

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: SB 2242

SPONSOR: Senator Clary

SUBJECT: Arbitration

DATE: March 29, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides that arbitration agreements or provisions made pursuant to state arbitration law, the Federal Arbitration Act, or laws of other states, territories, commonwealths, or countries are valid, enforceable, and irrevocable, regardless of the justiciability of the controversy or the legality of the agreement.

This bill prohibits the refusal of a court-ordered arbitration based on the ground that the claim lacks merit or that an action was previously agreed to, or that the contract is voidable, illegal, or void because it never was valid. Also, a court may not refuse to enforce an otherwise valid agreement or provision for arbitration on the grounds that the underlying contract may be illegal, voidable, or that it never was valid.

This bill substantially amends the following sections of the Florida Statutes: 682.02, 682.03, and 682.18.

II. Present Situation:

Florida Statutes

The Florida Arbitration Code is contained in chapter 682, F.S. Parties may agree to arbitration through a written contract or other writing regarding a current or future controversy.¹ Arbitration provisions are valid, enforceable, and irrevocable regardless of whether the controversy is justiciable.²

¹ s. 682.02, F.S.

² *Id.*

A court is defined as any court of competent jurisdiction.³ A party to an arbitration agreement may make application to the court for an order to compel another party to comply with arbitration.⁴ Similarly, a court may stay an arbitration proceeding where no arbitration agreement exists.⁵ A court is precluded from refusing to issue an order for arbitration on the basis that the claim in issue is meritless or because any fault or grounds for the claim for which arbitration is sought have not been demonstrated.⁶

In the absence of an arbitration provision specifying the method of appointment of arbitrators, or if the agreed method fails or the arbitrator fails to act and a successor has not been appointed, a party may apply to the court to appoint one or more arbitrators or an umpire.⁷

Unless the arbitration agreement provides otherwise, the powers of the arbitrators may be exercised by a majority.⁸

Unless an arbitration agreement provides otherwise, arbitrators must notice the parties personally, or by registered or certified mail, at least five days before the hearing.⁹ If a party is duly noticed and does not appear, the arbitrators are still authorized to proceed.¹⁰ Parties are entitled to be represented by counsel, be heard, present evidence, and cross-examine witnesses appearing at the hearing.¹¹ Subpoenas may be issued by an arbitrator or umpire for witness appearance and production of documents and other evidence.¹² An umpire authorized to hear and decide the cause is not counted as part of the quorum or in the making of the award.¹³

In the absence of a payment provision, the arbitrators' and umpire's expenses and fees, and other costs, not including attorneys fees, are to be paid as provided in the award.¹⁴

The court is required to confirm an award upon application of a party, unless there are grounds to vacate, such as upon a showing of corruption, fraud, or other undue means; evident partiality by an arbitrator; that the arbitrator exceeded authority; or that no arbitration agreement existed.¹⁵ The court is also required to modify or correct an award, when there are certain miscalculations or errors; an award has been made upon a matter not submitted; or the award is imperfect as a matter of form.¹⁶

³ s. 682.18(1), F.S.

⁴ s. 682.03(1), F.S.

⁵ s. 682.03(4), F.S.

⁶ s. 682.03(5), F.S.

⁷ s. 682.04, F.S.

⁸ s. 682.05, F.S.

⁹ s. 682.06(1)(a), F.S.

¹⁰ s. 682.06(1)(b), F.S.

¹¹ ss. 682.07 and 682.06(2), F.S.

¹² s. 682.08(1), F.S.

¹³ s. 682.06(3), F.S.

¹⁴ s. 682.11, F.S.

¹⁵ ss. 682.12 and 682.13, F.S.

¹⁶ s. 682.14(1), F.S.

Appeals are authorized in the same manner as from orders or judgments in a civil action.¹⁷

Case Law

Where doubt exists, the court typically favors upholding an arbitration agreement.¹⁸ Section 2 of the Federal Arbitration Act authorizes generally applicable contract defenses, including fraud, duress, or unconscionability, to be applied to invalidate an arbitration agreement.¹⁹ Additionally, Florida courts have invalidated arbitration clauses and underlying contracts based on unconscionability.²⁰ The test for unconscionability requires that a court find that a contract is both procedurally and substantively unconscionable.²¹ In so applying the test, the court is required to consider:

Whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract, or whether the terms were merely presented on a “take-it-or-leave-it” basis; and whether he or she had a reasonable opportunity to understand the terms of the contract.²²

The determination of whether a contract is illegal and unenforceable is to be made by the court rather than the arbitrator.²³ Further,

“A party who alleges and offers colorable evidence that a contract containing an arbitration clause is illegal cannot be compelled to arbitrate the threshold issue of the existence of the agreement to arbitrate; only a court can make that determination.”²⁴

The Florida Supreme Court recently ruled that where a party to an arbitration agreement challenges the underlying contract as illegal and void, the trial court must resolve this issue prior to granting a motion to compel arbitration.²⁵ Where the underlying contract is held to be entirely void, the arbitration clause contained within the contract is also nullified, pursuant to Florida public policy and contract law.²⁶ In a subsequent case, the 11th Circuit U.S. Court of Appeals distinguished between specific allegations made against the enforceability of an arbitration clause and general challenges to the underlying contract.²⁷ In particular, the court held that a challenge to a contract as a whole was a proper matter before an arbitrator, while a challenge to a specific arbitration provision could be made before a federal court.²⁸

¹⁷ s. 682.20, F.S.

¹⁸ *Gainesville Health Care Center, Inc. v. Weston*, 857 So.2d 278, 289 (Fla. 1st DCA 2003).

¹⁹ *Id.* at 283.

²⁰ *See, e.g., Powertel Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999).

²¹ *Gainesville Health Care Center, Inc.*, *supra* note 18 at 284.

²² *Id.*

²³ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1213 (Fla. 2d DCA 2004).

²⁴ *Id.* quoting *Riverwalk Apts., L.P. v. RTM Gen. Contractors, Inc.*, 779 So.2d 537, 538 (Fla. 2d DCA 2000).

²⁵ *Cardegna v. Buckeye Check Cashing, Inc.*, 2005 WL 106966, 3 (Fla. 2005).

²⁶ *Id.* at 4.

²⁷ *Jenkins v. First American Cash Advance of Georgia, LLC*, 2005 WL 388269, 7 (11th Cir.(Ga.) 2005).

²⁸ *Id.*

III. Effect of Proposed Changes:

This bill attaches validity, enforceability, and irrevocable status to arbitration agreements or provisions made pursuant to state arbitration law, the Federal Arbitration Act, or the laws of any other state, territory, commonwealth, or country, regardless of the justiciability of the controversy, or the legality of the agreement.

In addition to prohibiting refusal of a court-ordered arbitration based on the ground that the claim in issue lacks merit or that an action was previously agreed to, it is also an impermissible ground for refusal that the contract is voidable, illegal, or void because it never was valid. Also, a court may not refuse to enforce an otherwise valid agreement or provision for arbitration on the grounds that the underlying contract may be illegal, voidable, or that it never was valid.

This bill takes effect July 1, 2005.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill may require consumers or other private parties to participate in arbitration, and possibly incur significant costs, by giving validity to contract provisions that would otherwise be illegal or voidable.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
