

ARBITRATION - AN ANSWER TO CONSUMER COMPLAINTS?

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It is a privilege, as President of the American Arbitration Association, for me to appear before this distinguished audience of consumer educators and advocates to discuss with you the potential in the consumer movement for using arbitration and other forms of dispute settlement, both to resolve individual controversies between consumers and merchants and also to utilize arbitration as an enforcement mechanism for bargains reached between organized consumer groups and industrial interests. Arbitration is only one of a number of voluntary techniques that can be used to help parties resolve their disagreements in a wide variety of fields.

Let me first define some terms:

Arbitration is the submission by the parties to a dispute of the issues between them to an impartial decision-maker whose award is agreed to be final and binding. The enforceability of the award is confirmed by state and Federal arbitration statutes, and by a long line of court decisions.

Other forms of voluntary dispute settlement are also available. Mediation and conciliation are techniques whereby an impartial agent attempts to persuade the parties to settle their dispute, by helping them to better understand and to compromise the issues between them.

Fact-finding is a procedure under which the impartial agent is given the authority to hear testimony and receive evidence as to the issues involved and to make findings, which may be conclusive as to the facts or may be received on a purely advisory basis. Advisory arbitration is a somewhat similar process.

The most widely used voluntary process is negotiating or bargaining, either done by the parties themselves or on a collective basis by representatives of the class of parties that may be involved.

These, then, are the tools of voluntary, out-of-court settlement. Consumer educators and advocates should be well aware of their availability, and how they can be used in practice. All of them have the advantage of being voluntary -- immediate -- participative -- and substantially free from the traumatic expenses and delays that are almost always encountered in court.

You will find that these techniques are well understood by businessmen. Corporations and their attorneys realize that it is far too expensive to handle most run-of-the-mill commercial disputes through the long, drawn-out litigation process. They use arbitration clauses in their contracts almost as a matter of course. For example, in the textile industry, practically every purchase and sale of goods is handled under the provisions of an arbitration clause. The Construction Industry Arbitration Rules of the American Arbitration Association are a normal part of the complex terms and conditions of the construction contract. Business lawyers like to use arbitration to resolve these disputes because they can practice in any part of the country. They can set hearings at their convenience, they can count on knowledgeable decision-makers in the industry in which the dispute arises. There are 40,000 arbitrators on the panel of the American Arbitration Association, available in every city and community throughout the United States. Arbitration cases are being heard every day in the twenty-one regional offices of the Association. Many of them involve these day-to-day transactions that would otherwise have to be settled in court.

Another very large use of arbitration in this country has to do with collective bargaining contracts negotiated by unions and corporations. It is the standard pattern and practice for such contracts to include grievance proceedings and arbitration provisions. Where the parties are unable to negotiate out employee grievances, they are normally submitted to an independent professional arbitrator for a final and binding decision. There are tens of thousands of these cases every year.

Here, arbitration is being used to enforce the obligations of the contract, both upon the employer and also upon the union. These contracts set the tone and establish the legal obligations for employers and employees. The decisions of labor arbitrators have established a common law of the shop, which has applicability even in employment relationships where there is no union. Here too, the business lawyer is aware of the benefits of having an out-of-court system to handle these disputes promptly and intelligently.

What does all this mean to the consumer? Let us first consider the problems involved in deciding consumer complaints promptly on a piecemeal basis. The advantages are fairly obvious. From the point of view of a consumer, there is a great convenience in utilizing an out-of-court process where the hearing can be scheduled at a convenient location, in the evening or whenever the consumer might desire. Arbitration provides the consumer with an opportunity to have a chance to lay the entire grievance or complaint before a decision-maker. There is therapeutic value in having a day-in-court, even if the tribunal is not actually a formal court. Furthermore, arbitration is a one-shot, final tribunal. There is not the long aggravating series of events which takes place in the litigation process. Where a system of arbitration is properly designed, there is simply the hearing, at which a full presentation is made on the case, and then the decision by the arbitrator which is final and binding. Any workable consumer system should have a provision which guarantees that the parties will abide by the terms of the award. And if it is so provided, arbitration has the capacity to

handle consumer complaints on a piecemeal basis in a way that is far more satisfactory than any more formal procedure might provide.

In its recent report, the National Institute for Consumer Justice recommended that further experimentation be carried out with the use of consumer tribunals in this emerging field. The HEW Secretary's commission on medical malpractice came to a similar conclusion in connection with patient malpractice claims, a specialized form of consumer complaint. In these general areas, and in specialized fields as well, industry and consumer groups would be well advised to consider the arbitration mechanism for handling consumer disputes.

What is the current state of the art in consumer arbitration? First, arbitration clauses are increasingly found in contracts that are written by individual enterprises or by industry groups. For example, the largest consumer arbitration tribunal in the United States is the arbitration of un-insured motorist claims under insurance policies written by hundreds of casualty insurance companies in an effort to resolve disputes between themselves and their policyholders as to their liability under the first-party coverage known as un-insured motorist coverage. Here, lawyers volunteer their time as arbitrators and have achieved a reliable pattern of awards in tens of thousands of cases during the past dozen years.

Other industries have followed the same process. One of the most interesting new utilizations of arbitration is that now found in the national home construction warranty program of the National Association of Home Builders, under which conciliation and arbitration are used to determine the possible liability of the home builder to the purchaser. Here, the arbitration will be under Expedited Home Construction Arbitration Rules administered by the American Arbitration Association. The arbitrator will be a person experienced in home construction, who will schedule a hearing at the home, at which an informal presentation of the matters in issue can be carried out by the home owner and a representative of the builder. We believe that this tribunal will provide a prompt decision for any disputes which are not resolved under the conciliation process of the local warranty council.

