

Consumer Arbitration Preserves Access To Justice For Consumers With Smaller-Value Disputes

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FORTHRIGHT
ON BEHALF OF
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Arbitration provides a custom-tailored dispute resolution mechanism for a broad range of legal actions, including commercial disputes, labor disputes, securities disputes, or even salary disputes between professional baseball players and team owners. In each instance, the nature of the arbitration proceeding is geared to match the requirements of a particular type of transaction, relationship, or dispute. Specifically, arbitration allows for customized discovery, relaxed or enforced rules of evidence, expert arbitrators in a particular legal domain or industry practice, and truncated or elongated proceedings, as dictated by the particular dispute.

Although often less visible, consumer arbitration is no exception. The flexibility of arbitration allows for the construction of a dispute resolution system that is tailored to resolve the types of disputes that arise from standard consumer transactions. When consumers assert or respond to a claim in arbitration, they are benefited by a system that is, among other things, specifically constructed to be inexpensive, relatively speedy, and fair.

The following are some of the important benefits of arbitration for consumers.

Simplicity And Flexibility

Formal pleading requirements and strict application of rules of evidence would only serve in the consumer context to deny consumers the opportunity to tell their story and to prove their case. While any party to consumer arbitration can choose to obtain legal representation, the system also permits unrepresented consumers to present their case to the arbitrator in their own words and without being impeded by excessive formal requirements.

Flexible hearing options give consumers a choice whether or not to miss work or to travel to a hearing. Consumers can elect to appear for a hearing in person, via telephone, or simply by submitting documents.

Low Costs

Accumulating fees and costs can render resolution of consumer disputes an economically irrational exercise. This is true whether the venue is a court of general jurisdiction, a small claims court, or an arbitration tribunal. The key to providing access to justice for smaller claims is to keep fees and costs as low as possible for the consumer party. The costs of arbitration are low for the consumer. The efficiency of document-based hearings and rules enabling consumer fees to be shifted to the business party allow consumers to assert even relatively small value claims in arbitration.

For example, at the National Arbitration Forum, filing fees for consumer

claimants start at \$19 for claim sizes under \$1,500. The filing fee is less than \$50 for a \$15,000 claim, and filing fees do not rise above \$100 until the claim size exceeds \$35,000. In addition to this consumer-friendly fee structure, low income consumers can seek to have all of their fees waived and, upon showing that arbitration fees prevent a consumer from effectively vindicating their claim, fees can be shifted to the business party.

Consumer Choice

Arbitration language is often included in a contract between two parties, entered into before a dispute arises. In many consumer contracts, the consumer party has the option to cancel the arbitration provision of the contract within a specified period of time. In addition, nearly all arbitration agreements are written to require arbitration only at the election of one of the parties. Studies show that consumers overwhelmingly favor arbitration over litigation and the use of pre-dispute arbitration agreements.

Some misguided policy proposals would require that arbitration agreements could only be formed after the dispute has arisen. The problem with this approach is that parties readily adopt arbitration in their contract in order to take advantage of the time and cost savings. After the dispute arises, however, one party will always see some advantage in forcing the other party to incur the expense and delays of court litigation, and an agreement to arbitrate is nearly impossible to obtain. The only practical way to lock in the efficiency advantage of arbitration is to do so up front and before any dispute has occurred.

Time Is Money

Access to justice is also linked to the amount of time it takes to get a dispute resolved. In court, mundane civil matters compete for docket space with all of the other priority matters that courts have to hear and decide. Small claims court can involve a long wait before a particular matter is heard.

In consumer arbitration, the dockets are clear and the arbitrator has time to hear and decide each case. The available data backs this up. One recent analysis of consumer arbitration cases showed that the average length of a case from initial filing to final award was 4.35 months for claims brought by consumers against businesses and 5.6 months for claims brought by busi-

nesses against consumers. To compare, the Bureau of Justice Statistics data on contract cases involving consumers in the 75 largest counties in the United States shows that the average length of a court lawsuit was 19.4 months when filed by the consumer, and 15 months when filed by the business.

