TAKE-IT-OR-LEAVE-IT ARBITRATION

BANNING CONSUMERS FROM THE COURT

Jonathan Foxx *

SLAYING THE DRAGON

Recently, there has been quite a lot of weeping and gnashing of teeth against the big, bad Bureau, the dragon with the scary name, Consumer Financial Protection Bureau (Bureau). The dragon slayers, such as banks and nonbanks, are fighting the dragon on its most recent fiery huffing and conflagrant puffing on a new rule involving arbitration clauses.

The ire of the dragon slayers is limitless due to the fact that the dragon has issued a "disgraceful," "egregious," "outrageous," and "shameful," final rule that bans companies from using arbitration clauses to bar consumers from filing class action lawsuits. The dragon slayers have formed a conclave consisting of banks, nonbanks, credit card companies, and sundry other companies to fight the good fight. They are even threatening to storm the dragon's redoubt by pitching at it the magical incantations of the Trump administration, mustering up in their cause a bevy of like-minded acolytes, disciples, groupies, hangers-on, oodles of assorted politicians and other baby-kissers.

On July 10, 2017, the Bureau announced the release of its anticipated Arbitration Rule, which opens the door for more consumer class actions against financial institutions concerning financial products and services.[1] Many consumer contracts, such as credit card and bank agreements, contain mandatory arbitration clauses. These clauses typically require consumer disputes to be arbitrated rather than litigated in court, with the goal to prevent class action lawsuits from being filed. But consumer advocacy

---

* Jonathan Foxx, PhD, MBA is the Managing Director of Lenders Compliance Group

groups have long complained about such clauses, pointing out that individuals are unlikely to be able to handle the costs of arbitration to resolve what are typically low dollar value cases. Their position is that if consumers were able to band together and file class action lawsuits, consumers would be more apt to challenge allegedly unlawful conduct against financial institutions, and companies would be held accountable.

The Bureau's position is really rather simple: it notes the incontrovertible fact that mandatory arbitration clauses that ban class action litigation happen to stop consumers from seeking judicial remedies in disputes over small fines and other charges. Let's call this kind of arbitration clause the "**Take-It-or-Leave-It**" clause.

Put another way, many consumers are unable to pursue small dollar settlements disputes, given the not erroneous belief that the payout would not be worth the trouble. So, the Bureau contends, not incorrectly, that allowing companies to use the Take-It-or-Leave-It clause enables them to wrong consumers, but face no consequences for doing so.

Under the final rule, the companies would no longer be allowed to put the Take-It-or-Leave-It clause in their arbitration provisions. The result of this rule, then, would be to put consumers into the position of banding together in group lawsuits, consisting of fellow sufferers with similar legal concerns.

To quote the Bureau's Director Richard Cordray, the fire-breathing top dragon mounty himself:

> "Arbitration clauses in contracts for products like bank accounts and credit cards make it nearly impossible for people to take companies to court when things go wrong. These clauses allow companies to avoid accountability by blocking group lawsuits and forcing people to go it alone or give up."[2]

Notice I did not indicate that arbitration clauses are themselves banned. That is because the rule does not ban arbitration clauses! Companies can still work out binding legal settlements with consumers by means of arbitrators paid for by the company.

A NEW ARBITRATION RULE

This new Arbitration Rule ("Rule") prohibits the use of mandatory arbitration clauses in consumer financial products and services contracts to prohibit class action lawsuits. However, financial institutions can still include arbitration clauses, but these clauses cannot be used to stop consumers from filing class actions. So, if companies want to include an arbitration clause in a consumer contract, the Rule requires that the clause incorporate the following language:

> "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."[3]

If an arbitration clause applies to several products or services, only some of which are covered by the Arbitration Rule, then the language must specify that the same language applies to conduct covered by the Rule.[4]

The Rule also requires companies that include arbitration clauses in consumer financial products and services contracts to produce certain records to the Bureau.[5] These records include (1) claims, counterclaims, answers, arbitration agreements, judgments or awards, and dismissals concerning arbitration claims filed; (2) communications with arbitrators concerning a determination that an arbitration agreement "does not comply with the administrator's fairness principles [or] rules;" and (3) court filings that rely on arbitration agreements in support of a company's request for dismissal, deferral or stay, and the arbitration agreement relied upon.[6]

In its announcement of the release of the final Rule, the CFPB stated that "gathering these materials will enable the CFPB to better understand and monitor arbitration, including whether the process itself is fair."[7]

The Rule makes changes to the arbitration process by forcing companies to submit information about individual cases to the bureau that would be published on the Bureau's website. I have a hunch that this is the point where the seething fire in the dragon slayer's belly rises brazenly, frantically, commencing with the ruminations of thought-distracting speculation, inwardly crushing through the spleen into poisoned reflections of petty mortifications, and compulsorily culminating in pulverizing, fuliginous vexations!

