AMERICAN BAR ASSOCIATION

SECTION OF DISPUTE RESOLUTION

Report of the Discussion of the Consumer Arbitration Study Group

January 15-16, 2010
Washington, D.C.
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INTRODUCTION

In light of the discussion of the Arbitration Fairness Act and the recent decisions of some arbitration service providers and [credit card] financial service companies to suspend or to end arbitration for consumer disputes, the resolution of consumer disputes is in a state of flux. Because of this state of affairs, the American Bar Association Section of Dispute Resolution (“the Section”) decided to bring together in a retreat a small group of people to talk about interests and options to ensure that consumers have reasonable access to an effective and affordable dispute resolution process. At the same time, the Section sought to create a forum for addressing the legitimate interests of the various proponents of consumer arbitration.

The governing council of the Section designated a small group to organize such a meeting. The organizers were former Chair of the Section, Lawrence Mills, Council member, Nancy Welsh, and the current Chair of the Section, Homer La Rue. Throughout the planning process, Section staff members Gina Brown and David Moora provided wide-ranging and invaluable support. The initiative also was aided by the wise guidance and counsel from the Section’s Executive Director, Kimberly Knight.

The goal of this initiative, which came to be named “The Consumer Arbitration Study Group,” was to educate and to inform the Section as to whether there is any useful role that it can play in assisting to resolve the issues facing the stakeholders with regard to consumer access to justice. From the outset, the organizers saw one of the objectives of such an initiative to be a brief recommended-action report. The purpose of that report to the Section from an assembly of stakeholders would be to advise the Section as to whether it has a role, and if so, what that might be. The answer to that question was in no way pre-determined. Always on the table was the possibility that the advice would be that the Section should “stand down,” that there is no useful role that it can play.

The Methodology for the Selection of the Participants

First, the Section should take no position with regard to the issues facing the various stakeholders; rather, the role of the Section should be that of convener, creating a safe space for the stakeholders to have a candid and open discussion about the issues facing them. Second, the assembly of the group should be done in a manner that would allow all of the participants to have a dialogue about their interests rather than to repeat once again a debate of their positions.

To accomplish the goal of creating a space for a candid and open
dialogue, the organizers agreed that identifying the right group of persons to invite would be essential. There were four criteria for the identification of invitees. First, we wanted persons who were knowledgeable about consumer arbitration/dispute resolution processes. Second, we wanted persons who were thoughtful about the issues related to consumer access to justice. Third, we wanted persons who were willing to listen deeply to the viewpoints of those with whom they might strongly disagree. Fourth, we wanted persons who would likely be influential with particular stakeholder groups, irrespective of their position in any organizational structure.

With these criteria in mind, the organizers talked to numerous persons and asked them, “Who, in your mind meets these criteria? Who would you suggest be invited to join such an assembly?” The organizers each spoke to a number of persons, putting to them the criteria and the questions. When the organizers came together to compare notes as to the pool of persons suggested to each of them, there was a remarkable overlap of suggested invitees.

The next challenge was to ensure that the various stakeholder voices would be represented. Great effort was made to ensure the correct balance among consumer interests, financial institutional interests, advocates of consumer arbitration, service providers, and governmental interests. The organizers arrived at a list of eleven invitees, believing that it was important to keep the number of participants small so that there could be true dialogue.

**The Organization of the Assembly**

The next task for the organizers was to decide on a general format for the retreat. Essential to the success of any such endeavor like this one is to enlist the correct facilitators. This was a daunting challenge given the disparate viewpoints that would be assembled. What would be needed would be persons with undoubted stature in the ADR field. That, however, would not be enough. The facilitators also would have to be very experienced and sophisticated. Finally, they would need to devise a process to fit the goals of the initiative. The Consumer Arbitration Study Group retreat could not have been better served than it was by the immense talent and hard work of Lisa Blomgren Bingham and Thomas J. Stipanowich. Lisa and Tom brought not only their talent and expertise to the task of designing and executing an effective process for the day and a half retreat, they also undertook the task with immense enthusiasm. Their continued optimism, that something worthwhile could be achieved, was infectious, contributing substantially to the success of the retreat.

