

The Trump Effect on Arbitration*

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The term “Trump Effect” originally refers to an alleged increase in school bullying in the USA caused by the rhetoric used by U.S. President Donald Trump during his 2016 presidential campaign.¹ Other “Trump Effects” have been alleged: various media channels spoke of the “Trump Effect overseas,”² the “Trump Effect on the stock market” (or “Trump trade”)³ and, most famously, the “Trump Effect on immigration.”⁴

To the authors’ understanding, the term the “Trump Effect on Arbitration” has not been used yet by anyone.⁵ However, from the outset of his presidential campaign, the arbitration community was wondering - or rather worrying - how a possible President Trump would affect arbitration. This article will consider the initial concerns raised by proponents of arbitration who feared the impact of a potential Trump presidency and, at the domestic level, the steps taken by the Trump administration in respect of the controversial topic of mandatory binding arbitration and their potential impact on the wider arbitration regime.

Unjustified initial fears

Although referring to himself as a “*free-trader*,” President Trump’s comments during his election campaign were quite to the contrary: “*NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country,*”⁶ “*I would do a tax [on imports from China; and] the tax should be 45%*”⁷ and “*[t]here will be a tax on our soon to be strong border of 35% for these companies⁸ wanting to sell their product, cars, A.C. units, etc., back across the border*”⁹ were just a few of the threats that sent shivers down the spines of arbitration practitioners. Someone who campaigned on a platform of apparent opposition to free trade would surely also be anti-arbitration, the mechanism most widely

¹ K. V. Korostelina, *Trump Effect* (Routledge, 2016).

² Editorial Board, ‘The Trump effect overseas: Praise from the president, then a crackdown’ (*Washington Post*, 21 July 2017) https://www.washingtonpost.com/opinions/global-opinions/the-trump-effect-overseas-praise-from-the-president-then-a-crackdown/2017/07/21/d3988926-6cbb-11e7-b9e2-2056e768a7e5_story.html?utm_term=.fae7696c6992 accessed 8 August 2017.

³ Stan Choe and Marley Jay, ‘Business Stocks are at records, but it’s no longer the “Trump trade”’ (*Washington Post*, 1 August 2017) https://www.washingtonpost.com/business/stocks-are-at-records-but-its-no-longer-the-trump-trade/2017/08/01/dd66ae9e-76f5-11e7-8c17-533c52b2f014_story.html?utm_term=.33ccc214f96a accessed 8 August 2017.

⁴ Tal Kopan, ‘Does border drop mean Trump’s tough talk is working?’ (*CNN*, 9 March 2017) <http://edition.cnn.com/2017/03/08/politics/border-crossings-huge-drop-trump-tough-talk/index.html> accessed 8 August 2017.

⁵ This is based on a Google search, which led to not one single hit.

⁶ Stephen Gandel, ‘Donald Trump Says NAFTA Was the Worst Trade Deal the U.S. Ever Signed’ (*Fortune*, 27 September 2016) <http://fortune.com/2016/09/27/presidential-debate-nafta-agreement/> accessed 5 August 2017.

⁷ Colin Campbell, ‘TRUMP: Let’s slap a 45% tariff on Chinese imports’ (*Business Insider*, 7 January 2016) <http://www.businessinsider.com/donald-trump-45-tariff-chinese-imports-china-2016-1> accessed 5 August 2017.

⁸ The term “these companies” as used referred to “*any business that leaves our country for another country, fires its employees, builds a new factory or plant in the other country.*”

⁹ Mahita Gajanan, ‘Donald Trump Warns of 35% Tariff For Companies That Move Abroad’ (*Fortune*, 4 December 2016) <http://fortune.com/2016/12/04/donald-trump-tariff-company-regulations/> accessed on 5 August 2017.

used to resolve cross-border disputes and investment disputes in particular. Was this the end of arbitration before Trump had even taken office?

To date no 45% tax has been imposed on US imports from China and no renegotiation to NAFTA has taken place. Much ado about nothing? Clearly not. One must not forget that it was President Trump who abandoned TPP, the Trans-Pacific Partnership,¹⁰ and there have been reports of companies allegedly investing in the US because of some of the threatening statements made by President Trump.¹¹

When it comes to arbitration, however, initial worries that it could be negatively affected turned out to be entirely unjustified, demonstrating that such concerns were unwarranted. Above all, free trade agreements as such must be clearly distinguished from the recourse foreign investors have against host states - investment arbitration. Just like someone who opposes football hooliganism is not anti-sport in general, President Trump's attacks on free trade do not automatically mean that he is against arbitration.¹²

As a businessman, President Trump successfully used arbitration to resolve disputes pertaining to him or his companies.¹³ The fact that he recently nominated an arbitration practitioner for the position of deputy US trade representative for investment, services, labour, environment, Africa, China and the Western hemisphere, with the rank of

ambassador also speaks for itself.¹⁴ Even more importantly, Neil Gorsuch, President Trump's nominee to the U.S. Supreme Court,¹⁵ is considered to be supportive of arbitration.¹⁶ In light of all of the above, it is not surprising that the authors fully agree with the prediction that President Trump will be someone who "*likes and uses arbitration.*"¹⁷

The shadow of mandatory binding arbitration in the domestic sphere

¹⁰ Peter Baker, 'Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal' (*New York Times*, 23 January 2017) <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> accessed 8 August 2017.

