

Preservation of Legal Rights

1. Prior to a dispute arising, a written agreement shall not waive or have the practical effect of waiving the rights of a party to that agreement to resolve that dispute by obtaining:

- a) Injunctive, declaratory, or other equitable relief;
- b) Relief on a class-wide basis;
- c) Punitive damages;
- d) Multiple or minimum damages as specified by statute;
- e) Attorney fees and costs as specified by statute or as available at common law; or
- f) A hearing where that party can present evidence in person.

2. Prior to a dispute arising, a written agreement shall not require or have the practical effect of requiring that any aspect of a resolution of a dispute between the parties to the agreement be kept confidential. This provision shall not affect the rights of the parties to agree that certain specified information is a trade secret or otherwise confidential or to later agree, after the dispute arises, to keep a resolution confidential.

3. Any provision in a written agreement violating this Act shall be void and unenforceable. A court may refuse to enforce other provisions of the agreement as justice dictates.

4. Any person who is a party to such an agreement can bring an action in court to reform such an agreement so that it complies with this Act. The party or parties responsible for drafting the offending provisions shall be liable for the reasonable attorney fees and costs of the person or entity bringing the action, where that action prevails or where, after the action is commenced, the parties reform the contract voluntarily.

5. Should a court decide that any provision of this Act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed and such decision shall not affect the validity of the Act other than the part severed.

Commentary on Model Law Dealing with Preservation of Legal Rights

This provision reaffirms the state's policy of using the rights of private litigants to effectuate justice for all of a state's citizens. Written agreements should not waive, prior to a dispute arising, individual rights that benefit the justice system as a whole. For example, the threat of punitive damages deters misconduct aimed at others. State authorization of class actions, statutory minimum or multiple damages, and statutory attorney fees all encourage private litigation to remedy law violations where law enforcement would otherwise be impractical. Injunctive relief can provide protections for other citizens. The state also has an interest in court orders being publicized so that other citizens can be better informed, and for litigants to appear in person to present their grievances in public.

The NCLC model does not in any way prevent parties, after a dispute arises, from settling the manner with a confidentiality clause or without providing for statutory remedies. Nor does the model in any way limit the ability of parties to agree, prior to a dispute arising, to settle the matter via arbitration. The model just prevents waiver of certain individual rights whose preservation is important for the operation of the justice system, whether the dispute is resolved in court, in arbitration, or otherwise. Such waivers are present both in arbitration clauses and elsewhere in contracts, and the state has an interest in prohibiting such waivers wherever they appear.

This model law is not targeted at arbitration agreements, but requires courts to void any contractual provision (in an arbitration clause or elsewhere in a contract) that waives, prior to a dispute, enumerated individual rights that implicate important state interests. The model law's generality thus does not run afoul of the FAA. The FAA specifically allows courts to refuse to enforce provisions "upon such grounds as exist at law or equity for the revocation of any contract."

Because the NCLC model applies to any contract involving any person, it avoids court rulings that preempt state statutes whose scope is more limited. At least four circuits interpret very literally "any contract" in the above quoted FAA language, and find FAA preemption where a state statute specifies grounds to revoke any contract, but where the statute is limited to contracts involving only consumers or only franchisees. See *Ting v. AT & T*, 319 F.3d 1126(9th Cir. 2003); *Saturn Distribution Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684 (5th Cir. 2003); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *OPE Int'l Ltd. P'ship v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998); see also *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997).

An Act to Amend the State Insurance Code Relating to Arbitration Agreements

1. For purposes of this act, "consumer" shall mean any individual who uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished insurance for personal, family, or household purposes.
2. Provisions in any written agreement that involve the offering of insurance and that require a consumer to submit a controversy relating to insurance thereafter arising to arbitration are contrary to the established public policy of this state.
3. The inclusion of such mandatory arbitration clauses in insurance policies involving consumers, or in other written agreements involving the offering of insurance to a consumer, materially affects an integral part of the policy relationship between the insurer and insured and impacts upon the transfer or spreading of risk between insurer and insured.
4. A written contract for insurance with a consumer or other written agreement involving the offering of insurance to a consumer, that requires the submission to arbitration of any controversy related to the insurance transaction thereafter arising between the parties, is hereby prohibited, and any such arbitration provision is hereby declared invalid, unenforceable, and void. Any such arbitration provision shall be considered severable, and other provisions of the contract for insurance shall remain in effect and given full force.
5. If a written agreement that involves both insurance and any other services, goods, property, or credit includes a mandatory arbitration provision, there shall be a clear and conspicuous disclosure that the mandatory arbitration provision does not apply to any insurance-related dispute.
6. A party violating this Act shall be liable to the consumer in an amount equal to the sum of any actual damage sustained by the consumer as a result of the violation, plus \$100, even if no actual damage is proved, plus costs of the action, together with a reasonable attorney's fee. Any provision requiring that such an action to enforce this Act be submitted to arbitration is void and unenforceable, unless the consumer agrees to arbitration after filing suit or after otherwise notifying the other party as to the violation.
7. Should a court decide that any provision of this act is unconstitutional, preempted, or otherwise

invalid, that provision shall be severed, and such a decision shall not affect the validity of the act other than the part severed.

