



arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.”<sup>1</sup>

Florida has traditionally encouraged the use of arbitration and enacted the Florida Arbitration Code in 1957. Even before the enactment of ch. 682, F.S., Florida courts have a record of favoring settling disputes using arbitration.<sup>2</sup>

### **The Florida Arbitration Code**

The code provides that:

- Two or more parties can enter an agreement to submit to arbitration any controversy.<sup>3</sup>
- Arbitration can be compelled if one party refuses to comply with the terms of the contract to resolve a dispute through arbitration.<sup>4</sup>
- Parties can agree to methods for appointing arbitrators or umpires and that the court may appoint an arbitrator if for any reason the arbitrator fails to act.<sup>5</sup>
- Unless otherwise provided in an agreement, the majority of arbitrators in a case may exercise power by a majority.<sup>6</sup>
- Arbitrators shall appoint a time and place for the hearing and serve notice not less than 5 days before the hearing. Appearance at the hearing waives a party’s right to the notice. The parties are entitled to be heard, to present evidence, and to cross-examine witnesses.<sup>7</sup>
- Parties are entitled to legal representation.<sup>8</sup>
- When arbitrators cannot agree to an award in a case, the arbitrators are authorized to issue subpoenas and take depositions of witnesses to seek out additional evidence.<sup>9</sup>
- Awards shall be in writing and signed by the arbitrators joining in the award. Notice of the award can be delivered personally or by registered or certified mail, or as provided in the agreement.<sup>10</sup>
- Arbitrators’ fees and expenses are paid according to the terms in the award.<sup>11</sup>
- Awards can be confirmed by the court upon application of a party unless there are grounds for vacating or modifying the award.<sup>12</sup>
- Evidence of corruption, fraud, or other undue means in the procurement of an award or partiality by an arbitrator is grounds for vacating an award.<sup>13</sup>

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<sup>1</sup> Douglas J. Giuliano, *Parochialism in Arbitration?*, 81 Fla. B. J. 9, Feb. 2007 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,24 (1991).)

<sup>2</sup> *Id.*

<sup>3</sup> Section 682.02, F.S.

<sup>4</sup> Section 682.03, F.S.

<sup>5</sup> Section 682.04, F.S.

<sup>6</sup> Section 682.05, F.S.

<sup>7</sup> Section 682.06, F.S.

<sup>8</sup> Section 682.07, F.S.

<sup>9</sup> Section 682.08, F.S.

<sup>10</sup> Section 682.09, F.S.

<sup>11</sup> Section 682.11, F.S.

<sup>12</sup> Section 682.12, F.S.

<sup>13</sup> Section 682.13, F.S.

- An applicant may request the court to modify or correct an award for mistakes in calculations, descriptions of evidence or witnesses, and issues not affecting the merits of the controversy.<sup>14</sup>
- Judgments or decrees on an award are entered and enforced like any other judgment or decree.<sup>15</sup>
- Appeals may be taken from orders:
  - denying applications to compel;
  - granting a stay;
  - confirming or denying confirmation of an award;
  - modifying or correcting an award;
  - vacating an award without rehearing; or
  - entering an award or judgment under the provisions of the act.<sup>16</sup>

### III. Effect of Proposed Changes:

#### Section 1 - Definitions:

The bill creates a definition's section to the Florida Arbitration Code (the code) and defines:

- "Arbitration agreement" as a standardized contract written by the nonconsumer party, which requires that the resolution of disputes be submitted to binding arbitration;
- "Arbitration organization" as a neutral association, agency, board, commission, or other entity that is involved in the appointment of the arbitrator;
- "Arbitrator" as a neutral individual appointed to render an award in a controversy;
- "Consumer" as a party to an arbitration agreement who is an individual and not a business;
- "Evident partiality" as a reasonable person would conclude that an arbitrator was partial to one party;
- "Financial interest" as holding a position in a business as an officer, director, trustee, or partner; holding a position in management; or owning more than 5 percent interest in a business;

"Knowledge," "person," "record," and "small business" are also defined.

#### Section 2 - Application:

The bill exempts insurance policies or arbitrations governed by rules adopted by a securities self-regulatory organization from the act. It also provides that mandatory binding arbitration is void and unenforceable except to the extent that federal law provides for its enforceability.

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<sup>14</sup> Section 682.14, F.S.

<sup>15</sup> Section 682.15, F.S.

<sup>16</sup> Section 6823.20, F.S.

**Section 3 - Effect of arbitration agreement; nonwaivable provisions:**

The bill permits parties to waive or vary certain requirements of the code as permitted by law. It prohibits waiver of certain provisions of the code prior to a controversy arising.