DECIPHERING THE CFPB

The unseemly disclosure of such sordid, humiliating, and wretched details to consumers include having to disclose initial claims and counterclaims, answers to these claims and counterclaims, and awards issued in arbitration. The Bureau also wants court records pertaining to arbitration requests to be included in motions to compel arbitration filed in individual cases. Personal information involving private arbitration hearings will be scrubbed.

Let us pause for a moment to consider two points of interest: (1) the implications of the Bureau's name, and (2) what it is about regulations that seems to drive people crazy.

The dragon's name starts with the word "**Consumer**," as in buyer, customer, purchaser, shopper, user, enjoyer, applicant, and borrower. The idea here is to proclaim as clearly, notoriously, unambiguously, and unconditionally as possible that the Bureau's mission is to prevent the consumer from being turned into a chump, dupe, easy mark, fool, patsy, target, sucker, or, if you prefer fowl play, a pigeon, turkey, or sitting duck. The goal is to ensure that purveyors of marketed goods and services, sought by the consumer through an orderly market, are prohibited from subverting a legitimate transaction through illegitimate intentions. Of course, we all know that all merchants are not hucksters as much as we know that all consumers are not pushovers. But we also know that some hucksters are merchants and some consumers are an easy touch.

Then we get to the next word in the dragon's name: "**Financial**." Not complicated, really. Particular kinds of consumers are involved in economic transactions. We are obviously not talking about consuming food and drink, space on a cruise ship, the volume of air intake, the carbon dioxide absorbed by plants, or the amount of energy or power utilized to generate some device. The word "financial" modifies the word "consumer," and so, taken together, the notion is that a consumer financial transaction must be economic, commercial, monetary, and in some way or other mercantile, as in financial services.

Now let's get to that contentious word in the Bureau's title, "**Protection**." Essentially, it is just another way to say "regulation." There's something about that word "regulation" that really seems to annoy people. I deal with this reaction all the time from people who have caught the "free market" bug and refuse to believe that a true free market has never existed since the advent of recorded human history. I have expressed this irrefutable fact on occasion, only to be told that "it's never too late to start!" When I speak about a regulation at a conference, inevitably somebody asks why "yet another," such and such regulation must be clamped onto their way of doing business.

All markets are regulated. All of them, without exception! Even crooks have a *modus operandi*. All nature conforms to regulatory constraints, such as those imposed by earth's seasonal demands. All bodies in the universe conform to regulatory accommodations. No exceptions whatsoever!

But when it comes to human-made regulations, there are three arguments for every two people!

RIDDLE WRAPPED IN A MYSTERY INSIDE AN ENIGMA

Recently, President Trump signed an Executive Order, titled "Reducing Regulation and Controlling Regulatory Costs." To quote the order, "for every one new regulation issued, at least two prior regulations [must] be identified for elimination."[8] Thus, issue a regulation; but, if you do so, find two regulations to kill. Yeah! That's it! That's the way to curb regulatory growth! Actually, this method of handling regulations is "not only not right, it is not even wrong," as the theoretical physicist Wolfgang Pauli once intoned about a concept he deemed incorrect, produced by sloppy thinking.

Further warping this weird demand is the order's requirement to ensure that "the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero."[9] Or, to put it more succinctly, any increase in cost for a new regulation must be offset by a decrease or elimination of the cost pertaining to another regulation, such that the net resulting cost is equal to no increase in cost at all. This way is no way at all, since it eviscerates the very purpose of providing protection, which is the basis of the regulation in the first place. Protection always comes at a cost, since implementation requires market interaction. This shallow contrivance of "Reducing Regulation and Controlling Regulatory Costs," devised to prune regulations, seems almost metaphysical in nature.

