GE Energy – Outokumpu Oral Argument at SCOTUS was January 21. Hard to Say Where This One Will Land

By George H. Friedman, SAA Editor-in-Chief

Oral argument took place January 21 before the Supreme Court in GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, *No. 18-1048. Judging by the questions (always a risky endeavor), we're not sure which way the Court will go. Unlike some recent arbitration-related decisions, though, we don't see a unanimous decision.*

The Petition for *Certiorari* was filed February 2019, seeking review of *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018), a case we summarized in SAA 2018-42 (Nov. 7). At issue is whether the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("*Convention*") permits a non-signatory to enforce a predispute arbitration agreements ("PDAA") against a signatory by invoking the equitable estoppel doctrine.

FAA and the UN Convention

To review, FAA Chapter 2, which implements the *Convention*, enforces not only arbitration Awards, but also PDAAs. It is also hornbook law that a signatory to a broad PDAA is bound by its terms under FAA Chapter 1, and that sometimes such an arbitration agreement can be enforced by or against a non-signatory via equitable estoppel. How so? Under equitable estoppel, one cannot selectively assert rights under a contract. Thus, a contractual PDAA

can come into play where a non-party invokes an arbitration agreement involving a signatory. FAA Chapter 1, section 2, which in domestic transactions requires a written agreement to arbitrate, makes no mention of *signatures*, but the *Convention* does. The *Convention* also refers several times to "parties." Specifically, Article II, § 2 provides: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams" (emphasis added).

Case Below: Non-Signatory has No Equitable Estoppel Right to Compel Arbitration

The core issue presented in *Outokumpu* at the circuit court level was whether a non-signatory could compel arbitration under FAA Chapter 2. "No," said a unanimous Eleventh Circuit, as a matter of statutory construction. After determining that the underlying transaction was international, the Court found that the *Convention* as implemented by FAA Chapter 2 grants this right only to *signatory parties*, thus rendering the PDAA unenforceable by a non-signatory subcontractor: "Here, our inquiry starts and ends with the first factor because we find that there is no agreement in writing within the meaning of the *Convention* …. GE Energy is undeniably not a signatory to the Contracts."

The Oral Argument

The 73-page transcript has already been posted. By far the greatest number of questions came from Justice Gorsuch, with Chief Justice Roberts a close second. GE's counsel Shay Dvoretzky managed to get more than a minute into his opening remarks before being interrupted – as did Outokumpu's attorney Jonathan D. Hacker – which is no small accomplishment, considering that in the past few arbitration-related cases at SCOTUS, counsel barely got past "May it please the Court…" We briefly analyze below the arguments and questions, using a page number:line reference. Obvious typos (*ed: this transcript version is unofficial and subject to revision*) have been corrected.

Petitioner's Case in a Nutshell: *Convention* Sets Floor, Not Ceiling

GE's argument in a nutshell is that the *Convention* establishes a floor, not a ceiling, for PDAA enforcement, and that the U.S. is free to allow non-signatories to enforce PDAAs via equitable estoppel.

Dvoretzky (4:11): If this case involved a domestic arbitration agreement, GE Energy could enforce it, as long as it could satisfy domestic non-signatory enforcement doctrines like equitable estoppel. The question here is whether the *New York Convention* prohibits that same result for international arbitration agreements. It does not. The *Convention* is simply silent about enforcement by non-signatories. That silence is consistent with the *Convention* 's design, which sets a floor, not a ceiling, for enforcing arbitration agreements and awards…. (65:15) So in terms of how this case can be resolved, there's the narrowest possible way, is to simply hold that the Eleventh Circuit was wrong to apply a signatory requirement.

Jonathan Y. Ellis, Assistant to the Solicitor General (as *Amicus*) (22:8): [T]he Eleventh Circuit was wrong to read into the writing requirement of Article II a categorical prohibition on compelling international arbitration on the basis of estoppel principles. of valid agreements, including who may be bound or who may invoke those agreements.

