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100th Anniversary of the Federal Arbitration Act

Arbitration has come a long way

By Tricia Bigelow

Arbitration has regularly been touted as a means of achieving a fair and balanced resolution of legal disputes, but it is also a divisive issue within our profession. Some say arbitration is an efficient and effective way to achieve justice for injured parties; others say it is an unfair process that favors defendants.

But arbitration as we know it is changing. As we commemorate the centennial of the Federal Arbitration Act (FAA), we have an opportunity to review how the law began, how it has evolved, and how recent developments have improved the process. The 2025 arbitration landscape is far different - more balanced, more fair, more valuable - than at any time in recent decades.

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The history

When it was enacted in 1925, the FAA was simply a way to help business people resolve their disagreements. If they agreed to settle their disputes outside the courtroom, the law said they should be allowed to do so. Courts were required to stay litigation, upon motion, whenever a dispute involved a contract with a written arbitration clause. The FAA presupposed that all parties to the contract understood its terms, were in a position to negotiate those terms, and willingly and knowingly agreed to those terms.

This was how things worked for many decades. Arbitration was an outlier, rarely invoked in business contracts. Most disputes went to trial; businesses negotiated arbitration only when they wanted an alternative way to resolve their disputes. However, things started changing in the last two decades, and arbitration is now a standard part of almost every commercial agreement. It is also routinely included in consumer and employment agreements.

It makes sense. Businesses know that bringing their matters to arbitration can help avoid the roulette-wheel outcomes of jury trials. And it is easy to plug boilerplate arbitration clauses into fine-print contracts signed by employees and consumers. Even if they don't understand what they are signing, those terms are binding. Courts - notably the U.S. Supreme Court - have consistently upheld the sanctity of arbitration agreements. Today mandatory arbitration agreements bind more than 80% of the U.S. workforce.

The challenges

Bias

Arbitrators who receive substantial repeat business from one party to a dispute, even if they truly believe they can render impartial judgment, may be subconsciously inclined to favor that party.

According to "The Arbitration Epidemic," a 2015 Economic Policy Institute report by Cornell University professors Alexander Colvin and Katherine Stone, "On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court." There may be many reasons for this disparity, but when arbitrators' decisions tend to favor defendants, it is easy for plaintiffs to attribute it to bias.

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Beyond the risk - or the mere perception - of implicit bias, arbitration has presented other challenges for parties seeking equitable resolution of their disputes.

Discovery

Unless special circumstances apply, parties have not been allowed to conduct the type of early discovery permitted in court proceedings. The California Arbitration Act barred prehearing third-party discovery unless the arbitration agreement expressly provided for it by referencing Code of Civil Procedure Section 1283.05, or the claim involved wrongful death or personal injury. Those limitations have kept critical information out of litigants' hands until late in the process, after claims have already been asserted and arguments made.

Appeal

If the arbitrator's decision is flawed or inconsistent with the facts there is really no recourse for the losing party. The FAA allows judicial review only if a decision was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set forth in the arbitration agreement.

Big changes

In the past three years, significant changes have been made to the laws and procedures governing arbitration, at both the federal and state level.

Federal carve-outs

The first significant change occurred in 2022, when Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. That law cancels out predispute arbitration agreements whenever a claim of sexual assault or harassment is asserted, allowing victims to have their day in court.

A second exclusion, for age-discrimination claims, is now under consideration. The Protecting Older Americans Act of 2023, if passed, would invalidate predispute arbitration agreements when older workers suffer discrimination or harassment.

Ethics, bias, disclosure

California arbitrators and mediators will soon be subject to a State Bar-created certification program that recognizes levels of commitment to ethical practice. Senate Bill 940 (SB 940) requires arbitrators who desire such certification to evidence their commitment to California's Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Standard 5 states that "An arbitrator must act in a manner that upholds the integrity and fairness of the arbitration process. He or she must maintain impartiality toward all participants in the arbitration at all times." Standard 6 says that "a proposed arbitrator must decline appointment if he or she is not able to be impartial." Certified ADR providers will also be required to have a system in place for handling complaints.

The California Arbitration Act (CAA), Code of Civil Procedure Sections 1280-1294.4, spells out disclosure requirements for arbitrators, to ferret out potential conflicts and to disqualify arbitrators who are or appear to be biased. The CAA requires arbitrators to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt as to the proposed neutral arbitrator's impartiality."

SB 940 now requires that in consumer arbitration cases, neutrals must disclose any solicitation made after Jan. 1, 2025, and within the last two years "by, or at the direction of, a private arbitration company to a party or lawyer for a party." The law also prohibits the solicitation of a party or lawyer for a party during the pendency of the arbitration.

Discovery

SB 940 significantly opens the door for parties to conduct full pretrial discovery in civil cases brought in state courts. It repeals Section 1283.1 of the Code of Civil Procedure (CCP), which had prevented most parties in arbitration proceedings from obtaining third-party subpoenas and conducting other forms of prelitigation discovery.

Now parties in arbitration will be subject to CCP Section 1283.05, which gives them the same discovery rights as other litigants, including the right to issue third-party subpoenas and take depositions of non-party witnesses.

Other changes

SB 940 will now allow some consumer disputes to go to Small Claims Court even if an arbitration agreement is in place. New Civil Code Section 1799.209 will provide as follows: "If a consumer contract requires a dispute under the contract to be arbitrated and the dispute may be adjudicated pursuant to the Small Claims Act (Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of the Code of Civil Procedure), the consumer shall be given the option to have the dispute adjudicated pursuant to that act."

Senate Bill 365 amends CCP Section 1294 to give judges discretion to keep cases moving through the trial process even when a party has appealed an order dismissing or denying a petition to compel arbitration. The law empowers trial courts to let cases proceed while defendants appeal denial of a motion to compel arbitration. This should allow litigants to resolve their issues in the trial court without delays and loss of witnesses and evidence that can occur while an appeal of a grant of arbitration is resolved.

New and improved

Arbitration awards can be more challenging than judicial decisions - neither errors of fact nor law will typically justify review - but the law now provides strong tools to protect parties' interests from arbitrator bias and conflicts of interest. More stringent statutory arbitrator disclosure requirements, as well as the new ethics certification program, should help parties feel more comfortable with the arbitration process.

Broader pretrial discovery, trial of matters pending appeal of arbitration denials, and arbitration carveouts for certain claims should ensure that the entire process is fairer and more balanced for all parties.

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