Look at it this way: in order to give up two things to get one new thing, in an uncoerced transaction, we would ordinarily exchange the two for the one on the basis of equality of value between them. For instance, if I were to give up two widgets that I currently possess for the sake of getting one new widget, I would expect a fair trade, where the value of two widgets are equal to the value of one new widget. Or, for another example, I might accept trading two $1-dollar bills for one $2-dollar bill, but I would not trade two $1-dollar bills for one $1-dollar bill. (Yes, $2-dollar bills are a current denomination, worth only face value. Excluding rare, numismatic exceptions, $2 bills are not worth anything more than face value on the collectors' market.) If the foregoing proposition of market action between two parties in an uncoerced transaction is deemed to be an unacceptable description of economic theory, read no further, as I base my observations on long-settled, economic theory and normative human interaction consummated on the basis of two parties' affirmation of agreed-to values.

VALUE OF REGULATION

The value of a regulation is measured in its degree of protection to a class of people, which, in the case of consumer financial interactions, would be the class known as consumers. The notion is that protecting the consumer financially requires regulations, generally irrespective of the economic effect such regulation may have on the mercantile class. Protecting the consumer financially is actually more important than protecting the merchant, because without the consumer there is no market. No market; no merchant.

Whereas all merchants could be consumers, not all consumers can be merchants. A consumer can work for a merchant and even consume the merchant's products and services, but in our economic system the consumer does not usually participate in the merchant's profits. This configuration has been a settled feature of classical economics for centuries. A regulation that only protects the merchant, but does not protect the consumer, is socially and economically repugnant. Simply put, there can never be a naturally occurring, intrinsically stable, "level playing field" between consumers and merchants.

Implementing regulations costs money and expenses eat into profits. Merchants may be far sighted when it comes to how best to accommodate a consumer's financial needs, but they certainly are near sighted when it comes to eyeing the bottom line.

Hence, many merchants have two customary default, adversarial positions: (1) fight for no regulations, and, if that fails, (2) fight all new regulations! Merchants do not demand increasing consumer financial regulations; consumers rarely call for decreasing such regulations. Since regulations are for the ultimate protection of the consumer, and protection of solely the merchant is an obnoxious abomination, the merchant's push-back gambit is to encase its objections into a pretentious artifice that infers the consumer will somehow suffer if the regulations are implemented. Such suffering would come in the form of increased prices for financial products and services, merchants will argue, because the costs to implement regulations will be passed on to consumers.

Market Altruism

Here's the general stratagem behind the merchant's magnanimous view:

1. Increased prices of financial services would lead to reduced prices in various asset classes, such as real estate, because the more a consumer pays for credit the less money it has available to spend on real estate.
2. The reduction in the consumer's ability to purchase would force the consumer to forego purchases, leading to a slow or no growth economy, because foregoing purchases ripples into the entire economy in the form of reduced employment, reduction in common services, lower taxes, and so forth.

According to this rationale, merchants are heroes, champions of consumer interests, conquistadors bravely fighting regulations on behalf of consumers. There is no real need for a government agency to watch out for consumer financial protection – the merchants will do it! Fighting regulations is what the merchants willingly do on behalf of the consumer. By the logistics of this conjecture, good regulations are those that benefit the consumer by maintaining or increasing the merchant's profits, thereby ensuring that it does not have to pass on to the consumer the increased cost of implementing the regulations; bad regulations are those that cause the merchant to pass on the cost of the regulations, and, of course, thereby potentially reducing the merchant's profits. Banking departments, federal and state government authorities, agencies that enforce consumer financial protection statutes, regulators that promulgate rules to prevent financial abuse of consumers – these entities are thought to be parasitic pests, leeching the lifeblood out of the market by condemning the consumer to increased costs and economic uncertainty.

But if the consumers are the essence of market activity and merchants are, at best, reactionaries, then this chivalrous, perplexing notion of how the market works quickly evaporates into a fugacious mist! Perhaps merchants need protection from one another to prevent unfair competition. Maybe they need protection from one another to avoid the formation of monopolies. But Adam Smith's "invisible hand" is the one belonging to the consumer, not the merchant.

The metaphor "invisible hand" was first coined by Adam Smith in 1759. It is supposed to mean that self-interested behavior of people in a marketplace leads to the greater good for all. So, according to this interpretation of Smith's work, *Wealth of Nations*, there is no need to rely on government regulations to direct commercial activity. If the proper economic and legal institutions are set up, we can all expect to benefit economically if simply left to our own devices.

