

SPEAKING OUT

ARBITRATION: PANACEA OR NIGHTMARE?

Read the fine print. How many times have we heard these words of wisdom prior to signing a contract? Franchise agreements with fine print are a part of life, and franchisees sign them everyday without giving second thought to the fine print; never imagining that those few finely printed words that were gratuitously skipped over would deny them the fundamental right to a trial by jury.

What was expected by many to be the answer to extraordinary legal fees, judicial formalities and the uncertainties associated with jury trials has become a powerful weapon used by some as a shield; to some, a sword; and to many more, the kiss of death. Arbitration, a form of alternative dispute resolution, is a procedure in which parties to a dispute agree to submit their dispute for resolution to a neutral third-party individual or to a group of three arbitrators comprised of one neutral and two non-neutral arbitrators (each non-neutral arbitrator is an advocate for their client, while the neutral arbitrator casts the tie-breaker vote, if necessary), by whose decision, the parties agree to be bound.

It is true that arbitration is an effective method to alleviate overburdened court dockets and help the rusted and creaking wheels of justice churn a bit quicker, but some higher ups have taken the position that mandatory arbitration has perverted the pure and unadulterated concept of arbitration and transformed it into the three-headed monster that spurned the creation of the Arbitration Fairness Act of 2007 and many others like it.

The Federal Arbitration Act (FAA), enacted by Congress in 1925, was the first bit of legislation to provide for the resolution of disputes through contractually-based, mandatory and binding arbitration. The goal of the FAA was to allow equally footed parties an alternative forum in which to resolve their disputes; not to deny unwary consumers (and in our case, franchisors and franchisees in the hotel industry) the fundamental right to trial by jury. Today, mandatory arbitration provisions are in virtually all franchise agreements as well as consumer and employment contracts.

Millions of employees and consumers are required to agree to mandatory arbitration in order to secure gainful employment, receive necessary goods and services or obtain franchise agreements. Don't believe us?

Take a look at your cellular phone service contract, health club membership contract, your employment agreement, your credit card disclosure agreement or franchise agreement. Not to be exhaustive, but this is a very short list of the types of agreements whereby many have bound themselves to mandatory arbitration without realizing it or knowing the consequences.

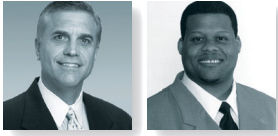
In arbitration, the parties may agree to allow the dispute to be heard by a single arbitrator or a panel of them whose final decision may not be appealed except for extreme and rare circumstances. Arbitrators are typically sophisticated and highly educated judges or lawyers but in some cases, non-lawyers (i.e., experts in the hospitality industry). Rightly or wrongly, some hotel franchisees oppose arbitration, claiming arbitrators tend to favor franchisors instead of franchisees in hospitality disputes. What franchisees need to realize is that arbitration proceedings are not always conducted according to rules of law such as the rules of evidence or civil procedure, thus, granting the arbitrator free reign over the proceedings and the sovereignty to decide as he wishes without consequence. We recently dealt with an arbitration clause that essentially "gutted" the reasonable expectation of fairness in an arbitration proceeding. In pertinent part, the arbitration clause stated the following:

"The arbitrator...will establish the rules for proceeding with the arbitration of the dispute...the arbitrator may use the rules of AAA for commercial arbitration but is encouraged to adopt the rules the arbitrator deems appropriate to accomplish the arbitration in the quickest and least expensive manner possible. Accordingly, the arbitrator may (a) dispense with any formal rules of evidence and allow hearsay testimony so as to limit the number of witnesses required, (b) accept evidence of property values or the values of Partnership interests without formal appraisals, (c) act upon his understanding or interpretation of the law on any issue without the obligation to research the issue or accept briefs of the issue prepared by any party, and (d) limit the time for presentation of any party's case as well as the amount of information or number of witnesses to be presented in connection with any hearing."

However, as contrary to all notions of fairness this clause may be, many arbitration clauses are equitable and are efficient methods for the resolution of disputes.

WHAT THE LAW SAYS

In an effort to avoid these predicaments, the Arbitration Fairness Act of 2007, is aimed at re-establishing and maintaining the spirit of the FAA as proposed in



* This article was co-authored by **Richard Barrett Cuetara, Esq.**, and **Steven J. Moses, Esq.**, of Dallas-based Cowles & Thompson, P.C. Rick is a shareholder in the firm and has extensive experience in the hospitality arena. He can be reached at rbarrett@cowlesthompson.com or 214-672-2165. Steven is an associate in the firm. He can be reached at smoses@cowlesthompson.com or 214-672-2130.

1925, and rejuvenating the fairness of arbitration. The Arbitration Fairness Act of 2007 would amend the FAA to prohibit the enforcement of a pre-dispute, mandatory arbitration clause if it requires mandatory arbitration of an employment, consumer, or franchise dispute; or a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

In no way does the Act intend to prohibit arbitration of these disputes; instead, it allows both parties to decide, while on equal footing after the dispute has arisen, whether or not arbitration is the most effective and efficient way to resolve the difference. While the Act has yet to be passed and signed into law, it has gained widespread support from numerous and influential consumer protection groups, franchisee associations and enjoys the support of many of those in Congress.

The Act has also inspired the introduction of others like it. Congresswoman Linda Sanchez (D-CA) introduced in the spirit of the Act, the Automobile Arbitration Fairness Act of 2008, which amends federal arbitration law to require that a controversy arising out of a consumer sales or lease contract for a motor vehicle may not be settled by arbitration unless, after the dispute has arisen, all parties agree to settle the dispute through arbitration in writing. Congresswoman Sanchez also introduced the Fairness in Nursing Home Arbitration Act of 2008, which amends the FAA to prohibit pre-dispute mandatory arbitration agreements that require the arbitration of disputes between a long-term care facility and a resident of such facility.

As evidenced by the widespread support of influential franchisee associations, consumer groups and the inspiration of others to follow suit, the Act has the potential to forever change the landscape of

alternative dispute resolution and render mandatory arbitration in franchise agreements nothing more than dust-covered fossils of the judicial system. In that event, it's back to the courthouse to resolve disputes.



TV Wall Mounts at Every Turn!

Chief, the industry leader in mounting solutions, provides a full line of quality mounts and accessories designed to blend seamlessly with most TV models and install easily into any décor. Our mounts, together with your vision, produce world-class audiovisual installations with aesthetic appeal.

Chief provides the best in Customer Service, available to you M-F, 7am to 7pm (CST), by phone or email.

Hospitality Solutions for:

- Guest Rooms
- Conference Rooms
- Lobbies
- Bathrooms
- Bars and Restaurants
- Gaming/Casinos



OUR MOUNTS. YOUR VISION.
www.chiefmfg.com ■ 888.254.5436

©2009 Milestone AV Technologies, A Duchossois Group Company LodgingHospitality_JAN09

CIRCLE 27 ON READER SERVICE CARD