Respondent's Case in a Nutshell: "*Signed* by the *Parties*" Means What it Says

Outokumpu argued that the *Convention*'s clear language allowed only signatory parties to the contract to enforce a PDAA, and that non-party, non-signatory subcontractor GE thus had no standing to assert arbitration rights against Outokumpu.

Hacker (33:15): GE cannot compel Outokumpu to arbitrate its tort claims with GE because there is no written arbitration agreement between them. I agree that would generally not be an obstacle in a domestic arbitration case because, as this Court held in *Arthur Andersen* [*v. Carlisle*, 556 U.S. 624 (2009)], Chapter 1's agreement enforcement provision, FAA Section 3, does not limit enforcement to "parties to a written agreement." But the lack of a written agreement is decisive here, because the *Convention* 's enforcement provision, Article II, Section 3, is limited to the parties to a written arbitration agreement. Because that

provision controls over Chapter 1's conflicting enforcement provision, non-parties cannot enforce agreements in cases under the *Convention*.

Hard to Say Where this Will Land

The questions from the Justices were far-ranging, often shifting, and did not indicate to us a liberal-conservative or pro/anti-arbitration split. As we've predicted several times, we think this case will come down to parsing of the verbiage in the *Convention.* We present below just a few representative comments and questions from the Court.

Chief Justice Roberts (7:12): I thought it was one of the central propositions of our arbitration precedents that arbitration is based on agreement. And here somebody who never agreed to arbitration is being forced into arbitration, even though he has a clear right to take his dispute to court.

Justice Kagan (9:4): So you're saying that when the United States entered into the *Convention* and when it then implemented the *Convention* through the FAA, Congress didn't understand arbitration to mean voluntary arbitration? … It seems odd that Congress would have passed the implementing legislation on the view that another contracting state could compel arbitration without any consent whatsoever.…

Justice Gorsuch (15:14): I had proceeded maybe on the mistaken assumption that the question whether equitable estoppel is recognized as a viable theory under the Federal Arbitration Act isn't before us. The only question before us is whether anything in the *Convention* precludes an argument like that to be made under the Federal Arbitration Act, whether or not it might succeed.

Justice Ginsburg (29:4): So what you're suggesting is that we should recognize this equitable estoppel, even though our treaty partners would not, which could yield divergent results and give you a real problem at the enforcement end because a country that doesn't recognize equitable estoppel will hesitate to enforce an award that was based on that theory?

Justice Sotomayor (38:9): You signed a contract. You agreed to arbitrate with the sellers. Sellers were defined as a list of subcontractors or sub-suppliers. They [GE Power] were among those. Why wouldn't estoppel stop you, normal estoppel rules?

Justice Alito (44:19): What do we have to decide? I mean, the Eleventh Circuit said a non-signatory can never enforce, right?… It said a non-signatory cannot enforce. It also emphasized the importance of a signature, which may look like an overstatement because we know Article II includes documents exchanged, letters, and telegrams. But, of course, the Eleventh Circuit was only talking about a signature because GE was not pointing to any sort of separate document exchanged in a letter or telegram.

Justice Gorsuch (53:3): Is there a universe of arbitration agreements a domestic law that might enforce that might not be enforceable under the *Convention*?… [if yes] isn't end of the case? If there are some universe of agreements that could be only domestically enforceable but are not enforceable under the *Convention*, then what?

A Prediction?

At this juncture, we can certainly say this case is too close to call, given the shifting thrust of the Justices' questions. The *Alert's* Editor-in-Chief George Friedman thinks we may be in for a surprise from the usually arbitration-friendly Court. Why? "Readers should note that Justices Gorsuch and Kavanaugh seem to be sticklers on statutory construction. Just read the Opinions they wrote in *Epic Systems* and *Henry Schein*. So, I would not at all be surprised by a decision saying essentially 'If Congress meant FAA Chapter 2 to deviate from the *Convention*'s definition of an arbitration agreement it would have used language to that effect.' On the other hand, the Justices' questions were all over the place, so who knows?"

