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Recommended Citation

Nancy A. Welsh & David B. Lipsky, *"Moving the Ball Forward" in Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, 19 *Disp. Resol. Mag.* 14 (2013).

Available at: <https://scholarship.law.tamu.edu/facscholar/995>

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“Moving the Ball Forward” in Consumer and Employment Dispute Resolution:

What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?

By Nancy A. Welsh and David B. Lipsky

Mandatory pre-dispute arbitration has been a divisive issue for many years, particularly since the Supreme Court began enforcing the arbitration clauses that businesses and employers impose on consumers and employees, respectively, in contracts of adhesion. In 2009, the Dispute Resolution Section’s Council proposed to weigh in on this issue through the vehicle of an ABA House of Delegates resolution. The compromise position developed by the Section, expressing support for pre-dispute mandatory arbitration clauses provided they offer a meaningful opt-out, generated such a firestorm of opposition from both pro-arbitration and anti-arbitration advocates that the Council ultimately chose to abstain from expressing any position at all.



Consumer Arbitration Study Group

In 2010, however, the Council revisited the issue by authorizing then-Section chair Homer LaRue, former Section chair Larry Mills and professor Nancy Welsh to convene a small group of scholars, business and consumer advocates and dispute resolution providers for a facilitated discussion regarding consumer arbitration. The organizers engaged professors Tom Stipanowich and Lisa Bingham to facilitate the discussion and borrowed liberally from the worlds of back-channel diplomacy and public policy dialogue in structuring what came to be known as the Consumer Arbitration Study Group. The Section

hosted the meeting at the ABA offices in Washington, DC, and provided limited travel reimbursement for invitees who otherwise would not have been able to participate.

The invitees were knowledgeable regarding consumer issues and dispute resolution, influential, and balanced in terms of their organizational affiliations. They did not possess any decision-making power, but they had reputations as thoughtful and persuasive people who were effective both in educating and in listening to others. The Study Group’s discussions were conducted subject to a modified version of the Chatham House Rule.¹ Specifically, although a list of attendees would be made available to the public, there would be no identification of individuals with specific statements that had been made. The goal was thoughtful, frank discussion that might lead to new and productive insights.

Considering the relatively realistic goals of the Consumer Arbitration Study Group, it is unsurprising that it produced no “magic bullet” solutions. Rather, the event resulted in a long list of preliminary ideas² that have since inspired a few concrete proposals and indirectly influenced other developments. One example of a concrete proposal is Tom Stipanowich’s Fairness Index, included in this issue of the Dispute Resolution Magazine. One example of indirect influence may be some companies’ decisions to revise their arbitration

clauses to allow consumers to opt into small claims courts. More generally, the Consumer Arbitration Study Group revealed the value of bringing together a group of people to get to know each other as thoughtful human beings trying to solve a problem, with structured and unstructured time to learn more about others' experiences and the bases for their perspectives, as well as the opportunity to "seed" areas of potential exploration and collaboration. The Study Group recommended continuing to convene these sorts of discussions on the issue of mandatory pre-dispute arbitration.

Pursuing a National Conversation

After the Consumer Arbitration Study Group's meeting, the issue of mandatory pre-dispute arbitration continued to fester. The Supreme Court issued a series of ever-more-controversial arbitration decisions; debates continued within academic symposia and other settings; and Congress authorized the Consumer Financial Protection Bureau. In light of these developments and the flicker of hope that continued to burn after the discussions of the Consumer Arbitration Study Group, an ad hoc Planning Committee³ began meeting in mid-2011 to hold another "national conversation regarding consumer and employment dispute resolution." As before, the modified Chatham House Rules applied, and invitees included scholars, business and consumer advocates, employee advocates and dispute resolution providers. Also as before, the invitees participated as individuals, not as official representatives of any institutions, firms or clients. Unlike before, however, the conversation included decision-makers as well as agency representatives and policymakers. The goal this time was to identify "areas of current or possible consensus, promising procedural initiatives, and gaps in knowledge that require empirical research."

The Planning Committee also stated that it hoped its efforts would "move the ball forward."

