The prior subsections examine only some of the problems consumers can face in arbitration. For example, arbitration decisions may not comport with applicable law. Because the FAA provides the consumer with a sharply circumscribed ability to appeal the decision maker’s erroneous interpretation of the law, arbitrators may effectively ignore state or federal consumer protection statutes and judicial precedent. Arbitration has come under significant criticism for the lack of quality control inherent in many arbitral fora. The lack of an appeals process means that even grossly erroneous applications of the law are generally binding.

Another concern is that arbitration, by forcing consumers unwittingly into waiving their right to a jury trial, undermines basic principles of democracy and respect for the law. Arguably, an arbitration agreement requires the waiver of several constitutional rights, including the First Amendment right to petition the government, Fifth Amendment due process rights, and the Seventh Amendment right to a jury trial, but the Supreme Court “has never acknowledged the waiver of constitutional rights inherent in an agreement to arbitrate and has never specifically considered the constitutionally required standard for such a waiver.” Courts that have considered the matter have concluded that arbitration itself cannot be unconstitutional because it does not involve state action.

Some corporations tack on unfair provisions to their arbitration clauses that further rig the system against individuals. For example, some corporations impose “loser pays rules” to discourage individuals from bringing claims; some corporations insert provisions into arbitration clauses that strip individuals of substantive statutory rights; and some corporations require people to arbitrate their claims in inconvenient locations far across the country. The enforceability of these sorts of provisions is discussed in Chapter 8 [1], infra.

Footnotes

69 [69] See Ch. 11 [2], infra. See also United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 39, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (arbitration award will stand even if the arbitrator’s factfinding was “silly” or if “court is convinced [the arbitrator] committed serious error”); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 643 (6th Cir. 2005) (standard of review for arbitrators’ decisions is “one of the narrowest standards of judicial review in all of American jurisprudence”); Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) (judicial review of arbitrators’ decisions is so narrow that “perhaps it ought not be called ‘review’ at all”); Upshur Coals Corp. v. United Mine Workers of Am. Dist. 31, 933 F.2d 225, 231 (4th Cir. 1991) (“[U]nless the arbitrator appears utterly to have failed to execute his duty to interpret the contract or the relevant law, the arbitrator’s decision must stand.”); Michael H. LeRoy, Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review, 2009 J. Disp. Resol. 1 (in study of employment arbitration awards, finding that federal district courts vacate arbitration awards only 4.3% of the time).


1.4.8 Other Concerns

Nat’l Cas. Co. v. First State Ins. Grp., 430 F.3d 492, 496 (1st Cir. 2005) (“[a]rbitral awards are nearly impervious to judicial oversight”); Eric Berkowitz, Is Justice Served?, L.A. Times Magazine, Oct. 22, 2006, at 24 (discussing court cases that allow arbitration awards to stand even in the face of “substantial injustice,” with one former judge and arbitrator noting that: “[J]udges can rule on the basis of the tea leaves . . . the fact is that arbitrators make mistakes . . . and there is no appeal if I make a stupid or diabolical mistake, or one that is made in bad faith. The parties are on their own.”).


Roberts v. AT&T Mobility L.L.C. [4], 877 F.3d 833, 838 (9th Cir. 2017).

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