*(ed: *Wonder how this case was heard as scheduled Tuesday morning, given that the Chief Justice was busy presiding over the impeachment trial in the Senate that day? Easy. The impeachment trial did not convene until 1 pm, giving the CJ time to hear the case, grab a sandwich, and head over to the Senate. Better that he didn't miss the oral argument, given that several major SCOTUS decisions involving arbitration were 5-4 votes. **Justices*

*Kavanaugh and Thomas asked no questions. ***The audio recording will be posted here on January 25; we'll see whether tone and cadence changes our views. ****SCOTUSBlog has an excellent analysis of the oral argument. *****We will of course track this one and keep our readers and followers informed.)* (SAC Ref. No. 2020-03-01)

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More on the EEOC's Rescission of its Anti-Arbitration Policy

By George H. Friedman, SAA Editor-in-Chief

As reported in SAA 2019-48 (Dec. 18), the EEOC has formally rescinded a Clinton-era policy against mandatory arbitration of workplace discrimination claims. Here are more details.

The Commission in 1997 issued a policy statement, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,* stating: "The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment

discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws…. The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts — an avenue of redress determined by Congress to be essential to enforcement" (Policy no. 915.002, July 10, 1997).

SCOTUS Begged to Differ

In the more than two decades since the policy was adopted, the Supreme Court has made clear not only that there is a strong federal policy in favor of arbitration, but that employment claims – even statutory ones – may be the subject of mandatory predispute arbitration agreements. The Commission on December 17 issued *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, formally abrogating its 1997 policy "that had disapproved of the practice of requiring workers to enter into arbitration agreements to resolve workplace discrimination claims and instructed its staff to proceed with claims against employers despite the existence of such agreements." Why the change in policy? Says the EEOC: "Since its issuance, the Supreme Court has ruled that agreements to arbitrate employment-related disputes are enforceable under the Federal Arbitration Act (FAA) for disputes between employers and employees. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). In other arbitration-related cases it has decided since 1997, the Court rejected concerns with using the arbitral forum – both within and outside the context of employment discrimination claims. Those decisions conflict with the 1997 Policy Statement."

The Bottom Line: PDAAs are OK

The *Rescission Statement* has a long list of Supreme Court cases backing up its assertion,

with the result that "the *Policy Statement on Mandatory Binding Arbitration* does not reflect current law, is rescinded, and should not be relied upon by EEOC staff in investigations or litigation." Citing *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002), however, the revised policy notes that nothing therein "should be construed to limit the ability of the Commission or any other party to challenge the enforceability of a particular arbitration agreement."

(ed: As we said in SAA 2019-48, it's about time. We've had a hard time understanding how the EEOC, "the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws," could take a position contrary to those laws as defined by SCOTUS.) (SAC Ref. No. 2020-01-02)

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District Court Grants TRO in Business Groups' Challenge to New California Law Restricting Employment PDAA Use and Enforcement

By George H. Friedman, SAA Editor-in-Chief

Just as it was about to go into effect, a federal judge enjoined the planned January 1, 2020 effectiveness of California AB-51, which essentially bans mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes.

We reported in SAAs 2019-48 (Dec. 18) & -47 (Dec. 11) that a coalition of business groups had filed suit in *Chamber of Commerce of the United States v. Becerra*, No. 2:19-at-01142 (E.D. Calif. Dec. 6, 2019), seeking declaratory and injunctive relief based on Federal Arbitration Act ("FAA") preemption. Recall that, as we reported in SAA 2019-40 (Oct. 23), Governor Gavin Newsom signed AB-51. The new law doesn't expressly bar predispute arbitration agreements ("PDAA"), but amends Labor Code section 432.6(a) to provide: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive *any right, forum, or procedure* for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added). The statute also states that an employer can't "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver. There are both civil and criminal penalties for violations. The statute has some carveouts seemingly included to avoid Federal Arbitration Act ("FAA") and federal securities acts preemption.

