

107TH CONGRESS  
2D SESSION

# S. 3026

To amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process.

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IN THE SENATE OF THE UNITED STATES

OCTOBER 1, 2002

Mr. SESSIONS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Arbitration Fairness  
5 Act of 2002”.

6 **SEC. 2. ELECTION OF ARBITRATION.**

7 (a) FAIR DISCLOSURE.—In order to be binding on  
8 the parties, a contract containing an arbitration clause  
9 shall—

1           (1) have a printed heading in bold, capital let-  
2           ters entitled “ARBITRATION CLAUSE”, which heading  
3           shall be printed in letters not smaller than 1/2 inch  
4           in height;

5           (2) explicitly state whether participation within  
6           the arbitration program is mandatory or optional;

7           (3) identify a source that a consumer or em-  
8           ployee can contact for additional information on  
9           costs and fees and on all forms and procedures nec-  
10          essary for effective participation in the arbitration  
11          program; and

12          (4) provide notice that all parties retain the  
13          right to resolve a dispute in a small claims court, if  
14          such dispute falls within the jurisdiction of that  
15          court and the claim is for less than or equal to  
16          \$50,000 in total damages.

17          (b) PROCEDURAL RIGHTS.—If a contract provides for  
18          the use of arbitration to resolve a dispute arising out of  
19          or relating to the contract, each party to the contract shall  
20          be afforded the following rights, in addition to any rights  
21          provided by the contract:

22                  (1) COMPETENCE AND NEUTRALITY OF ARBI-  
23                  TRATOR AND ADMINISTRATIVE PROCESS.—

24                          (A) IN GENERAL.—Each party to the dis-  
25                          pute (referred to in this section as a “party”)

1 shall be entitled to a competent, neutral arbi-  
2 trator and an independent, neutral administra-  
3 tion of the dispute.

4 (B) ARBITRATOR.—Each party shall have  
5 an equal voice in the selection of the arbitrator,  
6 who—

7 (i) shall comply with the Code of Eth-  
8 ics for Arbitrators in Commercial Disputes  
9 of the American Arbitration Association  
10 and the State bar association of which the  
11 arbitrator is a member;

12 (ii) shall have no personal or financial  
13 interest in the results of the proceedings in  
14 which the arbitrator is appointed and shall  
15 have no relation to the underlying dispute  
16 or to the parties or their counsel that may  
17 create an appearance of bias; and

18 (iii) prior to accepting appointment,  
19 shall disclose all information that might be  
20 relevant to neutrality, including service as  
21 an arbitrator or mediator in any past or  
22 pending case involving any of the parties  
23 or their representatives, or that may pre-  
24 vent a prompt hearing.

1           (C) ADMINISTRATION.—The arbitration  
2 shall be administered by an independent, neu-  
3 tral alternative dispute resolution organization  
4 to ensure fairness and neutrality and prevent ex  
5 parte communication between parties and the  
6 arbitrator. The arbitrator shall have reasonable  
7 discretion to conduct the proceeding in consid-  
8 eration of the specific type of industry involved.

9           (2) APPLICABLE LAW.—In resolving a dispute,  
10 the arbitrator—

11           (A) shall be governed by the same sub-  
12 stantive law that would apply under conflict of  
13 laws principles applicable in a court of the  
14 forum in which the party that is not drafter of  
15 the contract resided at the time the contract  
16 was entered into; and

17           (B) shall be empowered to grant whatever  
18 relief would be available in court under law or  
19 equity.

20           (3) REPRESENTATION.—Each party shall have  
21 the right to be represented by an attorney, or other  
22 representative as permitted by State law, at their  
23 own expense.

24           (4) HEARING.—

1 (A) IN GENERAL.—Each party shall be en-  
2 titled to a fair arbitration hearing (referred to  
3 in this section as a “hearing”) with adequate  
4 notice and an opportunity to be heard.

5 (B) ELECTRONIC OR TELEPHONIC  
6 MEANS.—Subject to subparagraph (C), in order  
7 to reduce cost, the arbitrator may hold a hear-  
8 ing by electronic or telephonic means or by a  
9 submission of documents.

10 (C) FACE-TO-FACE MEETING.—Each party  
11 shall have the right to require a face-to-face  
12 hearing, which hearing shall be held at a loca-  
13 tion that is reasonably convenient for the party  
14 who did not draft the contract unless in the in-  
15 terest of fairness the arbitrator determines oth-  
16 erwise, in which case the arbitrator shall use  
17 the process described in section 1391 of title  
18 28, United States Code, to determine the venue  
19 for the hearing.

20 (5) EVIDENCE.—With respect to any hearing—

21 (A) each party shall have the right to  
22 present evidence at the hearing and, for this  
23 purpose, each party shall grant access to all in-  
24 formation reasonably relevant to the dispute to  
25 the other parties, subject to any applicable

1 privilege or other limitation on discovery under  
2 applicable State law;

3 (B) consistent with the expedited nature of  
4 arbitration, relevant and necessary prehearing  
5 depositions shall be available to each party at  
6 the direction of the arbitrator; and

7 (C) the arbitrator shall—

8 (i) make reasonable efforts to main-  
9 tain the privacy of the hearing to the ex-  
10 tent permitted by applicable State law; and

11 (ii) consider appropriate claims of  
12 privilege and confidentiality in addressing  
13 evidentiary issues.

