CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JEFF FLAKE, ARIZONA
DAVID VITTER, LOUISIANA
DAVID A. PERDUE, GEORGIA
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT
DIANNE FEINSTEIN, CALIFORNIA
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

November 4, 2015

Mr. Noah Hanft
President & CEO
Institute for Conflict Prevention & Resolution
575 Lexington Avenue, 21st Floor
New York, NY 10022

Dear Mr. Hanft:

A recent investigation by The New York Times revealed the scope of an injustice that affects millions of Americans: the inclusion of forced arbitration clauses in countless consumer contracts, employment agreements, and patient admission forms. These agreements, buried deep within contractual fine print, waive consumers' rights to bring a claim in court or to band together in a class action, even when consumers are seeking to enforce their rights under fundamental state and federal laws.

We have grave concerns that forced arbitration thrusts consumers into a shadow justice system that operates with little transparency or oversight. The New York Times investigation showed alarming evidence that forced arbitration favors big corporations and repeat players over individuals seeking to vindicate their rights. Among other examples, the report highlighted:

- Several instances in which arbitrators socialized privately with corporate defendants during the course of an arbitration, including going to a basketball game, having lunch together during a break in proceedings, and meeting for coffee while proceedings were ongoing;
- Interviews in which more than three dozen arbitrators described feeling "beholden" to companies because of the threat of losing repeat business;
- Records of some 41 arbitrators who each handled 10 or more cases for one company between 2010 and 2014;
- Examples of an arbitrator who handled 40 cases for a single law firm over a 5-year period, and another arbitrator who handled 28 cases for a single company; and
- A story seen as a "cautionary tale" within the industry of an arbitrator who ruled in favor of an employee in an age discrimination suit and was never hired to hear another employment suit again.

This evidence of bias towards repeat players warrants more than simple conflict-of-interest rules to prevent abuse. It raises real and troubling concerns about whether a privatized system of justice can ever operate fairly for individuals – especially when that system is one that consumers are involuntarily forced into, that lacks transparency and is not subject to meaningful appeal.

Beyond these deep concerns for individual consumers, privatization of the justice system also jeopardizes our rule of law. By preventing individuals from joining together in a class action, mandatory arbitration clauses force many Americans to abandon their claims entirely because their single case is not worth pursuing alone. State attorneys general have warned that arbitration clauses banning class action lawsuits undermine a crucial tool for protecting consumer rights. Others have said that such clauses give a "get out of jail free" card to corporations who can escape accountability. We agree.

Forced arbitration also undermines key priorities for any justice system: predictability, fairness and consistency. Forced into private adjudication without a public record and with no precedential value between cases, plaintiffs' claims are reviewed on an *ad hoc* basis – again, often against the plaintiff's wishes and without the possibility of meaningful appeal. How is the public able to gain insight into what a particular law means, how it is to be interpreted, and how it applies to a given set of facts if there is no public disclosure of a claim or articulation of the basis for its resolution? Even if that approach may be justified for private disputes between sophisticated companies who *both choose* to engage in arbitration, it has a devastating impact in cases where individuals are seeking to enforce their rights under state and federal laws.

As one of the largest providers of arbitration services in the country, your organization plays a key role in perpetuating the arbitration system and determining which cases are heard and by what standards. Accordingly, we ask you to provide information to address the serious concerns that have been raised about inherent flaws and unfairness caused by forced arbitration clauses.

1. **Transparency in decision-making**. The New York Times investigation suggested that arbitration decisions can be made without publication or other mechanisms to promote transparency and inform the public about the proceedings.

   a. How is the public able to track arbitration filings within your organization? What specific information is made public about the parties, the arbitrator, any questions of law presented, the process followed in the arbitration, and the decision rendered in each case?

   b. How is the public able to gain information about an arbitrator's past judgments, experience, and relevant expertise?

   c. How is the public able to gain information about repeat adjudications against a particular party?

2. **Rule of law.** Article I of the U.S. Constitution grants to Congress legislative powers to enact laws; Article III of the U.S. Constitution grants to the judicial branch the power to interpret the law and apply those interpretations to specific cases. Foundational to the judiciary's constitutional role is its ability to publicly enunciate whether and how a law applies to a given set of facts. How do decisions of private arbitrators contribute to the interpretation and development of the law? Do you make arbitration decisions and opinions available to the public? What efforts, if any, are made to promote consistency across rulings of multiple arbitration providers?

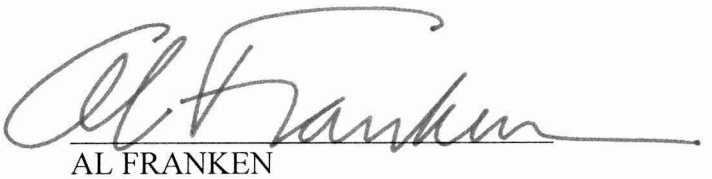
3. **Conflicts of interest.** Which party designates the arbitration provider? Do you place limitations, including numerical limitations, on the cases an arbitrator can hear from a particular client or firm? Do you disclose to parties the prior cases an arbitrator has heard, and what information do you make available to parties about how those prior cases were decided? Is a party able to reject an arbitrator based on that information?

4. **Arbitration resulting from forced arbitration clauses.** In our view, there is an important distinction to be made between arbitration that both parties *choose* to enter into after a dispute arises, and forced arbitration that results from fine-print embedded in consumer contracts or employment agreements that individuals sign before a dispute arises, often unknowingly or without real choice. Do you agree with the finding of The New York Times investigation that there has been an increase in the latter form of arbitration? Do you agree with its finding that individuals are increasingly being diverted into arbitration instead of bringing their claims as a class action in court? Do you share our concern that forced arbitration raises important questions about fairness to parties who would not opt in to arbitration if they were given a choice after the dispute arose?

Thank you for your prompt attention to this matter.

Sincerely,

PATRICK J. LEAHY
Ranking Member



AL FRANKEN
United States Senator