The Legal Challenges Asserted

The groups' suit asserted that relief was needed because: "AB 51's limits on arbitration agreements conflict with federal law. Those limits are therefore preempted and invalid under the Supremacy Clause of the Constitution of the United States. Accordingly, Plaintiffs respectfully request that the Court (1) grant a declaratory judgment that AB 51 is invalid with respect to all arbitration agreements governed by the FAA and (2) issue an order permanently enjoining Defendants from enforcing it with respect to such arbitration agreements." The complaint focusing especially on the law's chilling effect on arbitration

agreement use: “AB 51 singles out arbitration for disfavored treatment by imposing special restrictions on the formation of arbitration agreements, which do not apply to other types of contracts, and limit the ability of employers and workers to enter arbitration agreements. These requirements are not generally imposed to enter other provisions in employment contracts. Indeed, employers routinely condition employment on acceptance of other contractual terms…. AB 51 thus conflicts with –and also stands as an obstacle to — Congress’s objectives in enacting the FAA. It is therefore preempted.”

Court: Facts Support a TRO

On December 30th, District Court Judge Kimberly Mueller granted the TRO, finding that the plaintiffs: “have shown a likelihood of irreparable injury and that a restraining order is in the public interest…. Specifically, plaintiffs have raised serious questions regarding whether the challenged statute is preempted by the Federal Arbitration Act as construed by the United States Supreme Court…. Plaintiffs’ argument that allowing the statute to take effect even briefly, if it is preempted, will cause disruption in the making of employment contracts also is persuasive … particularly given the criminal penalties to which violators of the law may be exposed. See Cal. Lab. Code § 433 (‘Any person violating this article is guilty of a misdemeanor.’)” (citations omitted). The Motion for a preliminary injunction will be heard January 10.

*(ed: *Again we can’t say we are surprised. Our editorial comment in #40 said in part: “We suppose an argument can be made that the new law bars employers from enforcing the PDAAs, but in our view that would run afoul of the FAA. Stay tuned!” **The Court chided the plaintiffs for not acting sooner.)*

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The Other Shoe Drops: “Investor Choice Act” Finally Reintroduced in House and Senate. Would Amend 1934 Act and Investment Advisers Act of 1940 To Ban Mandatory Predispute Arbitration Agreements in Customer and Shareholder Relationships

By George H. Friedman, SAA Editor-in-Chief

It took a while, but joining the slew of anti-arbitration bills pending in Congress is the Investor Choice Act, *identical versions of which were introduced in the House and Senate in early December.*

We reported in SAA 2019-12 (Mar. 20) that House and Senate Democrats had reintroduced several anti-mandatory arbitration bills in late February and early March, seeking to amend the Federal Arbitration Act (“FAA”), specific statutes like Dodd-Frank, or both. Most were reintroductions of bills that were not enacted by the last Congress. One of the old bills that had not yet been reintroduced was the *Investor Choice Act* (“ICA”), which would have amended the *Securities Exchange Act of 1934* and the *Investment Adviser Act of 1940* to ban the use of mandatory predispute arbitration agreements (“PDAA”) by broker-dealers

and investment advisers and would have guaranteed class action participation. We later reported in SAA 2019-15 (Apr. 17) that the ICA was reintroduced March 28 in the House. The bill, however, was never formally introduced. That's no longer the case, because S. 2992 (introduced by Sen. Jeff Merkley (D-OR)), and H.R. 5336 (introduced by Rep. Bill Foster (D-IL)), were introduced within days of each other in early December.