However, most contemporary economists acknowledge that the "invisible hand" does not exist! As Nobel Laureate, Joseph Stiglitz states: "The reason that the invisible hand often seems invisible is that it is often not there."[10]

DEFEATING CONSUMER FINANCIAL PROTECTION

If the Bureau's promulgated regulation is not understood to be a proxy for protecting the consumer in financial transactions, then the concept of regulation itself has no practical, socially viable meaning in the context of a market economy. It becomes no more than a vacuous ruse camouflaging empty rhetoric for the sake of mollifying the masses.

Given the purpose served by consumer financial regulation, for the rest of this article I will use the word "Protection" instead of the word "regulation." As the educator Aeneas Sylvius Piccolomini wrote, nearly six hundred years ago, "ordinary words are those which are worn out by common use, and we can use these safely. Cicero said that those words which were formerly hard are softened by use." [11]

It should come as no surprise that virtually all Republicans in Congress, as well as mortgage industry associations, have been pushing the Bureau to hold off on issuing Protection with respect to the Take-It-or-Leave-It arbitration clause. In point of fact, this Protection could be voided through a vote under the Congressional Review Act.[12]

Director Richard Cordray has said he is aware that Congress could move to nullify the Protection, a move which would block the Bureau from issuing "substantially similar" Protection in the future, and he acknowledged there were risks associated with promulgating more Protection, given a Republican Congress and Administration in power. To that observation, it is worth noting that there is legislation currently pending in Congress that would remove the Bureau's ability to go after arbitration clauses.

ARBITRATION STUDY

Director Cordray has said that the Dodd-Frank Act mandates that he, as Director of the Bureau, must take action that is in the best interest of the public and that he was acting to do so based on an Arbitration Study the Bureau published that showed how consumers lost out in arbitration hearings.[13]

In the Arbitration Study, issued in March 2015, which included and evaluated statistics from the American Arbitration Association, it was found that only around 2 percent of credit card customers said they would consult an attorney or take legal action if they find themselves in a dispute with their credit card company or bank.

The Arbitration Study also showed that around 34 million consumers received payments, over $1 billion being paid out, as a result of consumer class actions over a five-year period. Comparatively, over that same period, the 78 consumers who went to arbitration recovered only a total of $360,000 – a mere pittance.

What is to be feared by giving consumers their day in court? By shutting the court house doors on consumers, according to the Bureau, companies would be able to avoid being held responsible for improper fees and other misdeeds. Consumers are aware of this purported imbalance in the scales of justice! Wells Fargo's initial push to force arbitration on the consumers harmed in its fake account scandal was stopped after significant public outcry. Ultimately, Wells Fargo agreed to a $142 million class action settlement in that litigation.

The Arbitration Study itself formed the basis of deliberations in promulgating the Protection, which, by the way, has some differences from the Bureau's May 2015 proposal with regard to exemptions for cards and other products issued by federal, state, local and Native American tribal governments to employees and other areas.

Ramona L. Lampley, Professor of Law at St. Mary's School of Law in San Antonio, Texas, in a published review by the American Bar Association, provides a brief synopsis of highlights involving the Arbitration Study:

- *Over the three-year period of 2010–2012*, consumers filed an average of 411 claims for arbitration in consumer financial services products. This is abysmally low.
- *Of the 1,060 arbitration filings studied*, about 60 percent settled or ended in a manner consistent with settlement. Only 32 percent were resolved on the merits. This settlement figure suggests that some sort of resolution is being achieved prior to a merits decision in consumer arbitration.
- *Consumers had access to attorneys*. Counsel represented consumers in nearly 60 percent of the cases. Companies, of course, nearly always had counsel.
- *It appears that attorneys with arbitration experience are representing these consumers*. Repeat player attorneys represented consumers in 50 percent of filings across all consumer financial services product markets. Forty-five percent of those filings were by "heavy" consumer repeat players, meaning the attorney appeared in four of more arbitration disputes in the three-year study period. For student loan disputes, heavy repeat player law firms represented 93 percent of consumers.
- *Dispute resolution is not a primary concern for consumer choice*. When asked about factors that are important in selecting a credit card, no consumer raised dispute resolution. When asked, in a telephone survey, what one would do if a credit card company charged an improper fee, most respondents commonsensically answered he or she would cancel the credit card. Less than 2 percent mentioned seeking legal advice or suing, but 10 percent said they would refer the issue to a governmental agency.[14]

Professor Lampley reached several conclusions. But, having weighed the Pros and Cons, her overall view is that the image which the "Arbitration Study paints of class actions shows that this vehicle is not providing satisfactory recovery to the individual class members."[15]

I am sure the Arbitration Study will be used in lawsuits, because the mortgage industry has ferociously opposed the Bureau's rulemaking process as well as the validity of the Arbitration Study itself.

