Creditors and merchants favor binding arbitration for a number of reasons and, in almost every case, these are reasons why the consumer will want to avoid binding arbitration. One of the main reasons corporations want to arbitrate disputes is that arbitration often dramatically reduces companies’ exposure to large damage awards, even when the companies engage in widespread patterns of egregious wrongdoing. As one commentator has observed:

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Arbitration clauses that provide slanted processes or limited remedies undermine the efficiency goal of personal injury law. A powerful contracting party can impose inadequate arbitration systems on countless potential plaintiffs. By doing so, it can reduce the anticipated cost of its accidents significantly and thereby decrease the deterrent effect of tort law.
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Therefore, no less an authority than the Office of the Comptroller of the Currency has observed that mandatory arbitration clauses “have been associated with abusive lending practices.”

Arbitration also involves the loss of a number of rights and procedural protections that some consumers may wish to retain. For example, “unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable.” Arbitrators in most arbitration cases are not required to give a reasoned explanation of the result. Arbitrators need not follow rules of evidence. There is some empirical evidence indicating that arbitrators tend to be less familiar than judges with recent cases and developments in the law.

One of the leading corporate proponents of forced arbitration has openly stated that arbitration strips consumers of familiar protections: “Arbitration materially changes the dispute resolution rules that consumers and borrowers are accustomed to: there is no right to a jury trial, pre-hearing discovery is limited, class actions are eliminated and appeals are severely circumscribed.” The Rand Institute for Civil Justice has also concluded that mandatory arbitration has been adopted by some businesses to limit verdicts on behalf of consumers and thereby reduce the incentives for consumer attorneys to take cases.

**Footnotes**

14 [14] The points made in this section are presented as background information that consumer advocates should consider in determining whether to resist arbitration, not as arguments that should be made in court to resist arbitration in particular cases. It is fairly clear that broad arguments against the institution of arbitration will nearly always fail. See, e.g., Rollins, Inc. v. Foster, 991 F. Supp. 1426, 1436 (M.D. Ala. 1998) (“Foster’s argument goes to the adequacy of arbitration proceedings as compared to civil proceedings. This type of argument has been routinely rejected by federal courts as grounds for invalidating an arbitration clause.”).


17 [17] Cole v. Burns Int’l Sec. Services, 105 F.3d 1465, 1476 (D.C. Cir. 1997). See also Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 Law & Contemp. Probs. 253, 272 (2004) (“The public nature of litigation, and its status as a function of government, is a way in which society enunciates its values, and in which it creates and enforces the rules that govern primary behavior. From the standpoint of the legal system, arbitration can eliminate the ability of courts to perform this declarative function.”).


21 [21] Alan S. Kaplinsky & Mark J. Levin, Anatomy of An Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered By A Consumer Lender, 1113 Prac. L. Inst. Corp. L. Prac. Course Handbook 655, 657 (1999). See also Mercedes Homes v. Colon, 966 So. 2d 10, 20 (Fla. Dist. Ct. App. 2007) (Griffith, J., dissenting) (“And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer—who gets to be the arbitrator; when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are thrown up—not to mention the fairness or accuracy of the decision itself. The drafters have every incentive to load these arbitration clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed. The state courts, demoralized by the United States Supreme Court’s disapproval, have too often allowed these overreaching provisions to succeed. Most consumers can’t read them, won’t read them, don’t understand them, don’t understand their implication and can’t afford counsel to help them out.”).


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