

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: CS/SB 1458

INTRODUCER: Judiciary Committee and Senator Diaz de la Portilla

SUBJECT: Dispute Resolution

DATE: February 10, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	<b>Fav/CS</b>
2.	McKay	Roberts	GO	<b>Pre-meeting</b>
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The Florida Arbitration Act (FAC), based on a 1955 model act, was passed in 1957 and revised in 1967. Since then, it has gone mostly unchanged. This bill creates the Revised Florida Arbitration Act based on a 2000 model act. The bill includes new concepts that were not included in the original act, such as the ability for arbitrators to issue provisional remedies, challenges based on notice, consolidation of separate arbitration proceedings, conflict disclosure requirements, immunity of arbitrators, and other substantive changes to the law. The bill provides a detailed framework for arbitration conducted under Florida law and repeals sections of the FAC, the substantive concepts of which are subsumed by the revised act.

This bill substantially amends the following sections of the Florida Statutes: 682.01, 682.02, 682.03, 682.04, 682.05, 682.06, 682.07, 682.08, 682.09, 682.10, 682.11, 682.12, 682.13, 682.14, 682.15, 682.19, 682.20, 44.104, 44.107, 440.1926, 489.1402, and 731.401.

This bill creates the following sections of the Florida Statutes: 682.011, 682.012, 682.013, 682.014, 682.015, 682.031, 682.032, 682.033, 682.041, 682.051, 682.081, 682.181, 682.23, and 682.25.

This bill repeals the following sections of the Florida Statutes: 682.16, 682.17, 682.18, 682.21, and 682.22.

## II. Present Situation:

Florida has traditionally favored arbitration. In 1957, the Legislature enacted the Florida Arbitration Code,<sup>1</sup> which prescribes a framework governing the rights and procedures under arbitration agreements, and for the enforceability of arbitration agreements. It was subsequently amended in 1967,<sup>2</sup> but remains largely unchanged. Florida's current Arbitration Code is based on the 1955 Uniform Arbitration Act (UAA). Alternative dispute resolution has been recognized as a viable alternative to litigation in a court or jury trial, and it historically has been attractive for the resolution of commercial business disputes.

### Arbitration Generally

Arbitration is an alternative dispute resolution process in which parties "subm[it] a dispute to one or more impartial persons for a final and binding decision."<sup>3</sup> Arbitration is intended to be a speedy and economical alternative to court litigation, which is often slow, time-consuming, and expensive.<sup>4</sup> Parties to arbitration voluntarily give up substantial safeguards that litigants in court proceedings enjoy, which may include the discovery process, where parties obtain information from one another.<sup>5</sup>

### Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to establish, in part, the enforceability of pre-dispute arbitration agreements involving interstate commerce.<sup>6</sup> The United States Supreme Court has recognized that with the passage of the FAA, Congress expressed intent for courts to enforce arbitration agreements and to place these agreements on an equal footing with other contracts.<sup>7</sup> The FAA established a federal policy that favors and encourages the use of arbitration to resolve disputes. Due to this federal policy, the use of pre-dispute arbitration agreements has expanded beyond use in commercial contexts between large businesses and those with equal bargaining power to use in noncommercial consumer contracts.<sup>8</sup>

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<sup>1</sup> Chapter 57-402, Laws of Fla.

<sup>2</sup> Chapter 67-254, Laws of Fla.

<sup>3</sup> See the definition of "arbitration" at the website of the American Arbitration Association, <http://www.adr.org/sp.asp?id=28749> (last visited Jan. 18, 2012).

<sup>4</sup> *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105 (Fla. 2d DCA 2009).

<sup>5</sup> Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice By Corporate America*, White Paper for the Center for Justice & Democracy, No. 13 (August 2005), available at <http://centerjd.org/content/white-paper-mandatory-binding-arbitration-civil-injustice-corporate-america> (last visited Jan. 18, 2012).

<sup>6</sup> See 9 U.S.C.A. ss. 1-16.

<sup>7</sup> *Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 270-271 (1995).

<sup>8</sup> Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 366 (Fall 2010).