PUSH-BACK GAMBIT

Now, however, comes the industry's magnanimous and accustomed push-back gambit! The consumer needs to be protected and the merchant is willingly going to safeguard the consumer's interests.

Let's take a look at the merchant's push-back gambit in action.

Here is but one example, this from the U.S. Chamber of Commerce:

> "The CFPB's rulemaking is based on a highly controversial and flawed study that ignored the practical benefits of arbitration, as compared to the court system, for addressing the types of injuries that consumers most often suffer. While arbitration is faster and cheaper for consumers, the Bureau chose to release this rule, which will eliminate the option of arbitration for most consumers."[16]

Yet another fine specimen of the push-back gambit, the American Bankers Association (ABA) issued this announcement:

> "The ABA and the state bankers associations have been vocal in their opposition to the rule, and ABA President and CEO Rob Nichols applauded lawmakers for taking the next step to block it from taking effect. He noted that in moving forward with the 'misguided' rule, the CFPB undermined its own data, which showed that customers fare far better in arbitration than in class action lawsuits."[17]

The action to block the rule would be made possible through the Congressional Review Act, which gives Congress the ability to reject new federal rules within 60 legislative days of publication in the Federal Register. Merchants have enlisted Senate Banking Committee Chairman Mike Crapo (R-ID) and House Financial Services Committee Chairman Jeb Hensarling (R-TX), who are nobly taking up the worthy cause of protecting consumers. The process has already begun: on July 25, 2017, the House of Representatives passed a "Resolution of Disapproval" by a vote of 231-190 to revoke the Protection under the authority of the Congressional Review Act.

We know the Protection is a huge burden on consumers because, as the ABA opines, "with such restrictions in place, arbitration is likely to disappear from financial services contracts, and could result in burdens on customers whose claims cannot be resolved through class actions, instead requiring them to go to court for minor, non-systemic disputes." Tom Cotton (R-AR), who is on the U.S. Senate Banking Committee, issued a statement promising to move forward with rescinding the Protection under the Congressional Review Act. And, prior to the Protection being unveiled by the Bureau, acting Comptroller of the Currency, Keith Noreika, is reported to have denounced it, citing the Dodd-Frank Act as his office's authority to strike it down.

The Heritage Foundation's policy wonk, Diane Katz, has exuberantly stated: "Three cheers for Keith Noreika, the acting comptroller of the currency, for having the chutzpah to challenge the regulatory deceit of the Consumer Financial Protection Bureau and its director, Richard Cordray." Not settling for just cheering, Ms. Katz charged that Director Cordray himself is involved in a "cover-up" that is "undoubtedly driven by the methodological defects that render the data – and the bureau's use of it – shady." Of course, she would just like to eliminate the Bureau altogether, to wit, "Lawmakers should then move to dismantle the Consumer Financial Protection Bureau and send Cordray and his crew packing."[18]

Obviously, the financial services industry is thankfully going to come to the defense of the consumer.

ABA's Nichols provides the rationale in no uncertain terms for why this Protection must be canned:

> "In reality, the vast majority of disputes get resolved quickly and amicably without the need for arbitration or legal action. If arbitration disappears, the bureau will force consumers to navigate an already overcrowded legal system where the only winners will be trial lawyers. We think our customers deserve better, and we urge lawmakers in both chambers of Congress to overturn this anti-consumer rule as soon as possible."[19]

The effective date is 60 days after the final rule was published in the Federal Register on July 19, 2017; therefore, September 18, 2017. Mandatory compliance applies to pre-dispute arbitration agreements entered into on or after March 19, 2018 (viz., only to contracts entered into by consumers 180 days after the effective date). Those politicians better get cracking and get that "anti-consumer rule" overturned already!

COUNTERING THE PUSH-BACK GAMBIT

Nevertheless, many consumer advocacy groups are supporting the Protection. For some reason, they are not graciously willing to accept the merchant's magnanimity nor are they particularly impressed with a policy wonk's exasperated indignation. In their view, eliminating the Take-It-or-Leave-It arbitration clause, which gives consumers their day in court, is precisely what they would like to see implemented.

