

PRE-DISPUTE BINDING CONSUMER ARBITRATION¹

I. Sellers and Creditors

A. *Advantages for sellers & creditors*

No class actions

Secret, so hidden from media & enforcement agencies

Can choose favorable arbitration organization or operate own arbitration process

Arbitrator not required to issue written opinion, findings of fact, or conclusions of law

Arbitrator not required to follow the law

Arbitrator not required to know consumer protection law

Limited remedies—monetary damages

Expense may preclude consumer from access to the forum, but see *Green Tree* case in
Supplementary Materials

Mutuality not required by most courts—courts uphold arbitration agreements in which
seller/creditor can go to court, but consumer cannot

No jury

B. *Disadvantages for sellers & creditors*

Apparently none. If there were any disadvantages, they would not impose arbitration. If they believe the arbitration service they have selected is deciding cases too favorably to consumers, they can switch to another service, etc.

II. Consumers

A. *Advantages for consumers*

Lower cost, sometimes. There is a great variation in the fees charged. Sometimes consumers are charged a \$2,000 non-refundable fee just to file a case (Gateway2000). At other times consumers pay very little to file a case, with the company paying the rest of the filing fee, raising questions about the independence of a process subsidized by one of the parties. Sometimes the arbitrator will waive the filing fee if the consumer pleads poverty, but there are no standards to guide the arbitrator's discretion. Even if the filing fee is minimal, usually consumers must share the cost of the arbitrators which typically

¹ The generalizations in this handout reflect legal requirements, rules of arbitration services, and typical arbitration agreements. Keep in mind that despite the few protections for consumers in the law, some arbitration agreements provide consumers with protections beyond what the law requires. For a bibliography of law review articles, see the link on my Web site to Summaries of recent consumer arbitration cases.

is hundreds of dollars.

Quicker, sometimes.

B. *Disadvantages for consumers*

Often consumer has not knowingly agreed to arbitration. Consumer “agrees” to arbitration prior to any dispute. The arbitration provision usually covers any and all disputes which could possibly arise or have already occurred. The consumer cannot make an intelligent, informed judgment as to whether he or she wants the dispute to be arbitrated before knowing what kind of dispute will arise. For example, for some types of disputes, the consumer may correctly decide arbitration is far superior. For other types of disputes, the consumer would be a fool not to go to court for a jury trial. In addition, the arbitration clause often is in legalese, is buried in voluminous papers, etc. Credit card issuers and others often impose agreements unilaterally in a monthly stuffer with junk mail as a ‘change in terms’ notice. Seller/creditor can change the terms of the arbitration agreement unilaterally at any time.

Most lawyers refuse to represent consumers in cases subject to arbitration because no class actions, limited discovery, no assurance attorney will be awarded fees even if permitted under applicable statutes, etc.

Arbitrator not required to follow consumer protection laws

Limited discovery. In many cases, only seller/creditor has possession of critical facts and documents

No jury

Limited remedy

No class actions

Sometimes very expensive, especially compared to small claims court. Some arbitration contracts have low filing fees or no filing fees, but the consumer must pay half the cost of the arbitrator who often charges high fees on an hourly basis. Seller/creditor who has a claim against consumer often has option of going to court, in which case consumer gets stuck with expense of litigation.

No appeal unless arbitrator is corrupt.

Often inconvenient forum far from consumer’s residence.

III. Integrity of Legal System

No precedent—secret, no written opinions, no requirement to follow the law

No rule of law

No data for regulatory and enforcement agencies—how many violations of the law, how serious are the violations, who is violating

Undermines objectives of legislatures in enacting laws which encourage consumers to be private attorneys general, explicitly permit class actions, provide for attorney fees and costs, delegate rulemaking and enforcement to government agencies, and declare consumer protection to be an important national public policy.

handout arbitration