New York State Bar Association
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Memorandum in Opposition

DISPUTE RESOLUTION SECTION

DR #2 May 23, 2019

A. 3337 By: M. of A. Dinowitz
S. 5669 By: Senator Sepulveda
Assembly Committee: Judiciary
Senate 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 SECTIONS REFERRED TO: Article 75 of the civil practice law and rules.

Section 7501 Proposal: In this Section, the Bill proposes to eliminate the parties' contractual choice to select an arbitration panel with two non-neutral arbitrators. If enacted this proposal would have a significant detrimental effect upon using New York as an arbitration forum by those industries that traditionally have two non-neutral arbitrators and one umpire as part of their structure. In the insurance industry and especially the reinsurance industry, the preferred method of arbitration is exactly the use of two non-neutrals. See, Rules of AIDA Reinsurance and Insurance Arbitration Society of the United States ("ARIAS-US") R. 6.1.

New York had become the place of choice for reinsurance arbitration and ARIAS-US, the primary reinsurance provider is based in New York. This proposal would clearly chase away those arbitrations from New York, to other states.

Maritime arbitration is controlled by the Society of Maritime Arbitrators. As of now, most of their arbitrations take place in New York. Maritime arbitrations utilize two non-neutral arbitrators. This Bill, if enacted will certainly prohibit Maritime practices and will chase those arbitrations to other states or to London. In essence, the Bill would take away from parties their freedom of choice to have two non-neutrals, if they so desire.

The preferred course and wording for this part of the legislation would be to insert the words "unless the contract for arbitration between the parties provides otherwise".[1] This would secure the parties' freedom of choice and preserve the right of industries that utilize non-neutral arbitrators, to continue to have arbitrations in New York.

Further, the Legislature could limit the mandatory all-neutral arbitration panels to consumer and non-executive employment arbitrations, which does appear to be of particular concern. In those arbitrations two sophisticated business entities are not adversaries and the likelihood is that the Claimant has not participated in agreeing to a non-neutral arbitrator.

Section 7505 (c) and (d) Proposal: We support full arbitrator disclosure and the language proposed in 7505-a (1), (2) and 7505-b and 7505- (e). On the other hand, a party who objects to an arbitrator, based on a disclosure, should be restricted in the time to assert the objection, so that the party does not "hold" the objection in its pocket waiting to see if the arbitrator seems favorable to its position. Parties should file their objection to an arbitrator's disclosure within ten days. This is sufficient time for a party to know if they wish to object to an arbitrator, for any reason, including possible bias. Simply put, parties should not have unrestricted time, following disclosure, to file their objection, waiting to see the arbitrator's pre-disposition regarding their case.

In addition, if the arbitration is being supervised by a provider organization (i.e. JAMS or American Arbitration Assn. or others), those organizations have their own procedures for handling party objections to disclosure, and the legislation should not interfere with those procedures, that have worked effectively to date.

Based on the foregoing, the NYSBA's Dispute Resolution Section **OPPOSES** this legislation.

[1] The United States Supreme Court has held that: "The principal purpose of the FAA is to ensur[e] that private arbitration agreements are enforced according to their terms." *ATT Mobility LLC v. Concepcion,* 563 U.S. 333 (2001). Since virtually all arbitrations, even those in state court, are governed by the F.A.A., parties clearly have a right to formulate the terms of their arbitration agreements; and thus if they wish to have two non-neutral arbitrators, that is their contractual right. *See, also, Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc*. 473 U.S. 614,628 (1985).