¹¹ For instance, see Timothy W. Martin, 'Samsung Plans U.S. Expansion, Would Shift Manufacturing From Mexico' (*Wall Street Journal*, 8 March 2017) <https://www.wsj.com/articles/samsung-plans-u-s-expansion-would-shift-manufacturing-from-mexico-1488985610> accessed 8 August 2017.

¹² For a detailed analysis, see Caroline Simson, 'Trump's TPP Exit Doesn't Implicate Investor-State Arbitration' (*Law360*, January 25, 2017) <https://www.law360.com/articles/884347/trump-s-tpp-exit-doesn-t-implicate-investor-state-arbitration> accessed 5 August 2017.

¹³ George H. Friedman, 'Trump in Charge - What Does It Mean for Arbitration?' (*Arbitration Resolution Services, Inc.*) <https://www.arbresolutions.com/trump-on-arbitration/> accessed 5 August 2017.

¹⁴ Benjamin Button-Stephens, 'Trump chooses arbitration lawyer to advise on trade' (*Global Arbitration Review*, 24 July 2017) <http://globalarbitrationreview.com/article/1144912/trump-chooses-arbitration-lawyer-to-advise-on-trade> accessed on 5 August 2017.

¹⁵ Julie Hirschfeld Davis and Mark Landler, 'Trump Nominates Neil Gorsuch to the Supreme Court' (*New York Times*, 31 January 2017) <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html> accessed on 8 August 2017.

¹⁶ George H. Friedman, 'Supreme Court Nominee Gorsuch Seems to be Pro-Arbitration!' (*Arbitration Resolution Services, Inc.*) <https://www.arbresolutions.com/supreme-court-nominee-gorsuch-seems-pro-arbitration/> accessed 8 August 2017.

¹⁷ George H. Friedman, 'Trump in Charge - What Does It Mean for Arbitration?' (*Arbitration Resolution Services, Inc.*) <https://www.arbresolutions.com/trump-on-arbitration/> accessed 5 August 2017.

While to date the Trump administration has refrained from taking actions that threaten the viability or use of international arbitration, the position in respect of domestic arbitration and in particular, mandatory binding arbitration, merits further consideration. In 2015 the New York Times published a series of scathing articles criticising arbitration, in particular the inclusion of mandatory binding arbitration agreements in consumer and employment contracts.¹⁸ Regrettably the public, understandably, often fails to distinguish between international arbitration and mandatory binding arbitration of a domestic nature. Criticisms of mandatory binding arbitration therefore threaten to leave both tarred with the same brush.

Mandatory binding arbitration typically requires parties to agree to resolve all disputes via arbitration, waiving their rights to participate in class action lawsuits, for example, and making it more difficult to pool resources and obtain legal aid to fund potential claims.¹⁹ Mandatory binding arbitration clauses are often buried in the fine print of detailed terms and conditions of contracts relating to financial products, for example, where parties have limited scope to negotiate terms. Such clauses may also serve to keep disputes that it may be in the public interest to raise in open court, such as sexual harassment and assault claims, behind closed doors. Agreement is the “*foundation stone*” of arbitration: a record of the parties’ consensual submission to arbitration.²⁰ To what extent, therefore, should the arbitration community have cause for concern about the Trump administration’s support of the use of mandatory binding arbitration when the parties have unequal bargaining power?

A number of steps were taken or supported by the Obama administration to protect consumers, employees and care home residents from corporations seeking to resolve disputes via mandatory binding arbitration²¹ - steps taken by the Obama administration consistently reflected an anti-mandatory binding arbitration approach. It appears, however, that steps taken by the Trump administration risk breathing new life into the concerns raised by the New York Times and distorting public perception of arbitration as a form of dispute resolution once again - a series of actions taken by President Trump to date reflect a stridently pro-arbitration stance, rolling back measures designed to curtail mandatory binding arbitration and protect consumers

Beginning with the impact on employees, the 2014 Fair Pay and Safe Workspaces Executive Order, signed by former President Obama, prevented companies with federal contracts valued in excess of \$1 million from using mandatory binding arbitration to resolve specific types of disputes - in particular claims by employees arising under Title VII of the Civil Rights Act of 1964 or those relating to sexual harassment or assault. As a result, this measure provided particular protection to female employees. In March 2017 President Trump signed an Executive Order revoking, among other provisions, the Fair Pay and Safe Workspaces Executive Order.²² Although such a measure is arguably pro-arbitration it is

¹⁸ The three part series, entitled ‘Beware the Fine Print’ began with Jessica Silver-Greenberg and Robert Gebeloff, ‘Arbitration Everywhere, Stacking the Deck of Justice’ (The New York Times, 31 October 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?action=click&contentCollection=DealBook&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> accessed on 6 August 2017

¹⁹ <http://www.investopedia.com/terms/m/mandatory-binding-arbitration.asp> accessed 7 August 2017.

