

By: West

S.B. No. 222

A BILL TO BE ENTITLED

AN ACT

relating to arbitration and arbitration agreements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. (a) The Texas Legislature, whose power is defined broadly to include the power to set public policy, has adhered to the Texas heritage of permissive arbitration and has not declared a public policy favoring compulsory arbitration. The Texas Arbitration Act, codified as Chapter 171, Civil Practice and Remedies Code, was intended to reflect the Texas heritage of permissive arbitration and was not intended to serve as an expression of public policy compelling arbitration in the absence of an agreement or as a consequence of agreements among parties of disparate bargaining power, nor was it intended to derogate the constitutionally protected right to trial by jury.

(b) A series of Texas Supreme Court decisions have changed the intention and meaning of the Act so that it now extends to nonsignatories and disputes among parties of disparate bargaining power, such as consumer and employment disputes. As a result, Texas consumers and employees may be compelled to submit their claims to binding arbitration, even in the absence of agreement.

(c) Few people realize or understand the significance of arbitration clauses set forth in fine print that strip them of constitutionally protected rights. Because entire industries have adopted the placement of arbitration clauses in documents of trade

1 or commerce, people increasingly have no choice but to accept them.
2 They must often give up their rights as a condition of having a job,
3 getting necessary medical care, buying a home, buying a car,
4 opening a bank account, getting a credit card, investing their
5 money, buying insurance, or buying an array of consumer goods and
6 services. Oftentimes, they are not even aware that they have given
7 up their rights.

8 (d) Mandatory or compulsory arbitration undermines the
9 development of public law for civil and consumer rights because
10 there is no meaningful judicial review of arbitrators' decisions.
11 Because they are working outside the civil justice system, and with
12 knowledge that their rulings will not be examined by a court
13 applying applicable law, arbitrators enjoy near-complete freedom
14 to ignore the law.

15 (e) Mandatory or compulsory arbitration is a poor system for
16 protecting civil and consumer rights because it is not transparent.
17 While the American civil justice system features publicly
18 accountable jurists who issue written decisions that are widely
19 available to the public and are subject to appellate scrutiny,
20 arbitration does not offer transparent or protective features.

21 (f) Many business entities add unfair provisions to their
22 arbitration clauses that deliberately tilt the systems against
23 individuals, including provisions that strip individuals of
24 substantive statutory rights, ban class actions, and force people
25 to arbitrate their claims hundreds or thousands of miles from their
26 homes. While some courts have been protective of individuals, too
27 many have upheld even egregiously unfair mandatory arbitration

1 clauses in deference to a supposed federal or state policy favoring
2 arbitration over the constitutional rights of individuals.

3 (g) Private arbitration companies, which have emerged to
4 handle the increase in arbitration business, are sometimes under
5 pressure to devise systems or engage in conduct that favors the
6 business entities that decide whether those companies will receive
7 their lucrative repeat arbitration business.

8 (h) For these reasons, Chapter 171, Civil Practice and
9 Remedies Code, should be amended to restore fairness to the system
10 of arbitration in Texas.

11 SECTION 2. Section 171.001, Civil Practice and Remedies
12 Code, is amended by amending Subsection (a) and adding Subsections
13 (c) and (d) to read as follows:

14 (a) Except as provided by this section, a [A] written
15 agreement to arbitrate is valid and enforceable if the agreement is
16 to arbitrate a controversy that:

- 17 (1) exists at the time of the agreement; or
18 (2) arises between the parties after the date of the
19 agreement.

20 (c) An agreement to arbitrate a controversy that arises
21 between the parties to the agreement after the date of the agreement
22 is void and unenforceable if the agreement requires arbitration of:

23 (1) a dispute between an employer and employee arising
24 out of the relationship of employer and employee, as defined by the
25 federal Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.);

26 (2) a dispute involving:

27 (A) a person who seeks or acquires goods, real or

1 personal property, services, money, or credit for personal, family,
2 or household purposes; and

3 (B) a seller or provider of goods, property,
4 services, money, or credit that is a business organization or
5 entity;

6 (3) a dispute between a franchisor and franchisee
7 arising out of or relating to a contract or agreement under which:

8 (A) a franchisee is granted the right to engage
9 in the business of offering, selling, or distributing goods or
10 services under a marketing plan or system prescribed in substantial
11 part by a franchisor;

12 (B) the operation of the franchisee's business
13 under the plan or system is substantially associated with the
14 franchisor's trademark, service mark, trade name, logotype,
15 advertising, or other commercial symbol designating the franchisor
16 or the franchisor's affiliate; and

17 (C) the franchisee is required to pay, directly
18 or indirectly, a franchise fee; or

19 (4) a dispute arising under any statute intended to
20 protect civil rights or regulate contracts or transactions between
21 parties of unequal bargaining power.