## Florida Arbitration Code

The Florida Arbitration Code<sup>9</sup> (FAC) is applicable to arbitration agreements that do not involve interstate commerce.<sup>10</sup> The FAC governs the arbitration process, including the scope and enforceability of arbitration agreements, the appointment of arbitrators, arbitration hearing procedures, the entry and enforcement of arbitral awards, and any appeals of awards. Under the FAC, Florida courts have held that the determination of whether any dispute is subject to arbitration should be resolved in favor of arbitration.<sup>11</sup> A court's role in deciding whether to compel arbitration is limited to three gateway issues to determine the enforceability of an arbitration agreement: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.<sup>12</sup> The FAC applies in arbitration cases only to the extent that it is not in conflict with federal law.<sup>13</sup>

### III. Effect of Proposed Changes:

This bill largely adopts the provisions of the 2000 revision of the Uniform Arbitration Act, as approved by the National Conference of Commissioners on Uniform State Laws.<sup>14</sup> The bill significantly amends or repeals each section of the existing Florida Arbitration Code, and amends s. 682.01, F.S., to rename the chapter as the "Revised Florida Arbitration Code." This bill also creates s. 682.011, F.S., to provide definitions.

#### Notice

The bill creates s. 682.012, F.S., to provide notice requirements. Notice is provided by taking reasonable action to inform the other person, regardless of actual knowledge. Actual knowledge or receipt of notice is sufficient. Additionally, the delivery of a notice to the person's residence or place of business, or another location held out by the person as a place of delivery, is sufficient to provide notice.

#### Applicability

The bill creates s. 682.013, F.S. providing applicability of the revised act. The revised act applies prospectively for agreements to arbitrate made on or after the effective date. It also applies retroactively if all parties agree to apply the revised act. The Revised Florida Arbitration Code does not affect an action or proceeding commenced or right accrued before the effective date of the act, July 1, 2012. Beginning July 1, 2015, an agreement to arbitrate will be subject to the then applicable law governing agreements to arbitrate.

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<sup>9</sup> Sections 682.01-682.22, F.S.

<sup>10</sup> Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code*, 82 FLA. B.J. 18, 19 (Nov. 2008) (citing *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006)).

<sup>11</sup> *Id.* at 20 (citing *Waterhouse Constr. Group, Inc v. 5891 S.W. 64th Street, LLC*, 949 So. 2d 1095, 1099 (Fla. 3d DCA 2007)).

<sup>12</sup> *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (citing *Terminix Int'l Co. L.P. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th DCA 1997)).

<sup>13</sup> *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000), and *Florida Power Corp. v. Casselberry*, 793 So. 2d 1174, 1179 (Fla. 5th DCA 2001).

<sup>14</sup> See Business Law Section of The Florida Bar, *Analysis of Proposed Revisions to the Florida Arbitration Code* (2012) (on file with the Senate Committee on Judiciary).

### **Effect of Agreement to Arbitrate**

The bill creates s. 682.014, F.S., to indicate that although the revised act is a default statute, “the parties’ autonomy as expressed in their agreements concerning an arbitration normally should control the arbitration.”<sup>15</sup> However, there are some provisions that the parties cannot waive before a dispute arises or cannot waive at any point.<sup>16</sup> Parties may not waive the right to judicial relief, the right to a provisional remedy, jurisdiction of the courts, the right to appeal, the right to notice, the right to disclosure, or the right to an attorney, before a controversy arises. Parties may not waive other requirements at any time which would fundamentally undermine the arbitration agreement.

### **Judicial Relief**

The bill creates s. 682.015, F.S., providing that a petition for judicial relief must be made to the court in a manner provided by law or by the rules of court. Notice of an initial petition to the court must be provided in a manner consistent with the service of a summons in a civil action. Other motions must be made in the manner provided by law or by the rules of court for serving motions in pending cases.

### **Nature of Arbitration Agreements**

The bill amends s. 682.02, F.S., providing that an agreement to submit to arbitration is valid, enforceable, and irrevocable except upon grounds that a contract can otherwise be revoked. The court decides whether an agreement to arbitrate is valid, while an arbitrator decides whether a condition precedent to arbitrability has been fulfilled and whether the contract containing the agreement to arbitrate is enforceable. Arbitration may continue during a court challenge of the arbitration agreement pending final resolution unless the court orders otherwise.