National Roundtable on Consumer Arbitration

The first National Roundtable focused on consumers, with particular (though not exclusive) emphasis on consumer financial services and securities transactions. The National Roundtable on Consumer Arbitration was held at Pepperdine University on February 2-4, 2012, and co-sponsored by the Pepperdine School of Law, the Straus Institute for Dispute Resolution and Penn State University, Dickinson School of Law. The Roundtable began with a series of brief presentations regarding the wide variety of existing consumer dispute resolution programs and models, including the American Arbitration Association's and JAMS' consumer arbitration services, debt collection arbitration, FINRA securities arbitration, consumer dispute resolution under the Magnuson-Moss Act, the Better Business Bureau Autoline Program, online dispute resolution, class actions, small claims courts and mediation.

During these presentations and the thoughtful discussion that followed, we learned that the term "consumer arbitration" is itself problematic. The label suggests that there is one model of arbitration in the consumer context.

In fact, there are many, as

well as important differences in overall systems. Some private arbitral organizations (e.g., AAA) require arbitration clauses' adherence to the Consumer Due Process Protocols. Others do not. Some organizations' procedures (e.g., FINRA) are subject to federal regulatory auditing and approval. Most are not. Some organizations' arbitrators (e.g., JAMS) are well-compensated. Other organizations use voluntary arbitrators who are paid a small stipend. Some arbitral awards (e.g., AAA and JAMS) are binding upon both the consumer and company. Other organizations' awards (e.g., Better Business Bureau Autoline) are binding upon the company but not upon a losing consumer. Some organizations (e.g., FINRA) make their awards public and even index them. Other organizations do not.

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The term “consumer arbitration” is also problematic in another way. It can be understood to focus on three quite different types of claims:

- 1) claims initiated by companies against consumers (e.g., debt collection claims);
- 2) “easy” claims initiated by consumers – claims that the consumers can easily identify, raise and present on their own; and
- 3) “difficult” consumer-initiated claims – or claims consumers tend to find difficult to identify, raise and present on their own without the assistance of legal counsel.

As each Roundtable participant presented regarding his or her experience with something called “consumer arbitration,” he or she focused on a particular “slice” of the field, largely unaware of the other slices involving very different parties, issues and dynamics. We learned to be careful to define which part of “consumer arbitration” we were discussing.

These presentations revealed that very few debt collection claims are currently being arbitrated. It is unclear what has happened to the cases that were handled at one time by the National Arbitration Forum.⁴ We learned, however, that companies face many disadvantages in using arbitration for debt collection. Arbitration fees often are higher than court filing fees; statutes of limitations for the enforcement of arbitral awards are shorter than those that apply to debt collection; and most debtors and creditors will benefit more from a procedure focused on helping the debtor develop a realistic repayment plan than they would from an arbitral award and judgment. Of course, we also learned that there are many problems associated with litigation of these matters – e.g., lack of notice to consumer-debtors, disproportional court filing fees, and consumers’ ignorance of statutes of limitations and other affirmative defenses. Research suggests, though, that consumers tend to perceive courts as fairer than arbitration.

We also learned that very few consumer-initiated claims are being arbitrated. The American Arbitration Association conducts fewer than 1,500 consumer arbitrations on an annual basis. Although the Better Business Bureau’s Autoline Program had approximately 18,000 cases in 2011, it has seen a steady decline over the years and has found that about 40 percent of the cases that are opened do not proceed to an arbitration hearing.

Many cases resolve as a result of the scheduling of settlement teleconferences and information-sharing. The low volume of these cases suggests that corporate subsidization of mandatory pre-dispute arbitration may not be as expensive as some have argued. These numbers also suggest the importance of determining whether mandatory pre-dispute consumer arbitration may itself have the effect of claim suppression.

Indeed, research conducted by the Federal Trade Commission indicates that a greater incidence of claiming by consumers is correlated with the availability of “credit card chargeback” systems to resolve disputes. There is no cost to the consumer for using these sorts of systems, and the credit card companies provide systemic monitoring. A business that significantly exceeds the average number of complaints is likely to be noticed by

a credit card issuer (or bank), which may then contact the FTC to suggest an investigation.