As mentioned earlier, it was important to create a safe space so that a candid and open discussion could take place. To achieve that objective, the
retreat was conducted under a rendition of the Chatham House Rule\(^1\). At the end of the retreat, the participants unanimously agreed to have their names listed as participating in their individual capacities consistent with the Disclaimer that is set forth below.

In the report, we have tried to limit ourselves to capturing the perceptions expressed by the participants. Those perceptions were often conflicting, and may or may not square with empirical studies. Throughout the day and a half retreat, the participants engaged in brainstorming new ways of envisioning a resolution to the issues facing them. They agreed that one issue, the existence or the ban of class actions in arbitration, was one upon which the opposing sides were not likely to agree. As you will read in the report, they also agreed on certain propositions, as well as, five action items. These five action items are matters that the group agreed would be worthwhile to pursue and matters in which they agreed to be involved.

The Section can take pride in its role as the convener of the stakeholders of the disparate interests represented in the retreat. Through careful planning as to who should be invited and the enlistment of extraordinary facilitators, the Section brought together a group that entered into a genuine dialogue over very difficult and complex public policy issues. A number of persons noted that the retreat had given them a unique opportunity to listen and to understand. Seldom is it possible to sit in the same room with persons of an opposing viewpoint and really hear their interests. As is often true, the opportunity for people to share a meal together (on Friday evening) opened up dialogue in a relaxed setting that was carried over to the next day. By the second day of the retreat, conversation had moved from participants talking to one another “across the table” to participants speaking to one another one-on-one or in small clusters.

While there is much work to do, there is reason to believe that continued dialogue, facilitated by the Section, is a worthwhile endeavor. It is a long journey, but every journey can only begin with the first step, no matter how small.

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\(^1\) The Chatham House Rule is a rule that governs the confidentiality of the source of information received at a meeting. Since its refinement in 2002, the rule states:

When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.
DISCLAIMER

Participants in the ABA Section of Dispute Resolution’s Consumer Arbitration Study Group were selected on the basis of pertinent background, experience and ability to offer helpful perspectives. The participants engaged in informed, constructive discussion regarding issues surrounding consumer arbitration and broader questions of consumer justice. Whatever their affiliations, all of the individuals in the Study Group were present in their individual capacities and not as representatives of their respective organizations. Moreover, in an effort to promote free and frank interchange it was agreed beforehand that no statements made during the meeting would be attributed to any individual participants. Aside from the numbered “propositions” set forth at the end of this document, there was no general consensus regarding the issues discussed or the perspectives summarized.
# MEMBERS OF THE CONSUMER ARBITRATION STUDY GROUP

## Co-Chairs & Facilitators

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<th>Member Name</th>
<th>Title and Affiliation</th>
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Wayne Thorpe
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Chair-Elect, ABA Section of Dispute Resolution

Section Staff

Kimberly Knight
Executive Director

David Moora
Staff Attorney

Gina Brown
Director, Dispute Resolution Resource Center
I. SETTING THE STAGE

After introductions, Study Group members engaged in a brief facilitated large group exchange designed to quickly capture group members’ impressions of the (A) landscape of consumer disputes—that is, the kinds of issues, controversies or claims that involve U.S. consumers—and (B) the range of current approaches to addressing such matters. The exercise was intended to develop a collective appreciation of the scope of consumer conflict and to encourage brainstorming on the wide spectrum of possible approaches to resolving consumer disputes. The following is a summary of those impressions.