New Bills are Almost Identical to the Old ICA…

The newly-introduced ICA is nearly identical to the old one (H.R. 585). The caption describes the proposed ICA as intending "to amend the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to prohibit mandatory pre-dispute arbitration agreements, and for other purposes." Specifically, the bills would declare it unlawful for BDs, funding portals, municipal securities dealers, or investment advisers: "to enter into, modify, or extend an agreement with customers or clients of that entity with respect to a future dispute between the parties that — (1) mandates arbitration for that dispute; (2) restricts, limits, or conditions the ability of a customer or client of that entity to select or designate a forum for resolution of that dispute; or (3) restricts, limits, or conditions the ability of a customer or client of that entity to pursue a claim relating to that dispute in an individual or representative capacity or on a class action or consolidated basis."

… But Different

This iteration of the ICA is essentially the same as the one introduced in the 115th Congress, except it adds a section amending the *Securities Act of 1933* to state: "A security may not be registered with the Commission if the issuer, in its bylaws, registration statement, or other governing documents mandates arbitration for any disputes between the issuer and the shareholders of the issuer." The bills also prohibit issuers from including shareholder arbitration agreements in IPO subscription agreements.

Retroactivity with One Exception

If enacted, the changes would be retroactive, rendering void a preexisting non-conforming

arbitration agreement, except that pending, ongoing arbitrations would be allowed to continue. Specifically, a PDAA "shall not be void … if arbitration required by that provision was initiated by any party on or before the date of enactment of this Act." While this carveout would avoid chaos in pending cases, as we've said before, we think retroactivity – invalidating existing arbitration agreements – invites challenges as an impermissible taking under the Constitution.

*(ed: *The original bills were analyzed by SAC Editor-in-Chief and Fordham Law Professor George H. Friedman, who wrote a guest SAC Blog post we published in March,* Democrats Introduce Several Anti-Mandatory Arbitration Bills. What You Need To Know. *More recently, the Bates Group on April 25 published a nice analysis,* Federal Legislators Target Mandatory Arbitration*, focusing on potential impact on the financial services industry and regulators, and how they are reacting. **The added provision barring shareholder PDAAs to us is an effort to address this year's flap over Johnson & Johnson's attempt to require arbitration to resolve shareholder disputes. See our coverage in SAA 2019-13 (Apr. 3). ***The forum designation clause is interesting. Of course, FINRA's Rules already bar class action waivers and permit customers to opt out of arbitration into class actions. ****The non-partisan Govtrack.us Website has not yet rated the chances of enactment, but we see them as very low.)* (SAC Ref. No. 2019-47-01)

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More Details on Two New California Laws Impacting Arbitration

By George H. Friedman, SAA Editor-in-Chief

As reported in SAA 2019-39 (Oct. 16), California Governor Gavin Newsom within days of each other signed into law two new statutes that will impact arbitration. As promised, here are more details.

The Governor signed into law AB-51, a bill essentially banning mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes. Just three days later, he signed SB-707, a law that will impact arbitration fees and costs in consumer and employment cases, and address panel diversity. As we explain below, neither law is necessarily a complete "slam dunk" preemption candidate.

AB-51: A Limited Ban on Some PDAAs

AB-51 was introduced last March, passed by the legislature this summer, and signed by the Governor on October 10. The new law doesn't expressly bar predispute arbitration agreements ("PDAA"), but amends Labor Code section 432.6(a) to provide: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive *any right, forum, or procedure* for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with,

or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added). The statute also states that an employer can't "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver.

AB-51: Preemption Avoidance Carveouts?

The statute has some carveouts seemingly included to avoid Federal Arbitration Act ("FAA") and federal securities acts preemption. From its introduction, the bill has had an SRO carveout: "This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and his or her employer or any other person as specified by the rules of the self-regulatory organization." And the law provides that nothing contained in it "is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)." Last, it does not invalidate existing PDAAs; it goes into effect January 1, 2020, for "contracts for employment entered into, modified, or extended" on or after that date.

