

Regulating Arbitration Service Providers

According to Public Citizen's Congress Watch:

In recent years, an increasing number of businesses have imposed mandatory arbitration clauses on their employees, franchisees, and consumers. Buried in the fine print of a lengthy contract, employee handbook, or billing insert, these clauses take away one's right to go to court, and divert any future disputes into a costly private legal system. The clauses have had the practical effect of immunizing businesses from accountability for employment discrimination and violations of deceptive trade practice laws.

The goal of every consumer advocacy organization is to ban binding pre-dispute arbitration clauses in consumer and employment contracts, but to do so would require repeal of the Federal Arbitration Act. Nevertheless, it is possible for states to take steps short of an across-the-board ban that would temper the unfairness of arbitration clauses. One such step is the Fair Bargain Act, enacted by New Mexico in 2001.

Arbitration is a form of alternative dispute resolution (ADR) in which disputes are resolved in a less formal manner than by the courts. Its original purpose was to provide a swift and inexpensive means of adjudicating disputes between businesses. Its use has also been customary in fixing the amount of loss for purposes of property, uninsured motorist and no-fault automobile insurance. But outside these limited spheres, arbitration is unfair because of its high costs. A consumer must pay steep filing fees just to initiate a case—seldom less than \$750. In addition to those fees are the arbitrator's hourly charges, which generally range from \$200 to \$300 per hour, split between the parties. Because all these fees must be deposited in advance, and usually amount to thousands of dollars, most people covered by an arbitration clause are forced to drop their cases.

Arbitration providers are organized to serve businesses, not consumers. Their marketing is targeted entirely at businesses, and their panels of arbitrators consist primarily of corporate executives and their lawyers. Because only businesses will be repeat users of an arbitrator, there is a disincentive for an arbitrator to rule in favor of a consumer if he expects further retentions. Also, it is customary for arbitrators to "split the difference" between opposing parties' positions. As a result of these factors, arbitration claimants receive dramatically lower awards than do court litigants in similar cases.

Discovery is the process by which litigants obtain information and evidence in the possession of their opponent or third parties. In arbitration, discovery is a privilege, not a right, and many businesses draft arbitration clauses to severely restrict the claimant's ability to obtain necessary evidence. Moreover, arbitrators have no authority to order non-parties to comply with subpoenas, often requiring the filing of one or more court lawsuits, which arbitration is supposed to make unnecessary.

Consumers are disadvantaged by arbitration clauses relating to their most valuable assets—their homes and their health. Arbitration clauses are found in every contract to buy a new, existing, or manufactured home. If a home is defective (an increasing problem due to recent skilled labor shortages and new synthetic building materials) the consumer must pay thousands of dollars in arbitration fees to get a hearing. The clauses also insulate predatory lenders from lawsuits, explaining why the mortgage industry can challenge consumers to "enforce the existing laws." Many health insurance policies also require arbitration, forcing patients who are denied coverage to advance thousands of

dollars to appeal for life-saving treatment. Arbitration clauses are now being forced on patients by doctors and nursing homes as well.

Employees are hurt by one-way arbitration clauses that require them to arbitrate claims of discrimination or unpaid commissions, yet allow their former employers to sue them if they take a job with a competitor. Unfairly treated employees who are lucky enough to afford arbitration fees may be forced to arbitrate and litigate the same issues simultaneously.

Action by the states to address the problem of unfair adhesion arbitration agreements is limited by pre-emption under the Federal Arbitration Act. The pre-emption doctrine requires that arbitration clauses be enforced in most circumstances. Thus, a state legislature may not ban arbitration clauses (unless it does so under its McCarran-Ferguson Act authority to regulate insurance—about half the states ban arbitration clauses from insurance policies).

States do retain the power to regulate the arbitration process. Currently, many state legislatures are considering the Revised Uniform Arbitration Act (RUAA) that was promulgated by the Uniform Law Commissioners. The RUAA would do nothing to protect consumers from unfair arbitration clauses.

This SSL draft Act borrows and combines the language of two California laws enacted in 2002, Chapters 952 and 1158. The draft places several types of regulations on consumer arbitrations. Section 2 of the Act requires full disclosure of consumer arbitration outcomes so that any patterns of bias can be detected (Texas enacted a similar provision for residential construction arbitrations in 2003). Section 3 of the Act increases access to justice by requiring fee waivers for indigent claimants. Section 4 bans shifting arbitration fees to a claimant who does not prevail in arbitration. Finally, Section 5 of the Act tries to ensure impartiality of arbitration providers by prohibiting conflicts of interest.