The Roundtable also included several presentations regarding empirical studies of consumer dispute resolution. These presentations revealed that arbitration clauses are being included in a declining percentage of credit card companies’

contracts. For example, by 2010, the percentage of credit card loans with arbitration clauses had declined from 95 percent to 48 percent, probably due primarily to settlements reached in two cases, *Ross et al v. Bank of America, N.A.*⁵ and *State of Minnesota v. National Arbitration Forum et al.*⁶ Meanwhile, however, other research indicates very frequent inclusion of arbitration clauses in wireless contracts, with terms that are becoming more consumer-friendly.

There was also a presentation regarding the results of the Searle study, which show generally that businesses win debt collection cases at approximately the same rate in arbitration as in litigation. Businesses tend to win in both settings. There is also some evidence of the repeat-player effect in arbitration. The reason for this effect is not clear. It may be, for example, that arbitrators simply are biased toward businesses. Alternatively – and more likely – it may be that over time, arbitrators are influenced by their exposure to repeat players. Or, it may be that repeat-player businesses learn to identify and settle the cases in which consumer-plaintiffs have strong claims; they then arbitrate only those cases involving weaker claims. In the securities arbitration context, researchers have reported that a significant majority of

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investors (who do not tend to be repeat players) perceive the process as unfair and perceive the arbitrators as biased. These results may have contributed, in part, to FINRA's subsequent creation of an all-public arbitral panel option.

By the end of the Roundtable, many of the participants had concluded that it would be worthwhile to identify "difficult" consumer-initiated claims that could be converted into "easy" consumer-initiated claims. For example, as discussed in the Rogers article in this issue on page 20, dispute resolution systems such as the existing credit card chargeback system and online dispute resolution options have the potential to transform "difficult" cross-border (and domestic) consumer disputes into "easy" claims. Roundtable participants also began to explore options that would permit the aggregation of individual consumers' online claims. For example, when "easy" consumer-initiated claims reach a particular volume, this may signal the presence of a bad practice or a bad actor and the need for regulatory action or a modified form of class action.

Roundtable participants also acknowledged the potential value of non-legal, privately administered trustmarks, or "seals of approval," established by a trusted consumer organization.

Last, however, Roundtable participants grappled with the difficult question of whether individual, consumer-initiated arbitration or privately administered trustmarks truly can replace class actions. On one hand, it is important to acknowledge the views of consumer advocates, who argue that consumers need access to effective collective action (and legal representation) to deter corporate actors' bad behavior that involves only small individual stakes but generates a huge collective unearned profit. On the other hand, it is important to acknowledge the views of industry advocates, who urge that class claims can be frivolous and wasteful and that the "take rate" (the claim filing rate) in some class actions is so low that it evidences more concern for lawyers' income than consumers' rights. Despite healthy skepticism regarding each other's real open-mindedness, a heartwarmingly large number of the Roundtable "participants expressed interest in trying to find reasonable ways to assure that class actions are used only when necessary, that companies provide consumers with real redress and that consumers with valid claims get access to legal representation."⁷

National Roundtable on Employment Dispute Resolution

The second Roundtable focused on the other area in which mandatory pre-dispute arbitration has generated the most significant concern: employment matters. The National Roundtable on Employment Dispute Resolution was held at Penn State University on September 6-8, 2012, and was sponsored by Penn State University, Dickinson School of Law. As before, the invitees represented virtually all major stakeholders and constituencies in workplace dispute resolution, including academics and researchers, management and union representatives, employment attorneys, federal agencies and major providers. This Roundtable included some of those who had participated in the Consumer Roundtable, but there were also substantial differences in the pool of participants, due to the different substantive focus.

The symposium opened with an in-depth description of the landscape of employment dispute resolution and the importance of distinguishing the methods and policies used to resolve disputes

between labor unions and employers (nowadays generally referred to as labor disputes) from the methods and policies used to resolve disputes between individual, nonunion employees and their employers (now referred to as employment disputes). While the Roundtable focused primarily on employment disputes, the organizers also invited presentations regarding experience with the methods used to resolve labor disputes.

The organizers justified their primary focus on employment disputes based on changes in the US workforce. Today less than 12 percent of the US workforce (and less than 7 percent of the private-sector workforce) is represented by unions for collective bargaining (including grievance) purposes. Meanwhile, research presented at the Roundtable demonstrated that close to half of the employees in large US corporations have access to one or more of the various dispute resolution processes available to resolve employment disputes.