AB-51: New Governor, New result

If this seems familiar, recall that as reported in SAA 2018-37 (Oct. 3), then-California Governor Jerry Brown vetoed AB 3080, a similar bill (*ed: with no FAA or existing PDAAs carveouts*). Governor Brown's Veto Message expressed his concerns that the proposed law was an FAA preemption candidate. As we correctly surmised in our past editorial comments, "We're guessing the sponsors expect a more favorable reaction from current Governor Gavin Newsom." What's also different this time around is the language recognizing the supremacy of the FAA and the statutory language exempting existing PDAAs. We asked SAC Board of Editors Member and long-time neutral Paul Dubow for his take on the new law: "The exception for contracts covered by the FAA is interesting. There are often situations where draftspersons state that the contract will be covered by California law because they

want to take advantage of provisions in California law outside of the arbitration field and they do so without thinking about California arbitration law. Will a contract that affects interstate commerce and would normally be subject to the FAA be covered by AB-51 because the contract specifies California law?"

SB-707: Focus on Arbitration Fees

This amendment to California's arbitration statute aims to address the "procedural limbo and delay workers and consumers face when they submit to arbitration, pursuant to a mandatory arbitration agreement, but the employer fails or refuses to pay their share of the arbitration fees." The bill's other aim is addressing "the alarming lack of diversity in the arbitration industry, which calls into question the ability of the industry to fairly adjudicate claims brought by an increasingly diverse work force in California." A staff analysis states that SB-707 (*ed: presented essentially* verbatim):

- Provides that, where any drafting party fails to pay the fees necessary to commence or continue arbitration, within 30 days after such fees being due to be tendered to the arbitrator, the drafting party is held to have materially breached the arbitration and is in default of the agreement.
- Gives consumers or employees several remedies in the event a drafting party breaches the arbitration agreement by failing to pay the arbitration costs and fees.
- Would permit, should the drafting party fail to pay the costs necessary to commence arbitration, the employee or consumer to remove the matter to court or move to compel the arbitration.
- Provides that, in the event that the drafting party fails to pay the fees or costs necessary to continue an arbitration currently in progress, the employee or consumer can move the matter to court, seek a court order compelling the payment of the fees, continue the arbitration and permit the arbitrator to seek collection of their fees, or pay the costs and fees and seek those fees from the drafting party at the conclusion of the arbitration regardless of the ultimate outcome.
- To deter drafting parties from failing to pay arbitration costs and fees in a timely manner, this bill imposes mandatory monetary sanctions on any drafting party found to be in default

of an arbitration agreement for failure to pay costs and fees, and permits the imposition of additional evidentiary, terminating, or contempt sanctions, as the court or arbitrator sees fit.

SB-707: Focus on Arbitrator Diversity

The bill's other aim is addressing "the alarming lack of diversity in the arbitration industry, which calls into question the ability of the industry to fairly adjudicate claims brought by an increasingly diverse workforce in California." How? The staff analysis says that SB-707: "Requires an arbitration company that administers, or is otherwise involved in a consumer arbitration, to also include in the required report the demographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as provided by the arbitrator." The effective date is not clear from the face of the bill; we assume it is immediate.

*(ed: *Given the FAA carveout in AB-51, one wonders to which situations the new law will apply? Many SRO employees are not included, nor are workers covered by an existing PDAA. And the part exempting PDAAs enforceable under the FAA seems to gut the prohibition on PDAAs entered into after January 1st. So, what's left? We suppose an argument can be made that the new law bars employers from enforcing the PDAAs, but in our view that would run afoul of the FAA. Stay tuned! **Dorsey & Whitney LLP, published in the October 17* JDSupra *an excellent, short analysis of AB-51, "Five FAQs on California's New Ban on Mandatory Arbitration Agreement." ***We reported in SAA 2019-29 (Jul. 31) on* Latif v. Morgan Stanley & Co., LLC*, No. 18cv11528 (S.D.N.Y. June 26, 2019), where the District Court held in a case of first impression that the FAA preempts a 2018 amendment to New York's arbitration statute – CPLR § 7515 – banning PDAAs covering sexual harassment claims. The Court, however, noted that a bill expanding the PDAA bar to employment discrimination claims in general was sitting on Governor Cuomo's desk, and "held" it preempted in advance of enactment. The Governor nevertheless signed the bill into law and it went into effect October 11. ****The first half of SB-707 to us is also an FAA preemption candidate, although the panel diversity data-gathering aspect seems fine to us. Recall that FINRA already publishes arbitrator (and mediator) panel demographics data.)* (SAC Ref. No. 2019-40-01)