A. The Landscape of Consumer Disputes

“Consumer disputes” include matters relating to:

- purchase (lease) of all kinds of products
  - From small to very large-dollar (e.g. house, including manufactured housing)
  - Sometimes involving a distribution chain (and multiple parties may be involved)
  - With or without warranties
- purchase of all kinds of services, often involving ongoing relationships, including
  - Cable services
  - Medical services
  - Nursing care, health care services
  - Insurance
  - Legal services
  - Loans, financial services, investment services
  - Internet

Claims or controversies may be based on:

- Breach of contract, including fraud and misrepresentation
- Reasonable expectations, unconscionability and “fairness” concepts
- Negligence, strict liability
- Consumer protection statutes—e.g., unfair and deceptive trade practices, including false representations or nondisclosures regarding product, services
- Fair Credit Reporting, Truth in Lending, Privacy (meant to be included above)
- Discrimination in lending (e.g. where consumer is subject to discrimination based on disability)
- Price-fixing, price gouging
- Consumer’s failure to pay for goods or services
Consumer transactions and disputes vary widely

- “Consumer” may be little guy or big guy, plaintiff or defendant
- Provider of goods or services might be for-profit or non-profit, even government
- May involve written contract, or oral transaction
- May involve elements of adhesion, or arms-length bargain
- Consumers differ in character and bargaining power—vary in age, competencies, ability to speak English, in ethnicity
- Claims may be brought individually or en masse (class actions)

B. Approaches to Resolving Consumer Conflict

Approaches to resolving consumer conflict may be

- Under public or private auspices, or mixed
- Pursued or developed “unilaterally” by or on behalf of a single party, “bilaterally” by or on behalf of both parties, or by or with the help of a third party (government, community, and service organizations)

Possible approaches to consumer conflict:

- Do nothing; stew, or avoid conflict due to ignorance, expense, etc.
- Direct, informal resolution—99% of disputes taken up with company get resolved
- Customer service desks, returns
- Other forms of self-help (e.g. collective action, including boycotts; use media, including gripe sites on internet)
- Credit card company acting on behalf of consumer—after consumer has complained to credit card company—“chargebacks”
- Better Business Bureau
- Individual lawsuits in court, including small claims court; special part of civil for smaller claims
- Class actions
- Bankruptcy court
- Court-connected mediation
- Administrative law judges
- Attorney general (“AG”) actions (sometimes with consortia of AGs aimed at global resolution)
- Government assistance that many AG offices provide—take complaints, mediate, conciliate
- Federal and state regulatory agencies—FTC, DOJ, potential criminal prosecution, more
- Legislative initiatives
• AARP programs—Elder Watch—volunteers help AG’s office to process calls, put in right pigeonhole, help person make necessary calls, etc.; make sure complaint framed in way that it will be noticed
• Legal services organizations’ self-help clinics—teach consumers how to represent selves, provide legal software with claims, availability of court forms
• Law school mediation programs, clinical programs to help people with disputes
• Bar associations have programs to help people with disputes
• Nonprofit consumer credit counseling
• Community mediation
• Village elders
• Binding arbitration (with institutional provider or individually-designed mechanisms), including class arbitration
• Ombuds (e.g. Canadian banking industry, some U.S. health care providers)
• Lemon law and Magnuson-Moss informal dispute resolution (binding on business but not consumer unless the latter accepts outcome)
• Government-regulated dispute resolution systems—commodities arbitration, securities arbitration
• Nursing homes—ombudsperson required by regulatory agency; nexus between public and private
• E-bay online community courts

II. A CLOSER LOOK AT THE CURRENT LANDSCAPE

The Study Group then engaged in a large group “story-boarding” exercise to encourage members of the group to “brainstorm” on a range of issues through posted written comments. They were asked to respond to the following questions:

• What are the perceived strengths and weaknesses of the current system of civil justice?
• What are the interests of participants in the current system?
• What alternatives might be explored?

The group’s collective postings are summarized below:

Perceived Strengths of Courts/Public Justice
• “Free;” government-sponsored and taxpayer funded
• Low filing fees
• Class actions to vindicate small value claims
• Civil judgments self-enforcing
• Courts open, public; credible
• Process and outcomes transparent
• Judgments subject to appeal

Perceived Problems with Courts/Public Justice
• Courts are overloaded, understaffed and underfunded
• Courts take a long time to resolve cases
• Court process is very costly (lost work time, process, discovery)
• Expense of legal counsel, difficulty of obtaining effective legal counsel
• Judges elected, unqualified; often politically/democratically accountable or appointed by public officials; biased against consumers, dislike consumer cases
• Pressure to settle
  o Process costs
  o Early intervention/diversion to ADR
• Courts grant motions to dismiss, summary judgment
• Court system is “mystifying” to public; limited consumer knowledge regarding process, legal rights
• Class action lawyer incentives, related concerns
• Runaway juries, high variance in outcomes/juries