Another current use of arbitration is in connection with class action settlement agreements under the supervision of state attorneys general. In these consent orders, escrow funds are established and arbitration provisions are entered into on behalf of the businessman so that factual determinations can be made as to members of the class. These systems have already been used in franchise dealership disputes, waterproofing contracts and several other forms of consumer fraud situations.

The National Center for Dispute Settlement of the American Arbitration Association has established consumer arbitration programs with various merchant groups in an effort to provide, on a local basis, a simplified procedure for conciliating and arbitrating consumer disputes. One such, in Albany, New York, appears to be particularly successful. The Better Business Bureau has also been experimenting in this field. In many cities,

local Better Business Bureaus have established arbitration systems, and a number of cases have already been heard. These systems are generally patterned on the rules and procedures of the American Arbitration Association, but have the support of the Better Business Bureau in the local community and support that organization's ability to conciliate claims so that they do not have to be arbitrated. The limited number of cases arbitrated under this system should not be the only guide as to how well it is working. The fact that there is an arbitration system at the end of the road, will motivate many businessmen to resolve their disputes through compromise or settlement.

Arbitration can be transplanted into the courts: there are no secrets about how it works. In New York City, small claims arbitration is a way of life. In the long run, this may well be the major use of arbitration in the resolution of a wide variety of consumer claims. The small claims courts of the nation, varying each from the other, under a variety of state laws, have an opportunity to establish arbitration tribunals as an alternative to trial by judges. The New York City system has been copied by many other jurisdictions and should be considered by any other court system that is concerned with the practical problem of providing prompt and equitable justice in a wide number of consumer claims. The most interesting aspects about the New York City program is that entry into it is limited to individuals, so that it has not become a corporate collection service -- the fate of many other small claims tribunals.

For individual consumer claims, arbitration has provided an efficient, modern way of handling human controversy: it offers a prompt hearing before an impartial expert empowered to reach a final decision. It can be part of a voluntary, private system established by any community or industry group. In addition, it can be part of a small claims court process. In any case, it is one of the important options that consumer organizations and industry groups should be studying in their effort to provide appropriate tribunals for case-by-case consumer complaints.

Perhaps even more important, consumer advocates should study the possibilities of creating collective bargaining mechanisms for consumer associations, through which industry groups can be brought to a negotiating table for the purpose of entering into long-term arrangements to alleviate some of the socially undesirable consequences of the present system of consumer marketing. Many problems encountered by consumers cannot be resolved in a case-by-case basis, but can only respond to systematic changes in the process under which goods are produced and distributed to the public. In these situations, consumer advocates should learn to use traditional negotiating skills, in such a way as to prepare their case, to bring the business interests to a bargaining table and to exert effective advocacy for the consumer position. Here, the mediation of experienced dispute settlers can be useful. And when agreements have been concluded, providing for the assumption of responsibilities by the business interests involved, voluntary, but binding, arbitration can be used as an enforcement mechanism. By negotiating, consumer interests may be best able to resolve some of the serious flaws in the

present economic system. Not only price and quality disputes may be settled in this way, but significant environmental, safety and ethical issues can be injected into such discussions, and commitments can be obtained in industry as to the eradication of antisocial behavior.

If consumer advocates can learn to apply such techniques, there would be a strong likelihood of significant changes in the process. In my view, this approach has a much higher potential than the naive efforts of some consumer groups to make changes through reliance upon "corporate democracy." Efforts to influence corporations by making appearances at annual meetings, through proxy fights, or through public relations campaigns are only a quixotic search for the real power within the corporate structure. Labor unions have seldom made the mistake of believing that the corporate facade is the real world where change occurs. Rather, they have relied upon across-the-table bargaining for obtaining the significant benefits and improvements that they seek for their members.

My advice to consumer educators would be to recognize that consumerism is the management of conflict: their primary challenge is to teach people to deal with business negotiators. Bargaining skills can be learned. Conciliation, arbitration and fact-finding can be part of the curriculum.

The American Arbitration Association is a not-for-profit service agency which has a strong commitment to participative, voluntary methods of facilitating social change through dispute settlement techniques. We strongly believe that the life style that is exemplified in organized bargaining can be applied to a wide range of other sectors of society. Just as students, tenants, prisoners and Indian tribes are learning to negotiate for their rights, so organized consumer groups can use the same techniques for enlarging the practical interests of their members and serving the public.

The American production and marketing process has been a miracle of the Twentieth Century. But it suffers from serious flaws that create social maladjustments. It is in these areas that consumer bargaining can play an important role in perfecting the process so that the underlying interests of the public are protected against needless systematic injury. There is a role here for individual well-trained, realistic consumer advocates.

It is my own hope, in speaking to the American Council on Consumer Interest Twentieth Annual Conference that many of you will return to your campuses and to your organizations with the firm conviction that consumer bargaining and voluntary arbitration have a vital role to play in humanizing the impact of American industry. The American Arbitration Association will be proud to play a part in this general effort. Our aim is to help people resolve disputes without unnecessary litigation or disruption of the fabric of our society. The administrative services, educational programs and advisory assistance of the Association, and of its National Center for

Dispute Settlement, is available to any consumer organization or industry group that wishes to design or redesign its relationships in connection with the consumer market. Over 40,000 prominent men and women serve on the AAA National Panel of Arbitrators. These people are ready and eager to participate in the resolution of individual disputes or to help with the restructuring of contractual relationships between organized parts of the economy.

Some conflicts must be resolved in court. Others require a political solution. In a wide range of human activities, particularly the economic sector, it is possible for men of good will to restructure their relationships through reasoning together, so as to serve their mutual interests and the public welfare.