Same Outcomes As Court

Access is commendable, but there must also be justice in consumer arbitration. To this end, arbitrators are required to follow the applicable substantive law and empowered to grant any legal, equitable or other remedy or relief provided by law in deciding cases. The idea is to provide parties with the same result as they would have obtained in court, but to do so more quickly and more efficiently. Here again, the available data demonstrates that consumer parties prevail in arbitration at almost exactly the same rate that they prevail in court litigation.

No Defaults

The arbitration system protects the interests of those who do not respond. In many consumer disputes, whether filed in court or in arbitration, the consumer often does not respond to the business's claim. In many court jurisdictions, this results in the issuing of a "default judgment" against the consumer. Unfortunately, the court clerk or judge often is not permitted to review the requested relief to ensure that the business has not overreached to take advantage of the absent consumer.

Under the National Arbitration Forum rules, "no award or order shall be issued against a party solely because that party failed to respond, appear, or defend." Instead, the arbitrator is required to review the merits of the claim and is empowered to request additional information from the other party and hold a hearing before deciding the case.

In consumer arbitration, requests for relief that go beyond what is permitted under the applicable law will be struck down by the arbitrator, even where the consumer party does not respond or appear. The default judgment procedures in many court jurisdictions do not permit this type of protection for absent consumer parties.

Neutral Arbitrators

Several characteristics of the consumer arbitration system and the available outcomes data demonstrate that the system is fair for consumers and for businesses.

First, consumer arbitrators are former judges or attorneys with at least 15 years of practice experience. These legal professionals are bound by a code of professional ethics, bound by arbitration rules to be neutral and unbiased, and take an oath of neutrality. In addition, while completing judicial review necessary for an arbitration award to be enforceable, the court can overturn the award upon a showing of partiality by the arbitrator.

Second, any lawyer who maintains a practice as an arbitrator and/or mediator lives or dies professionally by his reputation. Any hint of a stain on an arbitrator's reputation as a fair and neutral decision-maker effectively ends the referrals and the selections that constitute their practice as a mediator or arbitrator.

Finally, as mentioned above, outcomes

evidence demonstrates that consumers and businesses receive the same outcomes in arbitration as they receive in court. This evidence alone should put accusations of inappropriate bias to rest.

Due Process

To ensure that a consumer claim or defense will be fully heard, consumers are afforded fundamental due process protections in arbitration. For example, if an in-person hearing is elected, the hearing is required by rule to be held close to the consumer's place of residence. Under the National Arbitration Forum rules, the hearing must be held in the federal judicial district where the consumer party resides.

Notice of the arbitration claim is also crucial, given the relatively high rates of non-response – in court and in arbitration – for some types of consumers. To account for this potential issue, the National Arbitration Forum rules require delivery of two separate notices of an arbitration claim.

Access to information is also paramount for consumer parties asserting or defending claims against a business. Consumer arbitration rules provide access to all of the traditional methods of discovery that are available in court, including document requests, written interrogatories, depositions, requests for admissions, and physical and mental examinations.

Access To Justice

The provision of access to civil justice for consumers is really a two-fold issue. One aspect is the availability of an arbitration system that contains the necessary features and characteristics to permit the broad range of consumer disputes to be resolved in a practical and economically rational manner. The features and characteristics described above illustrate that the current consumer arbitration system was constructed in just such manner.

The other critical aspect to access to justice for consumers is the lack of a realistic alternative to consumer arbitration. As a practical matter, lawyers are most often unable to represent consumers on smaller-value claims, and most consumers require an attorney in order to successfully navigate the litigation system.

Small claims court presents an incrementally better, but still fundamentally flawed alternative. Delays can be considerable, hearing times uncertain, face-to-face confrontation with an opposing attorney can be intimidating, and missing work with the requirement to travel can be prohibitive. All of this is added to the possibility that the prevailing consumer could face a *de novo* appeal of the small claims court decision in the state trial court of general jurisdiction.

Arbitration systems can be constructed to fit all kinds of industry- and transaction-specific needs. Consumer arbitration is, in fact, a custom dispute resolution solution that has been specifically constructed to permit the fair and efficient resolution of the types of disputes that arise out of consumer transactions. Many of these consumer disputes cannot be efficiently resolved in court systems that are built to address a vast variety of criminal and civil matters. For consumer disputes, arbitration provides access to justice for consumers who will find no other avenue available for their lower-value disputes.

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