According to Rohit Chopra, a senior fellow at the Consumer Federation of America - an umbrella group for dozens of consumer advocacy organizations - the Protection will help to "combat the culture of companies profiting from charging illegal fees and committing other crimes against their customers. This is an important step of restoring law and order to the financial marketplace."[20] Representative Maxine Waters (D-CA), the Ranking Member of the Financial Services Committee, declared that "it is outrageous that Republicans are trying to nullify the rule to the detriment of consumers. Republicans should think twice before taking away consumers' rights to be heard in a court of law." [21]

So, the gloves are off! Why this umbrage at denying consumers access to the court?

CONSTITUTIONAL RIGHT TO A JURY

The esteemed jurist, Jed S. Rakoff, who is the Senior United States District Judge of the United States District Court for the Southern District of New York, wrote there are many reasons why access to the court has been increasingly denied. According to Judge Rakoff, "one is the ever greater cost of hiring a lawyer." He then enumerates up to eight other reasons:

> "A second factor is the increased expense, apart from legal fees, that a litigant must pay to pursue a lawsuit to conclusion. A third factor is increased unwillingness of lawyers to take a case on a contingent-fee basis when the anticipated monetary award is modest. A fourth factor is the decline of unions and other institutions that provide their members with free legal representation. **A fifth factor is the imposition of mandatory arbitration.** A sixth factor is judicial hostility to class action suits. A seventh factor is the increasing diversion of legal disputes to regulatory agencies. An eighth factor, in criminal cases, is the vastly increased risk of a heavy penalty in going to trial."[22] (My emphasis.)

Mandatory arbitration obviously restricts a consumer from having a judicial hearing. This provision is called a "contract of adhesion," which is a contract between two parties, where the terms and conditions of the contract are set by one of the parties, and "the other party has little or no ability to negotiate more favorable terms and is thus placed in a 'take it or leave it' position."[23] It is a contract between a party with stronger bargaining power and signed by another party with weaker bargaining power.[24] Indeed, a few centuries ago, this type of provision was considered "unconscionable" because it was thought that these contracts were such "as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."[25]

Importantly, the second party typically does not have the power to negotiate or modify the terms of the contract. To put it clearly, this type of contract is fraught with peril for consumers, because without giving the consumers realistic opportunities to negotiate terms that would benefit their interests, consumers cannot obtain the desired product or service unless they acquiesce to this provision. There are arbitration agreements that include due process protections, but there are others that shorten statutes of limitations. Arbitration clauses may alter the burdens of proof, limit the amount of time a consumer has available to present a case, or otherwise impose constrictive procedural rules. In fact, most of the time it is the corporation, not the consumer, that gets to decide whether to include fairness protections in the arbitration procedure. Some arbitration agreements require that the losing party pay all the arbitration fees, including the other side's attorney fees. This is called a "loser-pays clause" and it provides a powerful deterrent to consumers asserting any claims.[26]

Nevertheless, federal courts have enforced these conditions in certain cases, especially in light of the U. S. Supreme Court's 5-4 ruling in *AT&T Mobility LLC v. Concepcion* (2011),[27] where, in overruling the California Supreme Court, it was held that the California court's decision – which viewed such contracts as "unconscionable"[28] and "unenforceable" – is surpassed by a supposed "federal policy" that favored the "speed and efficiency" of arbitration.[29] It would appear that the U. S. Supreme Court also wants to protect the consumer, because speed and efficiency must be far more important and constitutionally defensible than a consumer being able to permit a court and jury to become involved.

But, then, there is the Bill of Rights, specifically the Seventh Amendment to the U. S. Constitution, that makes no precondition that speed and efficiency should outweigh the right to a jury.

It's worth reading the crisp text of the Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."[30]

While the Seventh Amendment's provision for jury trials in civil cases has never applied to the states, almost every state voluntarily complies with this requirement.

Because there is a constitutional right to a jury, it seems constitutionally objectionable to impose mandatory arbitration on a consumer or prevent a consumer from bringing class action claims. The only legally viable way that the Seventh Amendment can be superseded is by a consumer intentionally or voluntarily giving up his or her recognized, constitutional right, such as would be the case if the consumer accepts the Take-It-or-Leave-It arbitration clause.

DITCHING ARBITRATION

Arbitration presents certain unique challenges to the consumer. Arbitrators are not required to have any legal training. They do not need to follow judicial rules of evidence and procedure, designed to create some balance between the parties in court. There is limited discovery, which makes it much more difficult for individuals to have access to important documents that may help support a claim. In addition, arbitration proceedings are private hearings, not open to the public. Whether arbitrators write or publish detailed written opinions, no legal precedent or rules for future conduct are established. Yet, the arbitrator's decision is still enforceable with the full weight of the law. Generally, the right to appeal an arbitrator's ruling is severely limited.

