Evidence of corporations’ true motivations in requiring binding arbitration is demonstrated by their reactions when forced to arbitrate claims they would prefer to bring in court.

Arbitration clauses may force the consumer to arbitrate while as a practical matter leave the company the option to go to court in those cases when the company would be likely to sue the consumer. In the words of one commentator, the rhetorical question then becomes: “If arbitration—in particular, the arbitration system you have—is so great, why are you imposing it on your customers/employees while reserving to yourself the option of avoiding that arbitration system and pursuing litigation?”

Franchised car dealers were so upset by having to arbitrate disputes with their franchisors—whom the dealers thought were exploiting them through their superior bargaining position—that they approached Congress to obtain an exemption from the Federal Arbitration Act, even as they continued to include arbitration clauses in their own sales contracts with consumers. Similarly, a study looked at whether corporations included arbitration clauses in their contracts with other companies. Only 11% of such contracts had an arbitration requirement, in contrast to dramatically higher numbers in the corporation’s contracts with consumers, indicating that corporations do not view arbitration as an efficient substitute for court litigation when their own rights are at stake.

Another example of corporate hypocrisy is that ATT Mobility went to the United States Supreme Court to force its customers to resolve disputes through individual arbitration. But shortly after the company’s victory in the Supreme Court—and as it began to move forward with a merger with T-Mobile—AT&T Mobility filed suit in eight federal courts seeking to block individual customer arbitrations that could prevent the merger. It would prefer, apparently, to proceed in court.

Interestingly, recent studies have also shown that corporate counsel are increasingly dissatisfied with arbitration even for the commercial disputes that arbitration was initially designed to streamline. One publication for in-house counsel notes that arbitration is not significantly less expensive and time-consuming than litigation, and expresses concerns about arbitrators’ competence and neutrality.

Footnotes


1.4.9 Corporations Avoid Binding Arbitration When It Applies to Them


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