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Arbitrating Disputes Between Companies and Individuals: Lessons From Abroad

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The authors surveyed the approaches of four European countries, Canada and Australia to determine the accuracy of the U.S. perception that foreign countries ban all pre-dispute arbitration clauses in the consumer and employment contexts. They find no such bans in the countries surveyed. This finding casts doubt on the argument that Congress should adopt the Arbitration Fairness Act in order to bring the United States into alignment with foreign countries. Accordingly, the authors recommend that Congress consider the surveyed foreign models before voting on this bill.
Congress presently is considering the most significant overhaul of arbitration law in the United States since the Federal Arbitration Act’s (FAA) enactment in 1925. This follows many previous efforts in recent years to introduce bills that would invalidate pre-dispute arbitration clauses in contracts of various kinds, including those pertaining to consumer purchases, terms of employment, livestock/poultry, franchises, motor vehicle

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sales, military reservists, nursing home admissions, and home mortgages. A central premise underlying these bills is the idea that the parties to these agreements (typically there is an individual on one side and a company on the other) tend to occupy unequal bargaining positions. The drafters of these bills conclude from this that the individual’s choice to opt into arbitration before a dispute has arisen cannot be considered free and voluntary, and thus, the arbitration agreement should be considered void and unenforceable. Defenders of these bills claim that the United States, when compared to other nations, stands alone in allowing pre-dispute agreements between companies and individuals to be enforced. But is that true? We set out to test this claim in order to determine whether U.S. policymakers can learn anything from their foreign counterparts. Our research indicates that the treatment of pre-dispute arbitration agreements in other nations is not as portrayed by proponents of these bills, suggesting that Congress should take these other approaches into consideration before rushing to adopt purported reforms.

Arbitration at Home

Until the early 20th century, questions over the enforceability of arbitration agreements between companies and individuals simply did not arise. Prior to the enactment of the FAA in 1925, pre-dispute arbitration agreements largely were unenforceable.

In the immediate decades following the FAA’s enactment, arbitration agreements between individuals and companies received greater judicial acceptance, but it was far from complete. The FAA’s requirement that arbitration agreements be enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract” enabled courts to enforce some agreements between companies and individuals involving routine contract claims. Courts also would enforce arbitration clauses contained in collective bargaining agreements (the underlying rationale being that the labor union could effectively represent the interests of its members and, thereby, effectively counterbalance the company’s bargaining position). Yet the “nonarbitrability doctrine”—which precluded arbitration of many claims arising under federal statutes—effectively protected individuals from having to arbitrate certain disputes with companies.

The decline of this doctrine in the 1980s expanded the opportunities to use arbitration clauses in contracts between companies and individuals. Beginning in that decade, the U.S. Supreme Court increasingly enforced arbitration agreements in disputes arising under federal statutes. In quick succession, it permitted arbitration of claims under the federal securities and employment discrimination laws and, indeed, overruled an early non-arbitrability decision.

While early efforts to undo this pro-arbitrability jurisprudence received little support, more measured legislative efforts have succeeded. In the last seven years, Congress has passed legislation barring the enforcement of pre-dispute arbitration agreements in contracts between credit card companies and military personnel, between poultry wholesalers and farmers, and between automobile manufacturers and dealers (although President Obama has just signed legislation permitting this kind of arbitration). An underlying premise of these enactments was that they were necessary to counteract the company’s unfair bargaining position in the arbitration agreements.

The success of these incremental changes has sparked a renewed interest in a more comprehensive ban on enforceable pre-dispute arbitration agreements between companies and individuals. The boldest effort, the bill called the Arbitration Fairness Act, would retroactively invalidate pre-dispute agreements in employment, consumer, and franchise agreements. Defenders of this bill argue that its enactment would bring the United States into line with other industrialized nations which, so the argument goes, categorically prohibit arbitration in these contexts.

Arbitration Abroad

To test the proposition that, of all the industrialized nations, only the United States allows arbitration of disputes between companies and individuals, we examined European Union law as well as the arbitration laws of four European countries.

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(the United Kingdom, France, Germany and Switzerland) and two non-European countries (Canada and Australia). We recognize that the choice of countries is somewhat arbitrary. Nonetheless, the countries we selected represent both common law and civil law traditions, and are among the most important arbitral forums in the world. We included European law because of its increasing importance and influence in both the consumer and employment fields.


In 1993, the European Community (EC) passed Directive 93/13 which provides for a consumer protection scheme within the European Union. Article 3(1) of this directive sets out the definition of an unfair contractual term in consumer contracts. It states, “[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

The annex to the directive states that a consumer arbitration clause that makes arbitration the exclusive remedy meets the definition of an “unfair term” in Article 3(1). But, because the legislation is in the form of a directive as opposed to a resolution, the European Council only requires Member States to institute domestic policies that are harmonious with the directive. Therefore, Member States do not have to follow the directive exactly as it is written. Rather, “[d]irectives bind EU members to the stated goals, but the countries achieve directive purposes by changing their own laws, leaving wiggle room on compliance.”