In particular, participants at the Roundtable paid special attention to the emergence of so-called "integrated conflict management systems" and the use of early, internal dispute resolution methods to resolve workplace conflict. Recent research reveals that many organizations are adopting a strategic approach to conflict management, which allows them to resolve

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workplace conflict before the disputants need to turn to outside forums (such as third-party mediation and arbitration or the courts). Invariably, the participants offered comparisons of how the handling of employment disputes differed from the handling of labor disputes. For example, some participants (particularly those representing unions in labor disputes) expressed concerns about whether the resolution of employment disputes provided equity and procedural protections that approximated those provided in the resolution of labor disputes.

One of the presentations reported research confirming the presence of a significant “repeat-player effect” in employment arbitration cases. In unionized settings, both the employer and the union are likely to be repeat

players; that is, both parties have probably had considerable experience in the use of arbitration, mediation and other third-party techniques to resolve disputes. But in employment dispute resolution, employers are more likely to be repeat players and employees are more likely to be “one-shotters.”

Are repeat players more likely to “win” in employment arbitration? Research involving nearly 4,000 employment arbitration cases administered by the AAA over the period from 2003 to 2007 has resulted in strong evidence that employee win rates and award amounts are significantly lower when the employer has been involved in multiple arbitration cases. This current research confirms previous research results from the 1990s involving a smaller sample of AAA employment cases. Then, too, employees lost more frequently when the employer was a repeat player. These research results are worryingly consistent with the repeat-player effects reported during the National Roundtable on Consumer Arbitration. They suggest, at the very least, the need for more research to identify why the repeat-player effect is so robust.

Some of the participants noted that the widespread adoption of innovative conflict management strategies by many employers in both the private and public sectors provides employees with easy access to efficient and inexpensive (for many employees, costless) means of resolving workplace complaints that are not generally available to unionized employees. One presentation reported the results of a CPR/Pepperdine/Cornell survey showing that over the past 15 years, major employers

have adopted a wide array of internal ADR techniques, including so-called “hotlines,” open-door policies, early neutral evaluation, early case assessment, and conflict coaching.

Participants at the Penn State Roundtable also offered anecdotal evidence of other internal measures adopted by employers to achieve early resolution of workplace conflicts, ranging from the increased use of supervisor training to ensure “conflict competence” in the organization to the enhanced use of communication and feedback to provide managers with early warning

signals of incipient workplace conflict. Some of the participants also noted that a growing number of employers are incorporating the effective resolution of conflict into their performance appraisals of managers and

supervisors. The use of these strategies, particularly if they are part of an integrated conflict management system, may winnow out stronger cases and help explain the repeat-player effect.

There was broad recognition, however, that a conflict management system differs in important ways from a practice or technique. Most important, a system entails a comprehensive, proactive approach to managing and resolving conflict in an organization.⁸ At the Roundtable, there were two presentations regarding the establishment and use of integrated conflict management systems, rather than the importation of a particular ADR technique. These presentations described the potential for top and trusted corporate officers to create and implement integrated conflict management systems, and for ombuds to encourage the development of such systems. But these presentations also revealed the significance of the character, reputation and trustworthiness of the particular person responsible for establishing and implementing a conflict management system. This heavy reliance on the presence of the “right person” would seem to represent a potential weakness in terms of sustainable system design. Nonetheless, most Roundtable participants, regardless of their organizational affiliations, viewed the use of ombuds and integrated conflict management systems with considerable favor and believed further growth in their use would improve the management of workplace conflict. There was great interest in developing a “turn-key,” or “ADR in a box,” conflict management system for small- and medium-sized employers that probably cannot afford a customized system.

During the two Roundtables and in pre-meeting telephone conversations, the organizers were heartened to discover that our knowledgeable participants recognized that there was much they did not know.