22 (d) Except as otherwise provided by this chapter, the
23 validity or enforceability of an arbitration agreement shall be
24 determined by a court, rather than the arbitrator, regardless of
25 whether the party resisting arbitration challenges the arbitration
26 agreement specifically or in conjunction with other terms of the
27 contract containing the agreement.

1 SECTION 3. Subchapter A, Chapter 171, Civil Practice and
2 Remedies Code, is amended by adding Section 171.0021:

3 Sec. 171.0021. APPLICABILITY OF CHAPTER. (a) This chapter
4 does not apply to an arbitration provision:

5 (1) in a collective bargaining agreement between an
6 employer and a labor union; or

7 (2) required by statute.

8 (b) An issue as to whether this chapter applies to an
9 arbitration agreement shall be determined under the law of this
10 state.

11 SECTION 4. Section 171.021, Civil Practice and Remedies
12 Code, is amended by adding Subsection (d) to read as follows:

13 (d) An order compelling arbitration may not violate a right
14 protected by the constitution of this state or the United States
15 unless the person holding the right knowingly waives the right.

16 SECTION 5. Section 171.041, Civil Practice and Remedies
17 Code, is amended by adding Subsection (d) to read as follows:

18 (d) An arbitrator appointed under Subsection (b) must
19 satisfy objective qualification standards that consider education,
20 training, and experience.

21 SECTION 6. Section 171.044, Civil Practice and Remedies
22 Code, is amended by adding Subsection (d) to read as follows:

23 (d) Notwithstanding Subsection (c), the hearing may not
24 proceed in the absence of notice or waiver of notice in accordance
25 with this section.

26 SECTION 7. Section 171.047, Civil Practice and Remedies
27 Code, is amended to read as follows:

1 Sec. 171.047. RIGHTS OF PARTY AT HEARING. (a) Unless
2 otherwise provided by the agreement to arbitrate, a party at the
3 hearing is entitled to:

- 4 (1) be heard;
- 5 (2) present evidence material to the controversy;
- 6 ~~[and]~~
- 7 (3) cross-examine any witness; and
- 8 (4) obtain a stenographic recording of the hearing in
9 accordance with Subsection (b).

10 (b) A party must request a stenographic recording before the
11 commencement of the hearing or the party's right to obtain the
12 recording is waived. A stenographic recording under this section
13 may be made by any officer authorized by law to record testimony.
14 The cost of the stenographic recording shall be borne by all parties
15 requesting the recording or requesting a copy of the recording. The
16 cost of the stenographic recording may be considered by the
17 arbitrator to be an expense incurred in conducting the arbitration
18 under Section 171.055.

19 SECTION 8. Section 171.088(a), Civil Practice and Remedies
20 Code, is amended to read as follows:

21 (a) On application of a party, the court shall vacate an
22 award if:

23 (1) the award was obtained by corruption, fraud, or
24 other undue means;

25 (2) the rights of a party were prejudiced by:

26 (A) evident partiality by an arbitrator
27 appointed as a neutral arbitrator;

1 (B) corruption in an arbitrator; or
2 (C) misconduct or wilful misbehavior of an
3 arbitrator;

4 (3) the arbitrators:

5 (A) exceeded their powers;

6 (B) refused to postpone the hearing after a
7 showing of sufficient cause for the postponement;

8 (C) refused to hear evidence material to the
9 controversy; or

10 (D) conducted the hearing, contrary to Section
11 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that
12 substantially prejudiced the rights of a party; ~~[or]~~

13 (4) there was no agreement to arbitrate, the issue was
14 not adversely determined in a proceeding under Subchapter B, and
15 the party did not participate in the arbitration hearing without
16 raising the objection; or

17 (5) the award clearly violates fundamental public
18 policy or is the result of manifest disregard of the law.

19 SECTION 9. Section 171.098(a), Civil Practice and Remedies
20 Code, is amended to read as follows:

21 (a) A party may appeal a judgment or decree entered under
22 this chapter or an order:

23 (1) granting or denying an application to compel
24 arbitration made under Section 171.021;

25 (2) granting an application to stay arbitration made
26 under Section 171.023;

27 (3) confirming or denying confirmation of an award;

1 (4) modifying or correcting an award; or

2 (5) vacating an award without directing a rehearing.

3 SECTION 10. Section 171.002, Civil Practice and Remedies
4 Code, is repealed.

5 SECTION 11. The change in law made by this Act applies only
6 to an arbitration agreement entered into on or after the effective
7 date of this Act. An arbitration agreement entered into before the
8 effective date of this Act is governed by the law in effect
9 immediately before that date, and that law is continued in effect
10 for that purpose.

11 SECTION 12. This Act takes effect immediately if it
12 receives a vote of two-thirds of all the members elected to each
13 house, as provided by Section 39, Article III, Texas Constitution.
14 If this Act does not receive the vote necessary for immediate
15 effect, this Act takes effect September 1, 2009.