One of the most compelling advantages of an arbitration proceeding for a creditor or merchant is that it sharply limits the consumer’s ability to engage in discovery—a key benefit, as companies are often as concerned with public exposure of the nature of their practices as with a monetary verdict.

Limitations on discovery also substantively benefit the company over the consumer. In the majority of “David versus Goliath” disputes, only the larger party will have access to relevant data about, for example, the product’s design, history, and use. Without discovery, the individual consumer has no access to that information.

Restrictions on discovery also mean that consumers cannot determine if a practice is part of a more general pattern. Not only is this critical information in any case seeking punitive damages, but it could also result in an individual case expanding into a class action. Limiting discovery in a case to basic document production also makes it difficult for individual consumers to prove their individual claims.

Discovery is allowed in arbitration and failure to allow discovery can be grounds to overturn an arbitration award. But the scope of discovery permitted is left to the discretion of the arbitrator. An arbitrator may only permit depositions to be taken if doing so is necessary to preserve the testimony of key witnesses who will be unable to testify in person at the arbitration hearing.

Discovery is often far more limited in arbitration than in court.

Footnotes

61 [61] See, e.g., Michael A. Satz, Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform, 44 Idaho L. Rev. 19, 31 (2007) (“If discovery is allowed in arbitration, it is normally severely limited by both the contractual provision calling for arbitration and the rules of the arbitration provider.”; citing AAA rules); Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 89 (2001) (“Arbitration can reduce the amount of discovery available to consumer-plaintiffs, thus reducing the amount of time and money businesses must spend on the discovery process.”).


64 [64] Jean Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 683, 684 (1996) (“One way defendants can decrease a consumer’s expected return is to prevent the consumer from engaging in adequate discovery. Because the consumer will be more needful of discovery than will the company, which maintains the relevant records and has continuing access to the decisionmakers, even a seemingly neutral restriction on discovery will affect consumers adversely.” (citations omitted)).