**Section 4 - Notice:**

The bill provides that certified or registered mail, return receipt requested and obtained, or in-hand delivery of service of process is sufficient notice under the code except as otherwise provided.

**Section 5 - Initiation of arbitration:**

The bill provides that arbitration is initiated when a person gives notice by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.

**Section 6 - Appointment of arbitrators by court:**

The bill amends the method of appointing arbitrators by requiring parties to select the arbitrators only after the dispute has arisen. The court may appoint an arbitrator if parties do not agree. If an arbitrator has a direct material interest in the outcome or an existing or substantial significant relationship with a party, he or she is prohibited from serving.

**Section 7 - Provisional remedies:**

The bill permits a court to award provisional remedies in order to protect the effectiveness of the arbitration proceeding.

**Section 8 - Disclosure by arbitrator:**

The bill requires various disclosures by an arbitrator prior to accepting an appointment, including:

- any facts learned of after accepting appointment;
- financial or personal interest in the outcome of the arbitration proceeding;
- any existing or past relationship with the parties to the agreement; and
- the number of past arbitrations involving either party

Timely objection by a party to a disclosed fact or lack of disclosure may be grounds for removal or vacating the award.

**Section 9 - Consolidation of separate arbitration proceedings:**

The bill requires the court to consolidate separate arbitration proceedings if:

- There are separate agreements between the same persons or the claims arise from the same transaction;
- There is a possibility of conflicting decisions in the separate arbitration proceedings;
- Prejudice from failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of the party opposing consolidation.

It specifies that provisions in this section are not intended to prevent a party's participation in a class action lawsuit.

#### **Section 10 - Majority action by arbitrators:**

The bill amends s. 682.05, F.S., to require that powers of the arbitrator must be exercised by a majority and that all shall conduct the hearing in accordance with the arbitration process prescribed in statute.

#### **Section 11 - Arbitration process:**

The bill requires fundamental fairness in the conduct of arbitrations. Fundamental fairness includes notice, opportunity to be heard, opportunity to present relevant and material evidence, opportunity for argument before the decisionmakers, and a decisionmaker who is not biased.

The bill extends the arbitrator's authority to include the power to hold conferences with the parties prior to the hearing and determine admissibility, relevance, materiality, and weight of any evidence in accordance with the Florida Rules of Evidence and the Florida Rules of Civil Procedure.

The bill also provides for summary disposition in arbitration if all interested parties agree to a summary disposition or if one party submits a written request, provides written notice to all other parties, and the other parties are given 30 days to respond.

#### **Section 12 - Hearing:**

The bill amends s. 682.06, F.S., to increase notice of the arbitration date to the parties from 5 to 30 days and to require that notice include a statement that the party is entitled to representation at the hearing. It also allows for a replacement arbitrator to be appointed if during the course of a hearing an arbitrator ceases to act.

#### **Section 13 - Representation by attorney:**

The bill amends s. 682.07, F.S., to require that parties be provided with information concerning organizations that might offer assistance, such as bar organizations, legal service associations, civil rights organization, and trade unions.

**Section 14 - Witnesses, subpoenas, depositions, discovery:**

The bill amends s. 682.08, F.S., to require subpoenas, depositions, and discovery in the arbitration record. It also requires depositions to be given in a manner in accordance with the Florida Rules of Civil Procedure.

It allows the arbitrator to issue a protective order, enter discovery orders, and enforce subpoenas in the same manner as a civil court.

**Section 15 - Judicial enforcement:**

The bill allows any party to request the arbitrator to incorporate any preaward rulings into the written arbitration award. The court must issue an order confirming the award unless the court vacates, modifies, or corrects the award as provided under the applicable arbitration provisions.

**Section 16 - Award:**

The bill amends s. 682.09, F.S., to require an arbitration award to contain: a summary of issues considered, the arbitrators findings and reasons for the findings, damages, and any other relief requested that was not awarded. It requires the written record to be filed with the clerk of the court.

**Section 17 - Remedies; fees and expenses of arbitration:**

The bill amends s. 682.11, F.S., to allow the arbitrator to award punitive damages and attorney's fees if the award would be authorized by law in a civil action. It also permits the court to order the cost of the arbitration to be shared if good cause is shown.

**Section 18 - Confirmation of an award:**

The bill amends s. 682.12, F.S., to allow for confirmation of the award after the parties receive notice of the award.

**Section 19 - Vacating an award:**

The bill amends s. 682.13, F.S., to define how partiality may be demonstrated when the court is vacating an award. It allows arbitration awards to be vacated for various reasons including improper notice and violations of public policy. It also provides for judicial review upon a showing of good cause if there are errors of law in the arbitration award.