The participants also came to recognize that the lawyers who regularly represent employees in employment litigation play an important role in these systems. When potential clients come to them for representation, these lawyers are likely to spend substantial time learning about the internal dispute resolution options available to the clients, to be able to advise them regarding their use. Some lawyers even provide information and advice online. In a sense, these lawyers are serving as “conflict coaches,” even though they would probably tend to think of themselves as engaging in “client counseling.”⁹

Commonalities

During the two Roundtables and in pre-meeting telephone conversations, the organizers were heartened to discover that our knowledgeable participants recognized that there was much they did not know. They wanted to learn from each other about different dispute resolution procedures, best practices within those procedures, different models of regulation or accountability and means to deter bad behavior and encourage good behavior. Perhaps this desire reveals some sort of faith that being open to others’ knowledge and experience will (or at least may) reveal paths toward resolution.

More than one participant, however, also emphasized the need to “do” and not “just talk.” The organizers feel the same way. Each of us, in our own way, continues to try to move the ball forward. We have produced a report for the National Roundtable on Consumer Arbitration. We hope to do the same for the National Roundtable on Employment Dispute Resolution. We have presented at the ABA Dispute Resolution Section’s annual conference.

But our ad hoc group has also realized the need for the major dispute resolution organizations to play leading roles. The National Roundtables identified several projects that could inform appropriate next steps. For example, we need to understand why the repeat-player effect is so robust. We also need to know the characteristics of the industries that include arbitration clauses in their boilerplate contracts with consumers and the specific terms and implementation of those clauses. We need to help companies, policymakers, advocates, consumers and employees in making dispute resolution (and conflict management) systems sufficiently effective and fair. The National Roundtables thus also suggest that these stakeholders need guidance in creating, participating in, and assessing the effects of mandatory pre-dispute arbitration. The ABA Dispute Resolution Section (perhaps in collaboration with other major dispute resolution organizations and ABA sections) is uniquely positioned to spearhead needed research and the development of guides and best practices for companies, consumers and employees. We encourage the Section to take these next steps. ◆

Endnotes

1 The Chatham House rule reads: “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.” More information regarding the rule, including its very interesting history, is available at <http://www.chatham-house.org/about-us/chathamhouserule>.

2 *Report of the Discussion of the Consumer Arbitration Study Group*, 2010 A.B.A. SEC. DISP. RESOL. 18-19, available at <http://meetings.abanet.org/webupload/commupload/DR011000/relatedresources/consumerarbitrationreport.pdf>.

3 Comprised of Professors Tom Stipanowich and Nancy Welsh (co-chairs), Professor Lisa Blomgren Bingham and Larry Mills, with advice and assistance from Professor Homer LaRue, for the National Roundtable on Consumer Arbitration, and comprised of Professors Stipanowich and Welsh (co-chairs), Professor Bingham and Professor David B. Lipsky, with advice and assistance from Ruth Glick, for the National Roundtable on Employment Dispute Resolution.

4 In 2006, NAF handled 214,000 debt collection claims, making it the largest provider of consumer debt arbitration services in the United States at the time. See Nancy A. Welsh, *What Is “(Im)Partial” Enough in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 427-430 (2010) (describing the evolution of NAF and the action brought by the Minnesota Attorney General).

5 NO. 05-CV-7116 (S.D.N.Y.).

6 Available at www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf.

7 THOMAS STIPANOWICH ET AL., NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION: CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT (Apr. 17, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/roundtable2012.authcheckdam.pdf.

8 An integrated conflict management system: (1) entails a comprehensive, proactive approach to managing and resolving conflict in an organization; (2) has a broad scope, allowing many different types of disputes (statutory, nonstatutory, etc.) to be heard and resolved; (3) provides multiple access points for employees who have complaints (e.g., an employee can file a complaint with his supervisor, the human resource function, the counsel’s office, or the office that manages the system); and (4) provides multiple options for resolving disputes (e.g., both interest-based and rights-based methods).

9 This brief summary of the presentations and discussions at the Employment Dispute Resolution Roundtable cannot do justice to the range and depth of the subjects considered at the event. For example, there was also an extended discussion of the potential to revisit and update the Due Process Protocol for resolving employment disputes; the advances in case management implemented in recent years by the AAA, JAMS, FINRA, FMCS, and EEOC (e.g., assessment of neutrals, the customization of processes, and the public availability of information regarding outcomes and reasoning); and the growing reliance on online methods in workplace dispute resolution.