Consumer Perspectives on Arbitration (Strengths, Weaknesses, Interests)
• Lack of voluntariness, mutuality in choice of arbitration; loss of right to jury trial
• Concerns about fairness of process (higher up-front costs, no choice of venue, loss of substantive rights such as punitive damages)
• Problems of notice, service to consumers
• Difficulty of pursuing a single small value claim as opposed to aggregated claim
• Bias of arbitrators; tradeoff between bias and expertise
• Non-neutral forum/provider organization
• Repeat players get favorable treatment
• Lack of transparency (no precedents, written record, appeals)
• Unknown rules and procedures; lack of understanding of options; disappointed consumer expectations, surprise
• Do-it-yourself tort reform; de facto liability shield
• Expense of legal counsel, difficulty of obtaining counsel
• Confidentiality
• Lower costs (consumer pays no arbitration fees), efficiency, informality, ease of use (phone, online options)
• Arbitrators not likely to dismiss case before hearing
Business Perspectives on Arbitration (Strengths, Weaknesses, Interests)
- Lower dispute resolution costs; efficient, cost-effective process
- Prompt, expeditious, final resolution
- Ease of accessibility
- Flexibility in scheduling
- Confidentiality
- Trust and confidence in process, outcome (predictable, correct on law and facts)
- Expert decision-maker
- Level playing field; perspectives heard and considered
- Control over the process, related costs
- Avoidance of class actions
- Government’s limited resources for enforcement (and thus, a need for complementary private class actions)
- Avoiding accountability
- Tradeoff between bias and expertise
- Arbitrators won’t dismiss claims or rule on summary judgment
- No avenue of appeal/correction of mistakes
- Arbitration not good forum for class action

Other Interests and Perspectives (Government, General Public)
- Frivolous claims are expensive, consume resources
- Lawyers cannot afford to take small consumer claims
- Courts don’t focus on small claims (best judges not in small claims)
- Arbitration is designed to limit liability and private enforcement
- Arbitration stymies development of law and improvement of marketplace
- Forcing consumers into arbitration undermines public confidence
- Regulation of consumer arbitration could adversely affect commercial arbitration
- Bad practices should be deterred (through precedent, jury awards, class actions)
- Right to participate in juries
- More transparency is needed
- Voluntary settlement should be encourage
- Agencies, courts, AGs need more funding

Alternatives for Improving Consumer Justice
- Magnuson-Moss/Lemon Law one-way binding arbitration
- Post-dispute arbitration
- Public arbitration awards
- Costs borne by business
- Due process protocols
- Best judges should go to small claims courts
III. IMPROVING ACCESS TO JUSTICE FOR CONSUMERS

The Study Group next engaged in a second large group storyboarding exercise aimed at written brainstorming of possible approaches to improving the system of justice as it affects consumer disputes.