Commentary on Model Law Limiting Arbitration in Insurance Transactions

Although the Federal Arbitration Act (FAA) generally preempts state laws that limit the enforceability of arbitration agreements, state insurance legislation is an exception. The federal McCarran-Ferguson Act, 15 U.S.C. §1012(b), states that no federal law shall invalidate or impair a state statute regulating insurance unless the federal law specifically relates to insurance. Since the FAA does not specifically relate to insurance, state insurance law can prohibit arbitration agreements in insurance transactions. Just a sampling of cases upholding state restrictions on arbitration in insurance transactions includes: *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821 (8th Cir. 2001); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372 (9th Cir. 1997); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 (10th Cir. 1992); *Balaban-Zilke v. Cigna Healthcare of Cal., Inc.*, 2003 WL 21228038 (Cal. Ct. App. May 28, 2003); *Allen v. Pacheco*, 2003 WL 21310267 (Colo. June 9, 2003); *Cont'l Ins. Co. v. Equity Residential Properties Trust*, 565 S.E.2d 603, 255 Ga. App. 445 (2002).

The NCLC model invalidates pre-dispute arbitration clauses in any insurance transaction involving consumers. The model makes explicit that it is only regulating the business of insurance, avoiding the trap found in certain cases where a statute was found to generally regulate contracts and where McCarran-Ferguson was thus found not to apply. See *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971).

Only a relatively small number of states now limit mandatory arbitration in insurance transactions, and these often apply to only limited lines of insurance. On the other hand, mandatory arbitration in insurance is particularly troublesome because punitive damages via a jury trial and the attendant publicity is the most effective deterrent to the widespread insurer practice of delaying and refusing to pay legitimate insurance claims.

Advocates should also follow a proceeding by the National Association of Insurance Commissioners (NAIC) that is considering how to treat arbitration requirements in insurance transactions. Based on past history, the NAIC's initial interest in limiting arbitration clauses in insurance may be dramatically amended in response to industry pressures.

Because insurance is often sold in conjunction with other transactions, NCLC's model state law also requires disclosure in such a mixed transaction that an arbitration agreement does not apply to insurance. An effective remedy is provided where disclosure in mixed transactions is not made.

Disclosure of Arbitration Costs to Consumers

1. (a) A "consumer arbitration agreement" is defined as a standardized contract where one party drafts a provision that requires disputes arising after the contract's signing be submitted to binding arbitration, and the other party is a consumer. Such an agreement does not include a public or private sector collective bargaining agreement.

(b) Consumer is defined for purposes of this Act as an individual who either:

- i). uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished any real or personal property, tangible or intangible goods, services, or credit for personal, family, or household purposes; or
- ii) is an employee of or seeks employment from the other party to the agreement.

2. A party drafting a consumer arbitration agreement shall clearly and conspicuously disclose in regard to any arbitration:
 - a) The filing fee;
 - b) The average daily cost for an arbitrator and hearing room if the consumer elects to appear in person;
 - c) Other charges that the arbitrator or arbitration service provider will assess in conjunction with an arbitration where the consumer appears in person;
 - d) The proportion of these costs which each party bears in the event that the consumer prevails, and in the event that the consumer does not prevail.
3. The costs specified in section (2) need not include attorney fees, and, to the extent that, with regard to the disclosures required by section (2), a precise amount is not known, the disclosures may be based on reasonable, good faith estimates. A party providing a reasonable, good faith cost estimate shall not be liable in any manner for the fact that the actual cost of a particular arbitration varies from the estimate provided.
4. Failure to comply with this Act is not grounds to refuse to enforce an arbitration agreement. However, the information provided in the disclosure can be considered in a determination whether an arbitration agreement is unconscionable or otherwise is not enforceable under other law.
5. Where this Act is violated, any person or entity, including the State Attorney General, can request a court to enjoin the drafting party from violating the Act as to agreements it enters into in the future. The drafting party shall be liable to the person or entity bringing such an action for that person or entity's reasonable attorney fees and costs where the court issues an injunction or where, after the action is commenced, the drafting party voluntarily complies with the Act.
6. Should a court decide that any provision of this act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed, and such a decision shall not affect the validity of the act other than the part severed.