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More on the Whistleblower Improvement Act, and Another Anti-Arbitration Bill is Introduced

By George H. Friedman, SAA Editor-in-Chief

We briefly mentioned in SAA 2019-37 (Sep. 25) that the bipartisan Whistleblower Programs Improvement Act *had been introduced in the Senate. As promised, here is more expansive coverage, along with an analysis of yet another anti-arbitration bill that has since been introduced.*

The *Whistleblower Programs Improvement Act* ("WPIA") (S. 2529) was introduced September 23 by Senate Finance Committee Chairman Charles Grassley (R-IA), and Senators Tammy Baldwin (D-WI), Richard Durbin (D-IL), and Joni Ernst (R-IA). The bipartisan legislation aims to expand Dodd-Frank's whistleblower protections – including the anti-mandatory predispute arbitration agreement ("PDAA") feature – to employees of "an entity registered with, or required to be registered with, the Commission, a self-regulatory organization, or a State securities commission or office performing like

functions…"

Protection for Dodd-Frank Whistleblowers

A small part of the wide-ranging bill immediately drew our attention. While Dodd-Frank section 922 bars mandatory PDAAs covering Sarbanes-Oxley ("SOX") whistleblower retaliation claims, it does not cover whistleblower claims brought under Dodd-Frank, and courts have consistently declined to so extend whistleblower protection. For example, we covered in #37 *Daly v. Citigroup*, No. 18-665 (2d Cir. Sep. 19, 2019), where the Court followed the Third Circuit's holding in *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014), and held that Dodd-Frank does not bar arbitration of whistleblower claims asserted under that statute. The WPIA would extend Dodd-Frank's anti-arbitration protection to cover expressly Dodd-Frank whistleblowers. The text provides: "(1) WAIVER OF RIGHTS AND REMEDIES. The rights and remedies provided in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. (2) PREDISPUTE ARBITRATION AGREEMENT. No predispute arbitration agreement shall be valid or enforceable if the agreement requires the arbitration of a dispute arising under this section." There is currently no stated effective date.

Yet Another Bill to Curb PDAAs…

On September 27, Rep. Madeleine Dean (D-PA) introduced the *Ensuring Fair Legal Recourse for Private Student Loan Borrowers Act* (H.R. 4544), which would amend the *Truth in Lending Act* "to prohibit predispute arbitration agreements that force arbitration of disputes arising from private education loans, and for other purposes." Similar to almost all the anti-arbitration bills that have been introduced this year, the statute would be retroactive. This appears to be a companion bill to the *Justice for Student Borrowers Act* (H.R. 3764), which would amend the *Federal Arbitration Act* to ban PDAAs and class action waivers in private higher ed loan agreements.

A New Strategy?

As SAA Editor-in-Chief George Friedman observed in his SAC feature article, *Surprise! Some of the Anti-Arbitration Bills Introduced in Congress this Year May Actually Become Law (One Already Has),* these two bills target specific federal statutes. This is a sound tactic, given very clear and well-established SCOTUS jurisprudence holding that the FAA will prevail over another federal statute unless the latter expressly bars PDAAs (see *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

*(ed: *Public Citizen wrote on September 23 praising the WPIA's introduction and urging that it be passed. **Although the nonpartisan www.GovTrack.us Website rates the WPIA's chances of enactment as only 3%, we think the odds are much higher. This bill already has bipartisan support that will only grow, and if passed by Congress, will we suspect get consideration by the President (although, on second thought, whistleblowers may not be his favorite group right now…).)* (SAC Ref. No. 2019-38-01)

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