Submitted as:

California

[Chapters 952](#) and [1158](#) of 2002

Status: Enacted into law in 2002.

Suggested State Legislation

(Title, enacting clause, etc.)

1 Section 1. [*Short Title.*] This Act may be cited as "An Act to Regulate Arbitration Service
2 Providers."

3 Section 2. [*Definitions.*] As used in this Act:

4 (a) "Consumer arbitration" means an arbitration conducted under a predispute arbitration
5 provision that meets the criteria listed in paragraphs (1) through (3) below. "Consumer
6 arbitration" excludes arbitration proceedings conducted under or arising out of public or private
7 sector labor relations laws, regulations, or agreements.

8 (1) The contract is with a consumer party, as defined in these standards;

9 (2) The contract was drafted by or on behalf of the nonconsumer party; and

10 (3) The consumer party was required to accept the arbitration provisions in the
11 contract.

12 (b) "Consumer party" is a party to an arbitration agreement who, in the context of that
13 arbitration agreement, is any of the following:

(1) An individual who seeks or acquires, including by lease, any goods or services, including but not limited to financial services and insurance, primarily for personal, family, or household purposes.

(2) An individual who is an enrollee, subscriber or insured under a health care plan or health care insurance, or an individual with a medical malpractice claim.

(3) An employee or applicant for employment, in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

(c) "Financial interest" is holding a position in a business as officer, director, trustee or partner or holding any position in management; or ownership of more than five percent interest in a business.

Section 3. *[Requiring Private Arbitration Companies to Collect, Publish, and Make Certain Information Available to the Public.]*

(a) Any private arbitration company that administers or is otherwise involved in 50 or more consumer arbitrations a year shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:

(1) The nonconsumer party, if the nonconsumer party is a corporation or other business entity that is a party to the arbitration.

(2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than \$100,000, \$100,000 to \$250,000, inclusive, and over \$250,000.

(3) Whether the consumer or nonconsumer was the prevailing party.

(4) On how many occasions, if any, the nonconsumer has previously been a party in an arbitration or mediation administered by the private arbitration company.

(5) Whether the consumer party was represented by an attorney.

(6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.

(8) The amount of the claim, the amount of the award, and any other relief granted, if any.

(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

(b) If the required information is provided by the private arbitration company in a computer-searchable format at the company's Internet Web site and may be downloaded without any fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required is not accessible by the Internet, the company shall provide that information without charge to any person who requests the information on paper.

(c) A private arbitration company that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(d) No private arbitration company shall have any liability for collecting, publishing, or distributing the information in accord with this section.

Section 4. [*Private Arbitration Company Fees.*]

(a) All fees and costs charged to or assessed upon a consumer by a private arbitration company in a consumer arbitration, [exclusive of arbitrator fees] shall be waived for any person having a gross monthly income that is less than 300 percent of the federal poverty guidelines.

(b) Nothing in this section shall affect the ability of a private arbitration company to shift fees that would otherwise be charged or assessed upon a consumer party to another party.

(c) Prior to requesting or obtaining any fee, a private arbitration company shall provide written notice of the right to obtain a waiver of fees in a manner calculated to bring the matter to the attention of a reasonable consumer, including, but not limited to, prominently placing a notice in its first written communication to a consumer and in any invoice, bill, submission form, fee schedule, rules, or code of procedure.

(d) Any consumer requesting a waiver of fees or costs may establish eligibility by making a declaration under oath on a form provided by the private arbitration company for signature stating his or her monthly income and the number of persons living in the household. No private arbitration company may require a consumer to provide any further statement or evidence of indigence.

(e) Any information obtained by a private arbitration company about a consumer's identity, financial condition, income, wealth, or fee waiver request shall be kept confidential and may not be disclosed to any adverse party or any nonparty to the arbitration, except a private arbitration company may not keep confidential the number of waiver requests received or granted, or the total amount of fees waived.

Section 5. [*Prohibitions against Losing Parties Paying the Fees and Costs of Prevailing Parties in an Arbitration.*] No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses.

Section 6. [*Financial Interest of Arbitration Companies in Any Party to an Arbitration or Attorney for a Party to an Arbitration.*] No private arbitration company may administer a consumer arbitration to be conducted in this state, or provide any other services related to such a consumer arbitration, if

(1) The private arbitration company has, or within the preceding year has had, a financial interest in any party or attorney for a party.

(2) Any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company.

Section 7. [*Severability.*] Should a court decide that any provision of this Act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed, and such a decision shall not affect the validity of the act other than the part severed.

Section 8. [*Repealer.*] [Insert repealer clause.]

Section 9. [*Effective Date.*] [Insert effective date.]