Commentary on Model Law Requiring Disclosures in Arbitration Agreements

The Supreme Court has limited the ability of states to precondition an arbitration agreement's enforceability on the drafter's compliance with certain disclosure requirements. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). The NCLC model avoids such preemption issues because it does not make failure to disclose grounds for finding the arbitration agreement unenforceable. Instead, any party can seek an injunction to order the party proposing the arbitration clause to comply with the disclosure requirement in the future. The disclosure law thus does not affect the enforceability of the arbitration clause, but provides a practical mechanism to insure compliance with the statute.

The NCLC model focuses on the disclosure of the costs of arbitration (which can be many thousands of dollars for an in-person hearing), but a similar approach could require other disclosures relating to an arbitration agreement, such as requiring the arbitration clause to be in large type or on the front page of a contract. The NCLC model focuses on costs because this information will allow the consumer to assess, after a dispute arises, whether the arbitration process will be affordable. The disclosure will also aid the consumer to decide whether they should agree to the arbitration requirement in the first place.

The provision requires disclosure of the cost of an arbitration if the consumer opts for an in-person hearing, presenting witnesses and other evidence. Nothing prevents the other party from also disclosing the cost of an abbreviated arbitration procedure where the consumer would opt for a

procedure limited to written submissions or to a telephone conference call.

The disclosure as to who pays the costs will also require corporations propounding the arbitration requirement to specify whether costs will be shared or picked up by the corporation. Too often today, corporations only agree to pick up the costs after the consumer has effectively argued in court that the costs make arbitration unaffordable, and thus unenforceable. Meanwhile, other consumers are deterred from pursuing arbitration because they assume they will have to pick up half the costs, as specified in either the arbitration agreement or the rules of the arbitration service provider.

Limitation on Consumer Arbitration Agreements

1. (a) A “consumer arbitration agreement” is defined as a standardized contract where one party drafts a provision that requires disputes arising after the contract’s signing be submitted to binding arbitration, and the other party is a consumer. Such an agreement does not include a public or private sector collective bargaining agreement.

(b) Consumer is defined for purposes of this Act as an individual who either:

i). uses, purchases, acquires, attempts to purchase or acquire, or is offered or furnished any real or personal property, tangible or intangible goods, services, or credit for personal, family, or household purposes; or

ii) is an employee of or seeks employment from the other party to the agreement.

2. A consumer arbitration agreement is void and unenforceable except to the extent federal law provides for its enforceability.

Commentary on Model Law Limiting Consumer Arbitration Where Federal Law Does Not Apply

NCLC’s model law also includes a provision whereby a state announces its opposition to pre-dispute arbitration clauses in consumer transactions, and provides that they are unenforceable unless the FAA provides for their enforceability. This will have immediate effect for any transaction not in interstate commerce, and thus not subject to the FAA. In addition, were Congress ever to exempt certain transactions from the FAA’s scope (instead of outlawing arbitration clauses in those transactions outright), then state law would be in place to prohibit such clauses. Otherwise, state law might require that the clause be enforceable, despite the amendment to the FAA.

An Act to Regulate Arbitration Service Providers

1. The following definitions apply for the purposes of this Act:

(a) Consumer arbitration is a binding arbitration where one party is a consumer.

(b) Consumer is an individual who has a dispute relating to that individual’s status as:

i) a user, purchaser, or one who attempts to use or purchase, any real or personal property, tangible or intangible goods, services, or credit for personal, family, or household purposes.

ii) an enrollee, subscriber or insured under a health care plan or health care insurance, or an individual with a medical malpractice claim;

iii) an employee or applicant for employment, except where an arbitration is pursuant to the terms of a public or private sector collective bargaining agreement.

(c) “Financial interest” is holding a position in a business as officer, director, trustee or partner or holding any position in management; or ownership of more than five percent interest in a

business.