²⁰ Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Sixth Edition), 6th edition (© Kluwer Law International; Oxford University Press 2015) at p. 71.

²¹ See, for example, Final Rule, ‘Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities’ (Federal Register, Vol. 81, No. 192, 4 October 2016) <https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf> accessed on 6 August 2017.

²² The White House, ‘Presidential Executive Order on the Revocation of Federal Contracting Executive Orders’ (27 March 2017) <https://www.whitehouse.gov/the-press-office/2017/03/27/presidential-executive-order-revocation-federal-contracting-executive> accessed 6 August 2017.

debatable whether the cause of arbitration is best served by facilitating the use of mandatory binding arbitration in relation to claims relating to sexual harassment, for example.

Another area of frequent criticism has been the inclusion of mandatory binding arbitration clauses in contracts relating to nursing home facilities - critics raised particular concern in respect of the capacity of elderly residents (such as those with dementia, for example) to understand the nature of the rights that they were surrendering by agreeing to mandatory binding arbitration. Obama administration measures proposed to restrict the use of such clauses. However, in June 2017 the Trump administration published a proposed rule revising provisions relating to nursing home facilities participating in the Medicare and Medicaid programs.²³ In particular, provisions prohibiting the use of mandatory binding pre-dispute arbitration and requiring transparency in respect of arbitration agreements in nursing home facilities would be removed. It is likely that the rule will come into effect in due course.

By way of further example, contracts between consumers and financial services companies have met with criticism for the inclusion of mandatory binding arbitration clauses, in circumstances where there is an obvious discrepancy in bargaining power between the consumer and the financial service provider. In July 2017 the Consumer Financial Protection Bureau (“CFPB”), a U.S. government agency responsible for the protection of consumers in the financial sector, issued a final rule regulating arbitration agreements in certain consumer financial product and services contracts.²⁴ The CFPB’s rule sought to prohibit providers of specified products from using arbitration agreements that prevent consumers from filing or participating in class action proceedings in respect of the product or service covered by the relevant contract. It also sought to provide greater transparency by requiring providers of covered financial services to provide the CFPB with certain specified arbitral records. The purpose of such rule was to protect consumers.

In response the U.S. House of Representatives passed joint resolution H.J. Res. 111 on 25 July 2017, disapproving the CFPB’s rule under the Congressional Review Act²⁵ - this legislation empowers Congress to review new federal regulations issued by a government agency such as the CFPB and pass a joint resolution to overrule it. Providing a clear indication of the Trump administration’s position on the CFPB’s rule, the White House issued a Statement of Administration Policy strongly supporting the passage of H.J. Res. 111, on the basis that the CFPB’s rule would “*harm consumers by denying them the full benefits and efficiencies of arbitration*”.²⁶ While H.J. Res. 111 has yet to be passed by the U.S. Senate it is highly unlikely that the rule will survive, leaving financial institutions free to continue to use mandatory binding arbitration agreements in contracts relating to financial products. Whether consumers, as opposed to the interests of the Trump administration or the financial services lobby, are best served by mandatory binding arbitration remains less clear cut.

While initial fears of the impact of a Trump presidency on arbitration have proven to be unfounded and the authors have every confidence that the Trump administration will continue to promote and protect arbitration, it remains to be seen whether recent and

²³ Proposed Rules, ‘Medicare and Medicaid Programs: Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements’ (Federal Register, Vol. 82, No. 109, 8 June 2017) <https://www.gpo.gov/fdsys/pkg/FR-2017-06-08/pdf/2017-11883.pdf> accessed on 6 August 2017.

²⁴ The proposed rule was published on 19 July 2017: Rules and Regulations, ‘Arbitration Agreements’ (Federal Register, Vol. 82, No. 137, 19 July 2017) <https://www.gpo.gov/fdsys/pkg/FR-2017-07-19/pdf/2017-14225.pdf> accessed on 6 August 2017.

²⁵ H.J. Res. 11 (25 July 2017) <https://www.congress.gov/bill/115th-congress/house-joint-resolution/111/text> accessed on 6 August 2017.

²⁶ The White House, ‘H.J. Res. 111 - Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule’ (Statement of Administration Policy, 24 July 2017) <https://www.whitehouse.gov/the-press-office/2017/07/24/hj-res-111-disapproving-rule-submitted-consumer-financial-protection> accessed on 6 August 2017.

future actions in respect of mandatory binding arbitration will cast a shadow over the good name of international arbitration. As President Trump is presently in the first year of his first term in office, at this stage it is perhaps too early to say what his legacy will ultimately be for arbitration practitioners.

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