### **Compelling or Staying Arbitration**

The bill amends s. 682.03, F.S., providing that if a party with a valid agreement to arbitrate fails to appear or does not oppose a motion to compel arbitration, the court must order the arbitration. If the refusing party opposes the motion, the court must decide the issue and order arbitration unless it finds that there is no enforceable agreement to arbitrate the matter. If the court finds that there is no enforceable agreement to arbitrate, then it may not order the parties to arbitrate. However, the court may not refuse to order arbitration on the merits of the claim.

The motion to compel arbitration may be made in any court having jurisdiction. However, if the controversy is already pending in court, the motion to compel arbitration must be made in the court where the controversy is pending. If a pending case exists, the court must halt the judicial proceeding until it renders a final decision regarding arbitrability. If the court orders arbitration, the judicial proceeding must be stayed pending arbitration.

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<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 9.

### **Provisional Remedies**

The bill creates s. 682.031, F.S., providing for conditions of provisional remedies. Before an arbitrator is appointed, the court may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action. After an arbitrator is appointed, the arbitrator may issue provisional remedies to the same extent that a court could in a civil action. After an arbitrator is appointed, a party may move for a court order for provisional remedies only if the matter is urgent and the arbitrator cannot act in a timely matter or provide an adequate remedy.

### **Initiation of Arbitration**

The bill creates s. 682.032, F.S., providing that a person initiates arbitration by providing notice by the manner agreed to by the parties, or by certified mail if the agreement does not provide for a method of notice, or by a method allowed by law or rules of court for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought. Unless a party objects for lack of notice by the beginning of the arbitration hearing, notice challenges are waived if the party appears at the hearing.

### **Consolidation of Separate Arbitration Proceedings**

The bill creates s. 682.033, F.S., providing several conditions upon which a court may consolidate separate arbitration proceedings:

- Separate agreements and proceedings exist between the same parties or one party is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
- The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of transactions;
- The existence of a common issue of law or fact creates the possibility of conflicting decisions if separate arbitration proceedings occur; and
- Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

The court may consolidate some claims while allowing other claims to be resolved separately. However, the court may not order consolidation if the agreement to arbitrate prohibits consolidation.

### **Appointment of Arbitrators by the Court**

The bill amends s. 682.04, F.S., to provide conditions for the court to appoint arbitrators. The court, on motion, must appoint one or more arbitrators if the parties have not agreed on a method or the agreed upon method fails, or one or more parties failed to respond to the demand for arbitration or an arbitrator fails to act and a successor has not been appointed. The court must not appoint an arbitrator with a known, direct, and material interest in the outcome of the arbitration or a relationship to a party if the agreement calls for a neutral arbitrator.

**Disclosure by Arbitrator**

The bill amends s. 682.041, F.S., providing that before accepting appointment, an arbitrator must disclose potential conflicts or impartiality including financial or relationship conflicts. The arbitrator must continue to disclose any facts that may affect the arbitrator's impartiality that the arbitrator learns after accepting the appointment. Upon disclosure, if a party objects to the appointment or continued service, the objection may be grounds for vacating an award. If the arbitrator did not disclose a fact as required, the court may vacate an award upon timely objection by a party. An arbitrator who does not disclose an interest in the outcome of the arbitration is presumed to act with evident partiality. Substantial compliance with agreed upon procedures is a condition precedent to a motion to vacate an award on these grounds.

**Majority Action by Arbitrators**

The bill amends s. 682.05, F.S., providing that if there is more than one arbitrator; powers of the arbitrator must be exercised by a majority of the arbitrators.

**Immunity of Arbitrator**

The bill creates s. 682.051, F.S., granting arbitrators immunity from civil liability to the same extent as judges acting in a judicial capacity. Failure of an arbitrator to disclose conflicts does not waive immunity. Arbitrators cannot be compelled to testify about occurrences during arbitration except to determine the claim of an arbitrator against a party or to a hearing on a motion to vacate an award if the moving party establishes prima facie that a ground for vacating the award exists. An arbitrator sued by a party must be awarded attorney fees if the court decides that the arbitrator has immunity.