2. (a) Any private arbitration company that administers or is otherwise involved in 50 or more consumer arbitrations a year shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:

- (i) The name of any corporation or other business entity that is a party to the arbitration;
- (ii) The type of dispute involved, including goods, banking, insurance, health care, debt collection, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars (\$100,000), one hundred thousand dollars (\$100,000) to two hundred fifty thousand dollars (\$250,000), inclusive, and over two hundred fifty thousand dollars (\$250,000).
- (iii) Whether the consumer was the prevailing party.
- (iv) On how many occasions, if any, a business entity that is a party to an arbitration has previously been a party in an arbitration or mediation administered by the private arbitration company.
- (v) Whether the consumer party was represented by an attorney.
- (vi) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.
- (vii) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.
- (viii) The amount of the claim, the amount of the award, and any other relief granted, if any.
- (ix) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

(b) If the required information is provided by the private arbitration company in a computer-searchable format at the company's Internet Web site and may be downloaded without any fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required is not accessible by the Internet, the company shall provide that information without charge to any person who requests the information on paper.

(c) A private arbitration company that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(d) No private arbitration company shall have any liability for collecting, publishing, or distributing the information in accord with this section.

3. (a) All fees and costs charged to or assessed in this state upon a consumer by a private arbitration company in a consumer arbitration, shall be waived for any person having a gross monthly income that is less than 300 percent of the federal poverty guidelines.

(b) Nothing in this section shall affect the ability of a private arbitration company to shift fees that would otherwise be charged or assessed upon a consumer party to another party.

(c) Prior to requesting or obtaining any fee, a private arbitration company shall provide written notice of the right to obtain a waiver of fees in a manner calculated to bring the matter to the attention of a reasonable consumer, including, but not limited to, prominently placing a notice in its first written communication to a consumer and in any invoice, bill, submission form, fee schedule, rules, or code of procedure.

(d) Any consumer requesting a waiver of fees or costs may establish eligibility by making a declaration under oath on a form provided by the private arbitration company indicating the consumer's monthly income and the number of persons living in the household. No private arbitration company may require a consumer to provide any further statement or evidence of indigency.

(e) Any information obtained by a private arbitration company about a consumer's identity, financial condition, income, wealth, or fee waiver request shall be kept confidential and may not be disclosed to any adverse party or any nonparty to the arbitration, except a private arbitration company may not keep confidential the number of waiver requests received or granted, or the total amount of fees waived.

4. No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses.

5. No private arbitration company may administer a consumer arbitration to be conducted in this state, or provide any other services related to such a consumer arbitration, if

(a) The private arbitration company has, or within the preceding year has had, a financial interest in any party or attorney for a party.

(b) Any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company.

6. Where this Act is violated, any affected person or entity, including the State Attorney General, can request a court to enjoin the private arbitration company from violating the Act and order such restitution as appropriate. The private arbitration company shall be liable for that person or entity's reasonable attorney fees and costs where that person or entity prevails or where, after the action is commenced, the private arbitration company voluntarily complies with the Act.

7. Should a court decide that any provision of this act is unconstitutional, preempted, or otherwise invalid, that provision shall be severed, and such a decision shall not affect the validity of the act other than the part severed.

Commentary on Model Law (Patterned After California Statutes) That Regulates Arbitration Service Providers

The Federal Arbitration Act (FAA) does not preempt reasonable state regulation of arbitration service providers, such as the American Arbitration Association (AAA) or the National Arbitration Forum (NAF). As long as the regulation does not indirectly limit the enforceability of an arbitration provision, nothing in the FAA prevents such regulation.

California has recently enacted a series of such laws regulating arbitration service providers. See, e.g., Cal. Code Civ. Proc. §§ 1281.9, 1281.92, 1281.96, 1284.3. The NCLC model is closely patterned on four of the California provisions.

One NCLC provision requires arbitration service providers (not the individual arbitrators) to disclose information about individual cases and their outcome, how frequently a business uses the same arbitration service provider, how long arbitrations take, how much arbitrators are paid, and who pays them. This provision will not only provide useful information to consumers, but will also allow

for independent analysis that can point to any bias by AAA, NAF, or other providers in favor of business litigants.

A second provision requires waiver by the arbitration service provider of filing fees for low income consumers. The provision does not require waiver of the fees paid to cover the arbitrator's time, which can be significantly greater.

A third provision prohibits arbitration service providers from administering arbitrations where a non-prevailing consumer must pay the other side's arbitration costs or attorney fees. Otherwise, there would be serious risk for any consumer to proceed with arbitration, where the costs could be many times greater than the potential recovery. A final provision prohibits arbitrations where the arbitration service provider has a financial interest in one of the litigants, or where one of the litigants has a financial interest in the arbitration service provider.

While the California statutes do not provide for an explicit private remedy where arbitration service providers fail to comply with the statutory requirements, other California law provides generally for a private remedy for any law violation. For states other than California where this is not the case, a private remedy must be incorporated into the actual law regulating the arbitration service provider. The NCLC model does this.