**Section 20 - Modification or correction of award:**

The bill amends s. 682.14, F.S., to allow for modification of an award if fees awarded exceed the amount that would be assessed in a comparable civil claim in state court. It allows consumers to seek to modify or vacate an award within 30 days of receiving notice of a motion to confirm the award.

**Section 21 - Judgment or decree on award:**

Section 682.15, F.S., is amended to provide that the judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

**Section 22 - Appeals:**

The bill amends s. 682.20, F.S., to allow an appeal of any decision regarding the impartiality or lack of conflict on the part of the arbitrator or any evidentiary ruling by the arbitrator. It allows rulings to be reviewed by writ of certiorari on rulings concerning evidentiary privileges or confidentiality rights of parties and any granting of a protective order preventing the disclosure of privileged information.

**Section 23 - Relationships to the Electronic Signatures in Global and National Commerce Act:**

The bill provides that with some exceptions, the code supersedes the federal Electronic Signatures in Global and National Commerce Act.

The Electronic Signatures in Global and National Commerce Act provides, in part, that notwithstanding any statute, regulation, or other rule of law with respect to transactions affecting interstate or foreign commerce, electronic signatures will not be denied legal effect, validity or enforceability.<sup>17</sup>

**Section 24 - Regulation of arbitration organizations:**

The bill requires that any arbitration organization involved in 10 or more consumer arbitrations a year make quarterly Internet publications of the following information regarding the arbitration organization within the preceding 5 years:

- Name of the corporation that is a party to the arbitration;
- Type of dispute involved including, but not limited to:
  - Goods,
  - Banking,
  - Insurance,
  - Health care, or
  - Debt collection, employment, and if it involves employment, the amount of the employee's annual wage divided into categories of less than \$100,000, 100,000 to \$250,000, and more than \$250,000.;
- Name of the prevailing party;
- Number of occasions when a business entity was a party;
- Whether the consumer was represented by an attorney with identifying information on the attorney;
- Date of the demand for the arbitration;
- Type of disposition;

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<sup>17</sup> 15 U.S.C. ss. 7001 et seq.

- Amount of the claim; and
- Name of the arbitrator, the fee, and the percentage of the arbitrator's fee allocated to each party.

All fees and costs charged to or assessed against a consumer shall be waived for any person having a gross monthly income less than 500 percent of the poverty line. An arbitration organization must provide written notice of the right to obtain a waiver of fees. All information regarding waiver of fees may not be kept confidential.

Arbitration organizations may not administer a consumer arbitration or provide any other services related to such a consumer arbitration if:

- The arbitration organization has, or within the preceding year has had, a financial interest in any party or attorney for a party involved in the arbitration; or
- Any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the arbitration organization.

The bill provides that upon a violation of any provision of this section, the affected person, including the office of the Attorney General, may request a court to enjoin the arbitration organization from such violation and order appropriate restitution.

#### **Section 25 - Disclosure of arbitration costs:**

The bill requires clear and conspicuous disclosure in arbitration agreements of an enumerated list of all costs and filing fees involved in the proceeding. It provides that failure to comply with the disclosure requirements constitutes a deceptive act under the Florida Deceptive and Unfair Trade Practices Act.

#### **Section 26 - Effective Date:**

Provides for an effective date of July 1, 2008.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.



**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

There are various provisions of the bill that could have an economic impact on the private sector. To the extent the provisions in the bill requiring arbitrators to conduct arbitrations in a manner that is fundamentally fair results in more accurate determinations of disputes, parties to arbitration may benefit. Provisions allowing for punitive damages will have an economic impact on those awarded the damages and those required to pay them.

The bill also requires disclosure of costs and filing fees in arbitration agreements and subjects those who fail to comply with the disclosure requirements to potential penalties under the Florida Deceptive and Unfair Trade Practices Act. Private arbitration organizations may face some costs related to posting information on a quarterly basis on the Internet if they are involved in 10 or more consumer arbitrations per year. The requirements for compliance with the Florida Rules of Civil Procedure could also result in awards of attorneys fees to the prevailing parties in discovery violations.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:****Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:****Barcode 141568 by Judiciary on March 25, 2008:**

The strike-everything amendment builds upon many of the proposed provisions in the original bill. However, rather than making revisions and additions to the existing Florida Arbitration Code (ss. 682.01-682.22, F.S.) as the bill does, the strike-everything amendment organizes the proposed provisions into multiple new sections of ch. 682, F.S., that together will be cited as the “Florida Consumer Arbitration Act.” Thus, the amendment leaves in tact the provisions of the existing code. The provisions of the

amendment are similar to the changes made in the bill with the following principal exceptions:

- The amendment suggests that the proposed Florida Consumer Protection Act would generally apply to consumer arbitration agreements and that the existing code would not apply to such agreements.
- The definition for small business is deleted and the definition of “summary disposition” is added. It is defined as an expedited determination without formal evidentiary hearings and it is distinguished from the definition of “summary judgment” as defined in the Florida Rules of Civil Procedure.
- It adds a provision describing when arbitration agreements are made valid, irrevocable, and enforceable.
- It creates a section that provides for a proceeding to compel and stay arbitration. When a party claims another party has neglected or refused to comply with the provisions of an arbitration agreement, the party may apply to the court for an order directing the parties to proceed with arbitration. An arbitration proceeding may be stayed if the court finds that no agreement or provision for arbitration exists between the parties.
- It does not provide for provisional remedies as described in the bill.
- It creates new language in the section on hearings providing, similarly, that notice of a hearing must be served not less than 30 days before the initial hearing and adds “and not less than 10 days for any subsequent hearings”.
- It deletes the discovery provisions in the bill that required a party to provide the arbitrator and other parties with the name, address, and telephone number of each individual likely to have discoverable information and copies or descriptions of all documents that the party may use in his defense.
- It makes technical changes to the provision on awards and provides that if a court file has not been previously opened, the party seeking entry of judgment shall pay the applicable filing fee and file the documents specified in this section prior to entry of judgment.
- It creates a provision that allows for changes of awards by arbitrators or umpires upon the grounds stated in s. 682.24(1)(a) and (c), F.S., or for the purpose of clarifying the award. However s. 682.24(1) (a) and (c), F.S., does not exist in the Florida Statutes. It appears that a reference to the proposed language in s. 682.524, F.S., may be the correct language.
- It makes changes to the circumstances when modifications or corrections of awards can be sought by deleting language from the bill that allowed modification or correction when fees are awarded that exceed the amount that would be assessed in a comparable civil claim in state court.
- It creates a section that provides that applications to the court shall be through motion and heard in the manner and upon notice provided by law or rule of the court for the making and hearing of motions.
- It creates a provision that defines court and describes when the court has jurisdiction. Court is defined as any court of competent jurisdiction of this state. It provides that jurisdiction is conferred on the court when the arbitration when so stated in the agreement. It also adds that any judgment entered by a court of

competent jurisdiction of any state, territory, the Commonwealth of Puerto Rico, or foreign country is enforceable by applying to court as provided under this act.

- It adds a subsection for venue providing that venue can be established in the county in which the other party to the agreement resides or has a place of business or in any county if she or he has no residence or place of business in this state.

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**Barcode 656046 by Commerce on April 1, 2008:**

This amendment builds upon many of the proposed provisions in the bill as filed. However, rather than making revisions and additions to the existing Florida Arbitration Code (ss. 682.01-682.22, F.S.) as the bill does, the strike-everything amendment organizes the proposed provisions into multiple new sections of ch. 682, F.S., that together will be cited as the “Florida Consumer Arbitration Act.” Thus, the amendment leaves in tact the provisions of the existing code. The provisions of the amendment are similar to the changes made in the bill with the following principal exceptions:

- It deletes the application of the bill to small businesses, as defined.
- It creates a new section that provides for a proceeding to compel and stay arbitration. When a party claims another party has neglected or refused to comply with the provisions of an arbitration agreement, the party may apply to the court for an order directing the parties to proceed with arbitration. An arbitration proceeding may be stayed if the court finds that no agreement or provision for arbitration exists between the parties.
- It deletes provisional remedies provided in the bill as filed.
- It creates new language in the section on hearings providing that notice of a hearing must be served not less than 30 days before the initial hearing and adds “and not less than 10 days for any subsequent hearings”.
- It states that a party has the right to be represented by an attorney at any proceeding or hearing and a waiver to such is ineffective.
- It deletes the discovery provisions in the bill that required a party to provide the arbitrator and other parties with the name, address, and telephone number of each individual likely to have discoverable information and copies or descriptions of all documents that the party may use in defense.
- It provides that an award or opinion must be issued within a “reasonable” time of the final hearing but not more than 60 days after the final hearing.
- It deletes the provision for judicial enforcement of pre-award ruling.
- It deletes the “consolidation” provision which permitted the court to consolidate separate arbitration proceedings under certain conditions.
- It adds a section to provide that venue can be established in the county in which the other party to the agreement resides or has a place of business or in any county if she or he has no residence or place of business in this state.