**Hearing**

The bill amends s. 682.06, F.S., granting broad authority to an arbitrator to conduct the arbitration as the arbitrator considers appropriate. An arbitrator may decide a request for summary disposition if the parties agree, or if a party gives notice of the request to the other parties and they have an opportunity to respond. The arbitrator must provide at least five days notice prior to the beginning of the hearing. The arbitrator then may control the hearing, including adjourning the hearing from time to time as necessary. Each party has the right to be heard, to present material evidence, and to cross-examine witnesses. If an arbitrator is unable to act during the proceeding, a replacement arbitrator must be appointed.

**Representation by Attorney**

The bill amends s. 682.07, F.S., providing that a party to an arbitration proceeding may be represented by an attorney.

**Witnesses, Subpoenas, and Depositions**

The bill amends s. 682.08, F.S., providing that an arbitrator has the authority to issue a subpoena in the same manner as a court in a civil action. Arbitrators may allow discovery and depositions of witnesses and may determine the conditions under which discovery and depositions may be

taken. An arbitrator may also issue a protective order to prevent disclosure of privileged or confidential information, trade secrets, or other protected information, to the same extent as a court could in a civil action. Subpoena laws apply to arbitration proceedings, and out of state subpoenas are treated like they would be in a civil action.

### **Judicial Enforcement of Preaward Ruling by Arbitrator**

The bill creates s. 682.081, F.S., to establish that preaward rulings by an arbitrator may be incorporated into the ruling on motion by the prevailing party, and the court must then summarily decide the motion and issue an order.

### **Award**

The bill amends s. 682.09, F.S., to provide that an arbitrator must make a signed record of an award and provide a copy to each party. The award must be made within the time specified by the agreement to arbitrate or within the time ordered by the court. The time may be extended by a court order or by agreement of the parties to the arbitration.

### **Change of Award by Arbitrator**

The bill amends s. 682.10, F.S., to provide conditions to modify or correct an award. The arbitrator may correct an award when a miscalculation or problem of form, but not substance, results in an incorrect initial award. The arbitrator may also modify the award if the arbitrator has not yet made a final and definite award, or to clarify the award. A motion to change or modify an award must be made and notice provided within 20 days of the moving party receiving notice of the award. A motion to object to the award on any other basis must be made within 10 days of receipt of the notice of the award.

### **Remedies, Fees, and Expenses of Arbitration Proceeding**

The bill amends s. 682.11, F.S., providing that arbitrators may award punitive damages and attorney fees to the same extent they would be available in a civil action, but the arbitrator must justify such damages in the award. An arbitrator has broad authority to impose all other remedies, regardless of whether a court would provide similar remedies in a civil action.

### **Confirming or Vacating an Award**

The bill amends s. 682.12, F.S., providing that after an award is granted, a party may motion the court to confirm the award and provide a confirming order.

The bill amends s. 682.13, F.S., providing conditions upon which a court may vacate an award:

- Evident partiality by an arbitrator appointed as a neutral arbitrator;
- Corruption by an arbitrator;
- Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- An arbitrator refused to postpone the hearing upon showing of sufficient cause of postponement;

- An arbitrator refused to consider material evidence;
- An arbitrator conducted the hearing contrary to the act so as to substantially prejudice the rights of a party to the arbitration proceeding;
- An arbitrator exceeded his or her powers;
- There was no agreement to arbitrate, unless the moving party participated in the hearing without objection; or
- The arbitration was conducted without proper notice so as to substantially prejudice the rights of a party to the arbitration proceeding.

A motion to vacate an award must be filed within 90 days of the award, or within 90 days of the finding of corruption, fraud, or other undue means, or within 90 days of when the party knew or should have known of such a finding. If the court vacates an award for any reason other than the lack of an agreement to arbitrate, the court may order a rehearing. If a motion to vacate is denied, the court must confirm the award.