**Consumer Education/Access**

- Strengthen consumer education programs on public and private dispute resolution options to promote informed choice, including
  - the strengths and weaknesses of arbitration
  - options for resolving small claims
- Allow the new Consumer Financial Protection Agency to promulgate plain – vanilla standard contracts, including dispute resolution provisions
- Develop, secure public funding for on-line dispute resolution with consumer opt-in
- Develop on-line system for direct communication between consumer and representatives of corporation, with incentives to the latter for problem-solving (e.g. Dutch experiment with personal injury cases)
- Use social networking sites to let consumers collectively bargain and negotiate the terms of standard consumer contracts
- Publish outcomes in consumer disputes in a system that provides universal access
- “Positive data mining” – electronically collect consumer experience with company practices, corporate responses
  - create database of behavior results, showing discrete patterns
  - identify systemic abuses/illegal conduct
- Have government agencies rate companies on how well they preserve consumers’ access to courts and put those rating on products (e.g., Credit cards without forced arbitration get fewer “stars” than those without)
- “Small claims courts improvement and stimulus funding act”; comprehensively redesign small claims courts (clear and understandable process, informed judges, flexible hours)
- Increase resources to the courts
- Create “credit card” sections of local courts
- Designate “consumer courts” judges familiar with consumer protection claims
- Eliminate backlog by recruiting private bar to act as judges
- Pay judges by number of cases they handle and level of party (not any) satisfaction
• Establish evening hours for court
• Provide public/private funds for low cost but qualified attorneys to advise consumers to help them resolve disputes
• Promote Court-connected Mediation Options
  o Mandate mediation for claims under a certain dollar amount
  o Promote court-based online dispute resolution
  o Use “real mediators” (not head hunters); make mediator accountable to courts
  o limit percent of contingency fees
• Establish different types of judges with different procedural functions (settlement, “rough justice,” full-blown litigation)
• Revise Rule 23 to provide for opt-in rather than opt-out of class
• Require notice and opportunity to cure/resolve informally before filing lawsuit
• Require peer review (screening) before class actions may be filed
• Provide “declaratory judgment” option that a particular practice violates law or is unfair-publish

**Agencies, Government Regulation**
• Increase funding for government enforcement agencies; tax business to fund public AG’s that would litigate systemic issues, punish wrong doers
• Have AGs increase effort to enforce consumer laws
• Increase penalties for bad practices; amend Federal and state consumer protection laws to increase fee-shifting
• Establish a regulated arbitration system for claims by financial institutions against consumers
• Provide for governmental control/regulation of provider organizations—licensing, ethics standards, possible appeals board/administrative law judge

**Ombuds, Early Conflict Management**
• Encourage industries to set up well-publicized ombuds programs for consumer claims
  o Knowledgeable professionals –trusted by both sides
  o Focus on smaller claims
• Encourage consumers and corporations work together, share responsibility and risks
• Resolve disputes rather than adjudicate disputes; focus on practical rather than legal solutions before case goes to court or arbitration
• Encourage business openness to making systemic changes

**Consumer Conflict Resolution Alternatives**
• Emphasize shared interests: fair, trusted, final, fast, inexpensive, transparent, predictable
- Goal should not be to provide advantages to one or another interest
- Promote predictable outcomes – based on law and fairness
- Promote easy access to the forum, informality, provide assistance, advice, funding, representation, low cost/no cost for consumers
- If business practice affects large numbers of people, should permit alternatives to individual action
- Don’t limit choice for consumers
  - Provide an array of viable attractive ADR devices from which to choose access
  - Promote informed decisions by educating consumers
  - Allow consumers to choose the dispute resolution system for consumer initiated claims
- Organize consumers by industry with a “collective bargaining representative” empowered by law to negotiate consumer disputes resolving procedures
- Courts overworked; arbitration perceived unfair – need “new system”
  - Staged System? – ombuds, mediation, nonbinding arbitration
  - Specialized training for neutrals
  - ABA convene business/consumer/academic group to develop “new system”

**Consumer Arbitration—Alternative**
- To be fair, arbitration agreements must be voluntary and broadly disclosed
  - Choice should be the starting point – arbitration should stand or fall on its own merits (i.e. because it’s really efficient or preferable for everyone) and not because the stronger party can impose it on the weaker party
  - Posner Conversion effect– reject non-reality based legal paradigms and replace with social science based real work principles. E.g. Freedom of contract vs. inanity of saying anyone reads a credit card contract
  - Contracts should not be able to dictate what is “fair” because it stacks the system
- Do not prohibit pre-dispute arbitration clauses; permit opt-outs
- Make consumer arbitration binding only on business
  - Legislation to require corporations to offer a quick procedure and require consumers to use. Magnuson Moss/Lemon Law models
  - Corporation bound by outcome; consumer not bound; able to choose to go to court
  - Do not need “heavy due process protocols”
- Require arbitration firms to be selected by/accountable to courts
- Make statutory claims ineligible for forced arbitration
• If consumers are unrepresented, process should include automatic review of elements of claims/defenses by decision makers
• Get class actions out of arbitration; let courts decide the issue of class action waivers