The following European countries, three of which are EU Member States and one of which is not but often adopts EU regulations, have implemented this directive in their own way, as seen below.

**United Kingdom**

The United Kingdom (U.K.) overhauled its consumer arbitration regulations in 1999 when it implemented EC Directive 93/13, the European Community’s directive on consumer contracts. Known as the “Unfair Terms in Consumer Contracts Regulations 1999,” the U.K. regulations control all contractual relations between consumers and businesses. They contain a “non-exhaustive list of the terms which may be regarded as unfair and includes arbitration among them.” The term “consumer” is broadly defined to include any “natural person who is acting for purposes outside his trade, business, or profession.” It also lists a few circumstances in which a contractual term (including one referring disputes exclusively to arbitration) will be regarded as unfair. One of these circumstances involves a contract term that is imposed on the other party with no opportunity to negotiate it. Thus, the regulations say: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

Another circumstance suggesting unfairness is when the contract terms are boilerplate provisions, drafted before the current transaction. Thus, the regulations say: “A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.” Additionally, the regulations place the burden on the seller to prove that a term was individually negotiated. While the U.K. does place a restriction on the ability to contract pre-dispute for arbitration—namely that the arbitration clause must be negotiated for—it does not go so far as to make every pre-dispute arbitration agreement in a consumer contract void.

In the U.K., the arbitrability of employment claims is affected by the nature of the action—whether it is statutory or based on a private obligation. If arbitration is required by a private employment agreement, the matter is subject to the U.K. arbitration statute (Arbitration Act, 1996), which makes such agreements enforceable, thereby providing a basis for arbitrability. If, however, the plaintiff sues under statutory employment protections, the matter can be arbitrated via the Advisory, Conciliation and Arbitration Service (ACAS) scheme, referred to in

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Section 7(1) of the Employment Rights (Dispute Resolution) Act of 1998 (abbreviated as the ER(DR)A 1998). This scheme allows parties to avoid employment tribunals and to agree to arbitration after the dispute has arisen.

France

France has also implemented EC Directive 91/13 through Article 132-1 of the Code de la consommation [France’s Consumer Code]. This provision states: “any clause in a contract concluded between a seller or a supplier and a person who is not acting in the course of his trade, business or profession or a consumer shall be regarded as unfair if its object or effect is to create, to the detriment of that person or consumer, a significant imbalance in the rights and obligations of the parties to the contract.” The provision further states in the annex that an arbitration clause may be statutorily unfair but it is the plaintiff’s obligation to prove this.

Other German laws can also apply to consumer arbitration agreements. German consumer law, Ardizzoni says, allows arbitration clauses to be implemented pre-dispute but requires them to be written in an “intelligible and transparent manner.” “Unclear or nonunderstandable terms” have been held to violate the good faith requirement of Section 307(1).

German arbitration law imposes strict form requirements on cases in which consumers are involved. Section 1031(5) of the German Civil Code of Civil Procedure (ZPO) generally requires that the arbitration agreement be contained in a separate and mutually signed document that solely contains the agreement to arbitrate.

In Germany, employers and employees can agree to arbitrate under Sections 101 et seq. of the German Labour Courts Act (ArbGG), but they are required to use a “separate system of arbitral proceedings” found in Sections 103-110 ArbGG. In particular, Section 103(1) ArbGG provides that an employment arbitral tribunal must be composed of an equal number of workers and employers. Impartial persons can act as additional arbitrators.

Switzerland

Switzerland allows any claim involving an “economic interest” to be arbitrated. The courts interpret the term ‘economic interest’ in a very broad manner, favoring arbitrability. In general, consumer disputes are arbitrable under Swiss law because they are not preempted by Article 22 of the Federal Law of the Forum in Civil Matters (Bundesgesetzes über den Gerichtsstand in Zivilsachen or GestG) the provision that places restrictions on consumer disputes. However, there is some legal doctrine to support the view that, due to the interaction of code provisions, consumer disputes are...
only arbitrable under post-dispute arbitration agreements. But, this is not the prevailing view. The arbitrability of employment disputes in Switzerland is very similar to the arbitrability of consumer disputes, except that Article 24 GestG governs preemption. But, like consumer disputes, employment disputes are arbitrable and not preempted. Further, Swiss courts have specifically held employment disputes to be arbitrable.

**Non-European Union Countries**

**Canada**

In Canada, under federal law, parties generally are able to contract for arbitration before any dispute arises. Legislative limitations on the ability to enforce pre-dispute consumer arbitration clauses exist only in provincial law in the provinces of Ontario, Quebec and Alberta. In Ontario and Quebec, pre-dispute arbitration agreements are void in the consumer context and cannot prevent a plaintiff from filing a class action lawsuit or from becoming a member of a class. In Alberta, the Fair Trading Act guarantees access to courts, including class action procedures, in respect to all causes of action under the Act. In order for a pre-dispute arbitration agreement to be enforceable under the Fair Trading Act, it must have received ministerial approval. These limitations normally mean that a stay of litigation in favor of arbitration will not be granted. But, all three provinces allow consumers to agree to arbitration post-dispute.