With respect to notions of speed and efficiency, it is indisputable that arbitration cases can take years. Arbitration clauses often require that hearings be held in a location inconvenient to the claimant. Whereas class action plaintiffs who go to court largely pay little or nothing up front, arbitration costs are generally split between the consumer and the merchant – and those costs include the arbitrator's fees, which can range between $200 and thousands of dollars per hour.

The consumer watchdog group, Public Citizen, has actually listed high profile companies that have terms of service containing a "forced arbitration" provision and banning class actions. Financial institutions offering consumer banking and credit services, the list includes Wells Fargo, US Bank, Regions Banks, BB&T, Discover, PNC Bank, Chase, TD Bank, Charles Schwab Bank, American Express, Sallie Mae, Citibank, Sovereign Bank, and Discover (with 30-day opt-out provision on card).[31]

There is far less likelihood that corporations use arbitration clauses with one another than they use in contracts with consumers. Cornell Law Professors Theodore Eisenberg and Emily Sherwin and Professor Geoffrey P. Miller of NYU Law School found this to be the case. They examined contracts from 21 financial and telecommunications companies. The data showed mandatory arbitration clauses in over 75 percent of consumer agreements but in less than 10 percent of their negotiated non-consumer, non-employment contracts.[32] They concluded that "the absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers." Indeed, a systematic eschewing of arbitration clauses "also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses." Based on the data, the authors state that large corporations' assertions that "mandatory consumer arbitration is justified because it provides consumers with a superior form of dispute resolution thus appear to be disingenuous."[33]

THOUGHT EXPERIMENT

A final thought experiment in the form of three questions![34]

1. **Do you think a consumer should have his or her day in court?**

   Before you answer, consider that the Bureau's rule will allow groups of consumers to obtain relief when companies skirt the law. According to the Bureau, most consumers do not even realize when their rights have been violated. Often the harm may be too small to make it practical for a single consumer to pursue an individual dispute, even when the cumulative harm to all affected consumers is significant. The pilloried Arbitration Study found that only around 2 percent of consumers with credit cards who were surveyed would consult an attorney or otherwise pursue legal action as a means of resolving a small-dollar dispute. With class action lawsuits, consumers will have opportunities to obtain relief from the legal system that, in practice, they otherwise would not receive.

2. **Do you think that prohibiting a "Take-It-or Leave-It" arbitration clause would provide an incentive to companies to comply with the law to avoid group lawsuits?**

   Before you answer, keep in mind that mandatory arbitration clauses may enable companies to avoid being held accountable for their conduct. When companies know they can be called to account for their misconduct, they may be less likely to engage in unlawful practices that can harm consumers. Further, public attention on the practices of one company can affect or influence their business practices and the business practices of other companies more broadly.[35]

3. **Do you think that increased transparency is a valuable service to consumers and merchants alike?**

   Before you answer, it is worth noting that the Bureau's Protection would make the individual arbitration process more transparent by requiring companies that use arbitration clauses to submit any claims filed and awards issued in arbitration to the Bureau. The Bureau would collect correspondence from arbitration administrators regarding a company's non-payment of arbitration fees and its failure to adhere to the arbitration forum's standards of conduct. The collection of these materials would enable the Bureau to better understand and monitor arbitration. It would also presumably provide insight into whether companies are abusing arbitration or whether the process itself is fair.[36]

Contact us at Compliance@LendersComplianceGroup.com

Visit us at www.LendersComplianceGroup.com

---

[1] *Arbitration Agreements*, *Final Rule, Official Interpretations*, 12 CFR Part 1040, Bureau of Consumer Financial Protection, Federal Register, Vol.82, No. 137, July 19, 2017, Rules and Regulations

[2] *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, Financial Companies Can No Longer Block Consumers from Joining Together to Sue Over Wrongdoing, Consumer Financial Protection Bureau, Press Release, July 10, 2017

[3] 12 CFR § 1040.4(a)(2)(i)

[4] 12 CFR § 1040.4(a)(2)(ii)

[5] 12 CFR § 1040.4(b)

[6] 12 CFR § 1040.4(b)(1)(i)-(iii)

[7] Op. cit. 1

[8] *Reducing Regulation and Controlling Regulatory Costs*, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, Executive Order, White House, January 30, 2017

[9] Idem

[10] *Questions and Answers*, Joseph Stiglitz, Economist's View, October 22, 2006, interview conducted by Daniel Altman

[11] "*Usitata sunt verba, quae communi teruntur usu et his tutius uti possumus. Cicero dicit, quae primo dura fuerunt, usu molliri.*" de Puerorum Educatione, Aeneas Sylvius Piccolomini, my translation

[12] Indeed, several Protections from the Obama administration were voided by Congress in the early days of the Trump administration.