### **Modification or Correction of Award**

The bill amends s. 682.14, F.S., providing the court must modify or correct an award if:

- A miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award is evident;
- The arbitrator awarded something not submitted in the arbitration and making such a correction will not affect the merits of the decision; or
- The award is imperfect as a matter of form, not substance.

If the application is granted, the court must modify and correct the award. If not, the court must confirm the award.

### **Judgment or Decree on Award**

The bill amends s. 682.15, F.S., requiring the court, upon granting an order confirming, vacating, modifying, or correcting an award, to enter an order as if for a civil judgment. The court may allow reasonable costs of the motion and subsequent judicial proceedings. On motion by the prevailing party, the court may add reasonable attorney fees and expenses.

### **Jurisdiction**

The bill creates s. 682.181, F.S., providing a court with jurisdiction over the controversy has the right to enforce an agreement to arbitrate. An agreement to arbitrate in this state confers exclusive jurisdiction on the court to enter judgment on an award.

### **Venue**

The bill amends s. 682.19, F.S., providing that a petition for judicial relief under this act must be filed in the county specified in the agreement to arbitrate, unless a hearing has already been held, in which case the petition must be filed in that court. Otherwise, the petition may be filed in any Florida county in which an adverse party has a residence or a place of business. If no adverse



party has a residence or place of business in Florida, the petition may be filed in any Florida county.

### **Appeals**

The bill amends s. 682.20, F.S., providing for appeals from:

- An order denying an application to compel arbitration;
- An order granting a motion to stay arbitration;
- An order confirming an award;
- An order denying confirmation of an award except in certain circumstances;
- An order modifying or correcting an award;
- An order vacating an award without directing a rehearing; or
- A judgment or decree entered pursuant to this act.

Appeals are taken in the same manner and to the same extent as from orders or judgments in a civil action.

### **Electronic Signatures in Global and National Commerce Act**

The bill creates s. 682.23, F.S., providing that the revised act conforms to the requirements of s. 102 of the Electronic Signatures in Global and National Commerce Act.<sup>17</sup>

### **Disputes Excluded**

The bill creates s. 682.25, F.S., providing that the revised act does not apply to any dispute involving child custody, visitation, or child support.

### **Mediation Alternatives to Judicial Action**

The bill renames ch. 44, F.S., as "Alternative Dispute Resolution" and amends ss. 44.104, 44.107, and 731.401 F.S., removing references to binding arbitration. This ensures that the revised act is the sole statute in Florida pertaining to binding arbitration. The bill also amends ss. 440.1926 and 489.1402, F.S., to correctly cross-reference the revised act.

### **Effective Date**

The bill provides an effective date of July 1, 2012.

## **IV. Constitutional Issues:**

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

None.

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<sup>17</sup> 15 U.S.C. s. 7002.

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:

None.

C. Government Sector Impact:

According to the Office of the State Courts Administrator (OSCA), the fiscal impact on the courts cannot be precisely quantified, but OSCA anticipates judicial workload may increase as a result of the bill. To the extent the bill results in additional court involvement in the arbitration process it could result in the need for more judges.<sup>18</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

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

**CS by Judiciary on January 25, 2012:**

The committee substitute:

- Replaces “The Revised Florida Arbitration Code” with the more general phrase “this chapter” in several parts of the bill;
- Replaces the phrase “effective date of this act” in section with the specific effective date, “July 1, 2012”;
- Clarifies that arbitration agreements will be governed by the law existing at the time of the agreement unless the parties agree otherwise;

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<sup>18</sup> Office of the State Courts Administrator, *2012 Judicial Impact Statement, SB 1458* (Jan. 6, 2012) (on file with the Senate Committee on Judiciary).

- Specifies that the Revised Florida Arbitration Code will not affect an action commenced or right accrued before July 1, 2012;
- Deletes language applying the revised act to agreements to arbitrate after July 1, 2015, “whenever made”;
- Provides descriptive clauses for various cross-references;
- Deletes Section 36 of the bill, which is redundant to the effective date of the bill found in Section 45; and
- Makes other technical changes.

B. Amendments:

None.