14 (6) CROSS EXAMINATION.—Each party shall  
15 have the right to cross examine witnesses presented  
16 by the other parties at a hearing.

17 (7) RECORD OF PROCEEDING.—Any party seek-  
18 ing a stenographic record of a hearing shall make  
19 arrangements directly with a stenographer and shall  
20 notify the other parties of these arrangements not  
21 less than 3 days in advance of the hearing. The re-  
22 questing party or parties shall pay the costs of ob-  
23 taining the record. If the transcript is agreed by the  
24 parties, or determined by the arbitrator to be the of-  
25 ficial record of the proceeding, it shall be provided

1 to the arbitrator and made available to the other  
2 parties for inspection, at a date, time, and place de-  
3 termined by the arbitrator.

4 (8) TIMELY RESOLUTION.—Upon submission of  
5 a complaint by the claimant, the respondent shall  
6 have 30 days to file an answer. Thereafter, the arbi-  
7 trator shall direct each party to file documents and  
8 to provide evidence in a timely manner so that the  
9 hearing may be held not later than 90 days after the  
10 filing of the answer. In extraordinary circumstances,  
11 including multiparty, multidistrict, or complex litiga-  
12 tion, the arbitrator may grant a limited extension of  
13 these time limits to a party, or the parties may  
14 agree to an extension. The arbitrator shall notify  
15 each party of its decision not later than 30 days  
16 after the hearing.

17 (9) WRITTEN DECISION.—The arbitrator shall  
18 provide each party with a written explanation of the  
19 factual and legal basis for the decision. This written  
20 decision shall describe the application of an identi-  
21 fied contract term, statute, or legal precedent. The  
22 decision of the arbitrator shall be final and binding,  
23 subject only to the review provisions in subsection  
24 (d).

1           (10) EXPENSES.—The arbitrator or inde-  
2           pendent arbitration administration organization, as  
3           applicable, shall have the authority to—

4                   (A) provide for reimbursement of arbitra-  
5                   tion fees to the claimant, in whole or in part,  
6                   as part of the remedy in accordance with appli-  
7                   cable law or in the interests of justice; and

8                   (B) waive, defer, or reduce any fee or  
9                   charge due from the claimant in the event of  
10                  extreme hardship.

11          (11) SMALL CLAIMS OPT OUT.—

12                  (A) IN GENERAL.—Each party shall have  
13                  the right to opt out of binding arbitration and  
14                  into the small claims court for the forum, if  
15                  such court has jurisdiction over the claim. For  
16                  purposes of this paragraph, no court with juris-  
17                  diction to hear claims in excess of \$50,000 shall  
18                  be considered to be a small claims court.

19                  (B) EXCEPTION.—Where a complaint in  
20                  small claims court is subsequently amended to  
21                  exceed the lesser of the jurisdictional amount or  
22                  a claim for \$50,000 in total damages, the small  
23                  claims court exemption of this paragraph shall  
24                  not apply and the parties are required to arbi-  
25                  trate.



1 (c) DENIAL OF RIGHTS.—

2 (1) DENIAL OF RIGHTS BY PARTY MIS-  
3 CONDUCT.—

4 (A) IN GENERAL.—At any time during an  
5 arbitration proceeding, any party may file a  
6 motion with the arbitrator asserting that the  
7 other party has deprived the movant of 1 or  
8 more rights granted by this section and seeking  
9 relief.

10 (B) AWARD BY ARBITRATOR.—If the arbi-  
11 trator determines that the movant has been de-  
12 prived of a right granted by this section by the  
13 other party, the arbitrator shall award the mov-  
14 ant a monetary amount, which shall not exceed  
15 the reasonable expenses incurred by the movant  
16 in filing the motion, including attorneys' fees,  
17 unless the arbitrator finds that—

18 (i) the motion was filed without the  
19 movant's first making a good faith effort  
20 to obtain discovery or the realization of an-  
21 other right granted by this section;

22 (ii) the opposing party's nondislo-  
23 sure, failure to respond, response, or objec-  
24 tion was substantially justified; or

1 (iii) the circumstances otherwise make  
2 an award of expenses unjust.

3 (2) DENIAL OF RIGHTS BY ARBITRATOR.—A  
4 losing party in an arbitration may file a petition in  
5 the district court of the United States in the forum  
6 in which the party that did not draft the contract  
7 resided at the time the contract was entered into to  
8 assert that the arbitrator violated 1 or more of the  
9 rights granted to the party by this section and to  
10 seek relief. In order to grant the petition, the court  
11 must find clear and convincing evidence that 1 or  
12 more actions or omissions of the arbitrator resulted  
13 in a deprivation of a right of the petitioner under  
14 this section that was not harmless. If such a finding  
15 is made, the court shall order a rehearing before a  
16 new arbitrator selected in the same manner as the  
17 original arbitrator as the exclusive judicial remedy  
18 provided by this section.

19 (d) EFFECTIVE DATE.—This section shall apply to  
20 any contract entered into after the date that is 6 months  
21 after the date of enactment of this Act.

1 **SEC. 3. LIMITATION ON CLAIMS.**

2       Except as otherwise expressly provided in this Act,  
3 nothing in this Act may be construed to be the basis for  
4 any claim in law or equity.

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