations of unequal bargaining power New York law should protect the weaker party against unconscionable arbitration agreements that impose an arbitrator who is aligned in interest with or controlled by the stronger party. However, in cases of coercion or overreaching to induce weaker parties to enter into such agreements, New York Courts already offer protection. See Matter of Siegel, 40 N.Y. 2d 687, 691 (1976) (Fuchsberg, J.). If the Sponsors desire to expand present concepts of unconscionability in this regard, we would be pleased to continue to work with the legislature to achieve that objective through a narrower enactment that does not effect collateral damage to the structure of New York arbitration law.

New York State, as a venue for international and interstate arbitration and as a source of the law that parties may choose to govern such arbitration, must compete with numerous other states and countries, many of which have adopted familiar and well-understood arbitration codes, such as the RUAA and the UNCITRAL Model Law for International Commercial Arbitration. Ill-considered amendments to New York's venerable but unique arbitration statute, originally enacted in 1920 and long due for replacement by a modern, comprehensive statute such as the RUAA, would create uncertainty as to the validity of New York arbitration awards and place New York in isolation as a source of the law governing international and interstate arbitration. These uncertainties would result in a wave of court litigation over arbitration as parties argue over the import of a new unique statute burdening our already overburdened courts. These uncertainties would also cause parties to avoid New York as a venue for arbitrations and undermine ongoing efforts by the legal and business communities to establish New York as the leading venue for both domestic and international arbitrations. These New York based arbitrations (a) generate significant revenues for businesses and individuals in the state, and (b) contribute to New York's position as a global financial and business center which can not only handle the business aspects of a transaction but also the resolution of any disputes that flow from the transactions, as other leading financial centers are able to do effectively.

Accordingly, we call for further study to achieve a more focused legislative solution to the perceived problem of agreements appointing non-neutral arbitrators.

Based on the foregoing, the Dispute Resolution Section of the New York Bar Association **OPPOSES** this legislation.

Report Prepared by: William J.T. Brown, Esq. and John Wilkinson, Esq.
Section Chair: Rona Shamoon, Esq.