[13] *Arbitration Study*, Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), Consumer Financial Protection Bureau, March 2015

This is a magazine article, entitled *Take-It-or-Leave-It Arbitration: Banning Consumers from the Court*, by Jonathan Foxx, PhD, MBA, President & Managing Director, Lenders Compliance Group. The article is published in the August 2017 edition of National Mortgage Professional Magazine.

[14] *The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change*, Ramona L. Lampley, Business Law Today, American Bar Association, May 7, 2017
[15] Idem
[16] *U. S. Chamber: CFPB Arbitration Rule is Prime Example of Agency Gone Rogue,* U. S. Chamber of Commerce, July 10, 2017
[17] *Lawmakers Introduce ABA-Backed Legislation to Undo Arbitration Rule*, ABA Banking Journal, July 20, 2017
[18] *This Official Had the Spine to Stand Up to the Powerful CFPB. Congress Should Follow His Lead,* Diane Katz, The Daily Signal (The Heritage Foundation), July 18, 2017
[19] Op. cit. 15
[20] *Federal Regulator Moves to Mostly Ban Arbitration Clauses*, Rohit Chopra, The New York Times via The Associated Press, July 10, 2017
[21] *Waters Blasts Republican Effort to Use Congressional Review Act to Repeal Forced Arbitration Rule*, Press Release, July 20, 2017
[22] *Why You Won't Get Your Day in Court*, Jed S. Rakoff, The New York Review of Books, November 24, 2016
[23] *Contract of Adhesion*, Wikipedia
[24] *Adhesion Contract (Contract of Adhesion)*, Wex Law, Cornell Law School
[25] Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750), referenced in *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, Paul Bennett Marrow, Columbia Law Journal, February 2000
[26] For a general description of Arbitration procedures and challenges, see *Mandatory Arbitration deprives Workers and Consumers of their Rights*, Report, Katherine V.W. Stone and Alexander J.S. Colvin, December 7, 2015
[27] See, for instance, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, April 27, 2011
[28] "Unconscionable" is actually a doctrine in contract law that describes terms that are so extremely unjust, or overwhelmingly one-sided in favor of the party who has the superior bargaining power, that they are contrary to good conscience. Typically, an unconscionable contract is held to be unenforceable because no reasonable or informed person would otherwise agree to it. The perpetrator of the conduct is not allowed to benefit, because the consideration offered is lacking, or is so obviously inadequate, that to enforce the contract would be unfair to the party seeking to escape the contract. See *Unconscionability,* Wikipedia
[29] The issue addressed was to determine if the Federal Arbitration Act (FAA) preempts state law that does not allow contracts which prohibit class action arbitration. The rule of law to be deliberated was that the FAA displaces state law which prevents the making of contracts which disallow class action. Vincent and Liza Concepcion and members of a class filed suit against AT&T for deceptive advertising. They had contracted with AT&T for the sale and servicing of cellular phones. The contract provided for arbitration and AT&T moved the court to compel arbitration. The motion was denied by the district court, and the decision was affirmed by the Ninth Circuit Court of Appeals. AT&T appealed to the Supreme Court.
[30] *Seventh Amendment*, U. S. Constitution, Bill of Rights
[31] *Forced Arbitration Rogues Gallery*, Expose Corporations That Are Rigging the Justice System Against Consumers, Public Citizen website
[32] *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, Cornell Law School Legal Studies, Theodore Eisenberg, Cornell University, Law School, Geoffrey P. Miller, New York University School of Law, Emily L. Sherwin, Cornell University - Law School Research Paper No. 08-017, NYU Law and Economics Research Paper No. 08-28, December 18, 2007
[33] Idem
[34] Salient points made in *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court, Bureau Seeks Comment on Proposal to Ban a Contract Gotcha that Prevents Groups of Consumers from Suing Consumer Financial Companies,* Press Release, Consumer Financial Protection Bureau, May 05, 2016
[35] Idem
[36] Idem