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March 23, 2018

The Honorable Carl E. Heastie
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Email: speaker@nyassembly.gov

The Honorable Helene E. Weinstein
Chair, Ways and Means Committee
New York State Assembly
Room 923
Legislative Office Building
Albany, New York 12248
Email: wamchair@nyassembly.gov

Re: Comments on Sections 6-11 of New York Assembly Bill 9505

Dear Speaker Heastie and Assembly Member Weinstein:

The International Institute for Conflict Prevention and Resolution submits the following comments with respect to sections 6 through 11 of New York Assembly Bill 9505, which seeks to amend Article 75 of the New York Civil Practice Law & Rules (“CPLR”) through a budget bill for fiscal year 2018-2019. We respectfully request that our comments be carefully considered by the New York State Assembly and its Ways and Means Committee.

WHO WE ARE

The International Institute for Conflict Prevention and Resolution (“CPR”), a non-profit coalition of inside and outside counsel, academics, arbitrators and mediators, was founded in 1977 as the Center for Public Resources by a coalition of leading practitioners dedicated to identifying and applying appropriate alternative solutions to disputes thereby mitigating the extraordinary costs of lengthy court trials. Our mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes.

We fulfill our mission by convening high-level meetings between inside and outside counsel, academics and neutrals at meetings and programs, as well as through the efforts of our member committees and task forces; providing up-to-the-minute research information and case law in *Alternatives* as well as our other

printed publications, online materials, and CPR in-person or electronic guidance on ADR procedures and drafting; and resolving disputes via our Panels of Distinguished Neutrals, our administered and non-administered procedures, and our unparalleled ability to get parties to the table.

SECTIONS 6 THROUGH 11 OF NEW YORK ASSEMBLY BILL 9505

The proposed amendments to Article 75 of the CPLR contained in sections 6 through 11 of New York Assembly Bill 9505 (the “Article 75 Amendments”) are sweeping, with far reaching implications and potentially unintended consequences. As a result, we write to request that the Assembly hold public hearings and engage in robust debate on the Article 75 Amendments before deciding whether these Amendments become law.

It is axiomatic that arbitration is a creature of contract. It is inherent in the contractual nature of arbitration that, where there are sophisticated parties with equal bargaining power, these parties are free to agree to the dispute resolution provisions they deem appropriate for their individual circumstances. *See generally Commercial Arbitration at Its Best: Successful Strategies for Business Users*, (CPR Institute for Dispute Resolution/ABA, Section of Business Law and Section of Dispute Resolution, 2001) at p. 6 (“CPR/ABA Commercial Arbitration Treatise”). It is the hallmark of arbitration.

Many of the Article 75 Amendments, however, disregard the basic premise of party autonomy and, instead, usurp parties’ ability to freely contract. By way of example:

1. the bill would require all arbitral awards to “state the issues in dispute and contain the arbitrator’s findings of fact and conclusions of law,” (AB 9505 § 8, p. 191 lines 31-34), a change from the prior requirement that an award simply be in writing. This would be problematic in several respects. First, it imports litigation concepts (“findings of fact and conclusions of law”) that are inapposite to arbitration and would cause additional confusion and cost. Parties that seek arbitration do not generally seek formal court-like decisions, but rather “reasoned” decisions to address concerns that they might otherwise issue compromise awards. Second, CPR’s Administered and Non-Administered Arbitration Rules require reasoned awards while, at the same time, recognizing that there are circumstances in which parties may want to agree otherwise, and thus allow the parties the freedom to do so. By way of example, in baseball arbitrations, each party submits a proposed award to the arbitrator(s) and often agrees that the arbitrator(s) will choose one award from the submitted awards, without modification or explanation of why one award was chosen over the other. This amendment would, in effect, end the parties’ ability to agree to use this type of baseball arbitration or other creative approaches with which all parties are comfortable and to avoid the costs associated with the rendering of a reasoned award.
2. the bill would require that all arbitrators be “neutral third-party arbitrator[s]” and would not allow the parties to waive this requirement prior to the commencement of the arbitration hearing. (AB 9505 § 6, p. 190 lines 1-9.) The absence of a definition of

neutrality creates uncertainty. For example, does the fact that each party selects an arbitrator (a common practice) and the arbitrator knows which party selected them render the arbitrator non-neutral? Although CPR's domestic and international arbitration rules require arbitrators to be "independent and impartial," (CPR 2013 Administered Arbitration Rules, Rule 7.1; 2014 CPR Rules for Administered Arbitration of International Disputes, Rule 7.1), CPR recognizes that there are circumstances where sophisticated parties may choose to agree to use non-neutral arbitrator(s). For example, if the parties desire particular expertise that can only be obtained by each agreeing they can choose a "non-neutral" third party who would serve with a neutral Chair, CPR would defer to an agreement or stipulation by the parties to that effect.

There are additional troublesome provisions contained in the Article 75 Amendments. For example, section 6 of the Article 75 Amendments would allow the parties to wait until the eve of the arbitration hearing to raise objections to the arbitrator(s), even if the party knew of grounds earlier, setting the stage for disruption and delay tactics in the arbitration. (AB 9505 § 6, p. 190 lines 45-48.)

Finally, the bill would add an additional ground for vacating arbitral awards, allowing courts to vacate where "the arbitrator evidenced a manifest disregard of the law in rendering the award." (AB 9505 § 9, p. 191 lines 51-52.) The "manifest disregard" standard is not clearly defined or consistently applied and is often criticized as diminishing the finality of arbitration awards. As a result, New York courts have generally refrained from using it. Codifying the "manifest disregard of the law" into Article 75 of the CPLR could threaten New York's pro arbitration reputation and discourage parties from choosing New York as an arbitral seat, resulting in a loss of business for New York.

Although we take no position on the overall effort to address mandatory arbitration in the employment context, we believe the rush to implement sweeping changes without careful consideration is reflected in these provisions as well. For example, there are circumstances where an employee or independent contractor may want the option of enforcing the arbitration provision, and the resulting confidentiality, pre-dispute. However, as written, the bill would not give the employee this option. Moreover, the provision is so broad that it would apply to a variety of situations where sophisticated parties with significant bargaining power would otherwise freely negotiate arbitration provisions. Examples would include negotiated executive compensation contracts, as well as employment agreements embodied in mergers and acquisitions, closely held family corporations, professional practices and other contracts where parties desire the benefits of arbitration. Funneling these disputes directly to court would not only upset the economic balance of these heavily negotiated agreements but could lead to meaningful added costs and delays for all parties.

Considering amendments of this magnitude in the context of a budget bill does not provide the level of due process and scrutiny decades of New York arbitration practice deserves. Given the negative effect many of the Article 75 Amendments may have on New York state's reputation as a venue that respects party autonomy and as a reliable seat for the enforcement of international arbitration awards, we urge the Assembly and its Ways and Means Committee to allow a thorough review, hearings and an opportunity for public comment before the Article 75 Amendments are considered further.

Thank you for your consideration of our letter. Should you wish any further information about the comments herein, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Noah J. Hanft". The signature is fluid and cursive, with a large initial "N" and a stylized "H".

Noah J. Hanft
President and CEO

cc: Members of the Ways and Means Committee