Improving Binding Arbitration—Fairness, Protocols
• Provide live assistance to consumers to guide them through the process
• Create ways to induce trust in integrity of arbitrations
• Ensure transparent process, outcomes
• Review, revise, implement a Protocol (along the lines of the Due Process Protocol (AAA) or the JAMS protocol) including:
  1. Fundamentally fair process
  2. Access to information regarding ADR program for all users
  3. Independent and impartial neutral
  4. Program created jointly by all stakeholders
  5. Independent administration
  6. Quality of neutrals
  7. Access to small claims court
  8. Reasonable cost
  9. Convenient location
  10. Right to representation
  11. Mediation
  12. Clear notice of what arbitration entails
  13. Fundamentally fair hearing
  14. Access to key information discovery
  15. Same remedies as court
  16. Published decisions

• Promote better education, public awareness
• Encourage greater transparency, accountability
• Arbitrators must not be rewarded for siding with repeat players or punished for siding against repeat players
• If arbitration is going to be forced on consumers, the law should require: transparency, public law, reporting of outcomes, de novo review, precedent, and discovery. This would make arbitration just like court, however, so why even bother?
IV. GENERAL PROPOSITIONS

The final segment of the Study Group meeting was a facilitated discussion that led to a general consensus of group members regarding key propositions respecting the resolution of consumer disputes.

1. The issue of class action bans in arbitration clauses is a central, divisive issue in the arena of consumer conflict around which no agreement can be reached.

2. Consumer, business, government and other stakeholders should meet try and agree on basic contract provisions on certain terms.

3. Consumers need a place to resolve disputes; the Section and other entities should work to improve the handling of consumer disputes in court and related access to justice issues, including funding of courts, legal services, and dispute resolution services.

4. Consumers should have some meaningful choice among dispute resolution options.

5. Issues surrounding the enforcement of pre-dispute arbitration agreements are highly controversial and resistant to agreement.

6. The potential for on-line information sharing and consumer communities that can be created through social networking should be explored.

7. Consumers as well as businesses may benefit from early assistance in managing conflict and resolving disputes quickly and efficiently.

8. Consumers should have conflict management options that do not require lawyers.

9. Courts should make appropriate use of alternatives to traditional litigation.

10. Any binding consumer arbitration procedure should at the very least comply with the standards established in the Consumer Due Process Protocols.

11. There is a need for consumers to be educated regarding available dispute resolution options; there is also a need for business and corporate clients to be educated.

12. Thanks to its broad base of support and credibility, the ABA is in a unique position to assist in developing and disseminating information and educating stakeholders.

   • The ABA may study the operation of different choices
   • The ABA can be an education resource and source of information (financial literacy, ensuring informed choice, promoting transparency of processes, outcomes) [Compare the role of the National Association of AGs as an information clearinghouse and education source]
V. ACTION ITEMS

At the conclusion of the meeting, the Study Group identified five action items that might be undertaken by the ABA Section of Dispute Resolution with regard to consumer dispute resolution. Each member of the group was asked to vote for their top three suggested projects. The proposed action items are as follows:

1. Provide education for consumers, business persons, advocates and leaders in the field of consumer dispute resolution. (This received 8 votes.)

2. Work to improve the public justice system (including consumer courts, small claims courts, court-connected mediation, and on-line options). (This received 8 votes.)

3. Promote the design of model private programs (including ombuds, early conflict management, protocols, and other choices). (This received 8 votes.)

4. Convene consumer, business, government and other stakeholders for the purpose of promoting a better understanding among the stakeholders, including exploring the feasibility of concerted activity on the part of consumers. (This received 7 votes.)

5. Study the potential of virtual communities (including on-line systems, self-organizing, reputation websites and databanks, online community “juries”, wikis, and social networking). (This received 2 votes.)

The Study Group members (including the organizers and facilitators) expressed a willingness to assist the Section in moving forward with some or all of these action steps if the Section so elects.