There is no similar prohibition on the arbitrability of class actions for employment disputes.

**Australia**

Australia places only one federal limitation on the arbitrability of consumer disputes. That limitation applies only to insurance benefit disputes, and makes them non-arbitrable.

By contrast, employment disputes are fully arbitrable in a private setting. Most employment arbitrations in Australia make use of the federal Fair Work Australia scheme (the national workplace relations tribunal) because it is cheaper.

**Lessons from Abroad**

The foregoing survey exposes a mistaken premise in the current reform debate in the United States. Contrary to the statements of some reform advocates, foreign countries do not all categorically preclude enforcement of pre-dispute arbitration agreements between companies and individuals. Rather, our survey reveals a variety of approaches, ranging from the more conservative approach of England, to the more tolerant approach of Australia. These varying approaches suggest that the U.S. Congress has a far more diverse menu of options than simply invalidating pre-dispute consumer and employment arbitration agreements outright, or preserving the status quo. For example, it could follow the French model by codifying certain procedural protections in the FAA. Alternatively, it could follow the German model by imposing certain formality requirements on the arbitration agreement.

Whatever policy alternative it considers, Congress must keep in mind potentially salient differences between legal systems. For example, in contrast to the United States, many foreign countries permit the prevailing party to recover its attorney’s fees. Further, foreign countries have a more limited regime for class action and collective litigation. Most do not permit as extensive discovery as U.S. courts do. Thus, the consequences of barring certain kinds of arbitration could have very different effects here than they would if such a ban were implemented abroad.

It behooves Congress to study closely the lessons from these nations, rather than blindly accept unexamined claims about the foreign models that, this article demonstrates, are simply inaccurate. It would be unfortunate if Congress were to rush headlong into reform without considering these lessons from abroad and, indeed, the height of irony if Congress were to invalidate such arbitration agreements in the belief that it was bringing the United States into line with the systems of other nations when, in fact, some of those very same nations are moving more toward the American model.

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**ENDNOTES**


2 See Susan Lott et al., Report: Mandatory Arbitration and Consumer Contracts (Public Interest Advocacy Center (PIAC), Nov. 4, 2004), available at www.piac.ca/consumers/mandatory_arbitration_and_consumer_contracts (describing mandatory arbitration clauses in the consumer context as a “uniquely American experience”); Joseph M. Matthews, “Are Florida Courts Really Parochial When It Comes to Arbitration?” 81 Fla. Bar J. 29 (2007) (“In fact, the U.S. Supreme Court expansion of the FAA has pushed the U.S. past most other developed nations, particularly those in Europe, with respect to [arbitration], which is the primary means of resolving disputes in the international arena.”).


10 See supra n. 2.


13 Id.


15 Unfair Terms, supra n. 14, at Reg. 5(5), sched. 2, 1(q) (“excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract”).

16 Id. at Reg. 3(1).

17 Id. at Reg. 5(1)-(2).

18 Id.

19 Id. at Reg. 5(4).

20 See Employment Rights (Dispute Resolution) Act 1998, ch. 8, § 7(1).


23 Id. 526, 542; Jean-Louis Delvolvé et al., French Arbitration Law and Practice 54 (Kluwer 2003). Additionally, beyond the targeted consumer provisions of the Code de la consommation, French Civil Code Article 2061 limits arbitrability to disputes between professionals, implicitly excluding consumer contracts. Further, these provisions have been held to be inapplicable to international disputes but that position has been criticized. See Gabrielle Kauffmann-Kohler, “Online Dispute Resolution and Its Significance for International Commercial Arbitration,” in Global Reflections on International Law, Commerce, and Dispute Resolution (ICC 2005).

24 Delvolvé, supra n. 23, at 47.

25 Id.

26 Id. at 54.

27 Marco Ardizzoni, German Tax and Business Law 1066 (Thomson/Sweet & Maxwell 2005).

28 Id. at 1076.

29 Id. at 1066.

30 Id. at 1076.


34 Id.

35 Markus Wirth, “Kommentar zu Art. 9,” in Gerichtsstandesgesetz, Kommentar zum Bündnigestz über den Gerichtsstand in Zivilsachen art. 1 n.24-25 (eds. von Thomas Müller/Markus Wirth, Commentary on Article 9, in the Jurisdiction Act, Commentary on Federal Law on Jurisdiction in Civil Matters).

36 Wolfgang Portmann & Jean-Fritz Stöckli, Schweizerisches Arbeitsrecht 275 (Dike Verlag 2007). [Swiss Industrial Law].

37 Id.


40 Id. See Lott, supra n. 2, at 52 (stating that there is no national Canadian prohibition on “mandatory arbitration clauses”).


42 Fair Trading Act, R.S.A. 2000, ch. F-2, § 13(1) [Alberta Act].

43 Id. at § 16.


45 Quebec Act, supra n. 43, at § 11.1 (2); Ontario Act, supra n. 43, at §§ 7(5) & 8(4); Alberta Act, n. 44, supra, at § 16.

46 Barin, supra n. 39.

47 Lott, supra n. 2, at 45.

