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# *Mandatory arbitration comes under attack*

**GUEST COLUMN**

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Arbitration has become the predominant alternative for resolving disputes during the past several years. Individuals, often unknowingly, consent to arbitration when opening a bank account, getting a credit card, buying a car, signing a lease, purchasing items on the Internet, getting a job and getting necessary medical care. However, arbitrations have come under mounting criticism of late.

The Federal Arbitration Act, first enacted in 1925, created a national policy that promoted arbitration. Under the act, if the parties agreed to arbitrate, state and federal courts were required to convert arbitration awards into judgments enforceable in state and federal courts. The law also strictly limited judicial review of arbitration awards. Arbitrations were seen as an alternative dispute resolution device that would be faster, less expensive and relieve some of the burden on the court system.

Criticisms have increased lately, perhaps because arbitration clauses have become too prevalent. Consumers and advocate groups complain that businesses are using arbitrations to provide themselves an edge in resolving disputes with their customers, employees and others.

Consumers often have no meaningful choice but to submit their claims to arbitration. They accept terms and conditions when signing up for credit cards, purchasing items on the Internet or buying a car that include arbitration clauses they have not read. Consumer advocates claim that few people realize or understand the importance of the deliberately fine print that strips them of rights. Because entire industries are adopting these clauses, people increasingly have no choice but to accept them.

Consumer advocates complain that arbitration services are biased in favor of the corporations that appear repeatedly before them and decide whether those companies will receive their lucrative business. The arbitration clauses in standard agreements often contain one-sided provisions that deliberately tilt the system against individuals, such as class-action bans.

Even sophisticated institutions have begun to question the efficacy of arbitrations. Portland's city attorney, Linda Meng, recently spoke at a Federal Bar Association meeting in Portland, and stated that the city no longer routinely puts arbitration clauses in its contracts. She said that arbitration has the risks of a trial, but none of the safeguards. With no rules of evidence, and no appeals, you are at the mercy of the arbitrator.

Because of these criticisms, in the last few years we have witnessed an explosion of litigation involving challenges to the enforcement of mandatory arbitration clauses. Courts across the country, and particularly on the West Coast, have begun striking down mandatory arbitration provisions that go too far in limiting consumer remedies.

For example, the Oregon Court of Appeals recently held in the Vasquez v. Lopez case that an arbitration clause that contained a class-action ban and cost-sharing provisions was unconscionable; i.e. that the provision was so one-sided and unfair that it should not be enforced.

Similar rulings have been made in Washington and California state courts. This summer, oral arguments were held before the Ninth Circuit federal court of appeals sitting in Portland, Ore., on a number of cases presenting various nuances regarding challenges to the enforceability of mandatory arbitration provisions.

By way of humor, one member of the ruling panel stated that a better way for a business to handle its disputes with its customers would be to put them on interminable hold playing soothing music so that, when they hung up, they had reached a state of bliss where their dispute no longer mattered.

Federal legislation has been proposed to ban mandatory arbitration in certain circumstances. The Fairness in Nursing Home Arbitration Bill before Congress would require arbitration agreements to be entered into after a dispute arises, not at the time a patient is seeking access to admittance and may not be in a position to reject the mandatory arbitration provision.

The Fairness in Arbitration Act, also before Congress, is a broader bill that would ban the use of mandatory arbitration for employment disputes, consumer disputes and franchise disputes.

Consumers should be aware that they may be consenting to an arbitration clause when purchasing goods and services. Consumers and businesses should recognize that if the clauses are too overreaching, courts may not enforce them.

Given these changing circumstances, businesses should consider retooling their customer agreements in light of the evolving case law and should evaluate whether arbitration is the type of forum that they want to use for resolving important disputes.

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