

A Pro-Consumer, Pro-Arbitration Approach At The CFPB

By Eric Mogilnicki and Eitan Levisohn

Law360, New York (September 6, 2017, 12:36 PM EDT) -- Sometime in September, the U.S. Senate is likely to decide whether or not to join the House of Representatives in disapproving of the Consumer Financial Protection Bureau's controversial arbitration rule.[1] That rule, while nominally aimed at preventing class action waivers in arbitration agreements, is likely to significantly curtail consumers' access to arbitration.[2] Such a development would not serve consumers' interests. After all, the bureau's own arbitration study found that consumers on average recovered more money in arbitration than in class action litigation.[3] Moreover, while arbitration is available for consumer claims of every size and shape, the bureau's preferred class action regime will help only those consumers with cookie-cutter claims that can be resolved on a class basis.[4]



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However, the Senate's vote need not involve a choice between preserving or ending the status quo on arbitration. Instead, a vote to preserve arbitration by defeating the bureau's arbitration rule could open the door to a pro-consumer, pro-arbitration agenda that strengthens consumers' ability to resolve disputes with financial institutions. For example, the bureau points to low levels of consumer knowledge and utilization of arbitration rights as evidence that arbitration does not benefit consumers.[5] However, these findings do not reflect some inherent flaw in arbitration, but rather demonstrate that arbitration presents a significant opportunity for the kind of consumer education and empowerment that the bureau routinely uses to help consumers exercise their rights. Unfortunately, the bureau has proposed the drastic approach embodied in the arbitration rule before engaging in constructive efforts to preserve and enhance the arbitration process. Rejection of the arbitration rule would not prevent Congress, the bureau and/or financial services providers from addressing any concerns with arbitration as it exists today.



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Consumer Education on Arbitration

One step the bureau could take immediately would be to undertake an education campaign on arbitration clauses. The bureau's arbitration study found that "consumers are generally unaware of whether their credit card contracts include arbitration clauses." [6] If true, such a lack of awareness could account for the relative infrequency of arbitration.

The bureau's typical response to a deficit in consumer understanding is to work to educate consumers.[7] However, the bureau has made little effort to educate consumers about their right to pursue claims in arbitration. Instead, the bureau's arbitration rule would "solve" the problem of consumer ignorance about their arbitration rights in a way that makes it less likely that consumers will have those rights in the future.

Rather than forbidding certain types of arbitration agreements, the bureau could launch an initiative to work with financial services providers to help consumers understand their arbitration rights. The bureau already has experience using a host of tools to educate consumers, including dedicated webpages at consumerfinance.gov, bureau blog posts and speeches, and outreach through state and local authorities and consumer groups.[8] Using these tools to help consumers understand and exercise their arbitration rights would increase consumer understanding and use of arbitration provisions, thereby addressing concerns that the bureau cites as the basis for the arbitration rule.

Such an education campaign could highlight for consumers how arbitration clauses work. This would ensure that consumers understand their rights under arbitration clauses, including customer benefits such as fee waivers and guarantees regarding the impartiality and proximity of arbitrators. This general effort could be supplemented by outreach to particular consumers, such as those who have filed complaints with the bureau, particularly vulnerable populations, and consumers who have the right to opt out of arbitration at the outset of their agreement with a financial institution.[9] Armed with such information, consumers and their advocates could more effectively ensure that financial institutions are responsive to consumer concerns.

Arbitration Data Collection

The bureau has also neglected to use another of its usual tools — the collection and dissemination of data — to expand consumer use of arbitration. The bureau could easily collect data on arbitration clauses and provide consumers with information that empowers them to choose financial services and products with arbitration provisions in mind. As a threshold matter, the bureau could collect and provide information that helps consumers identify which financial services and products are offered with or without such provisions, and thereby help consumers make informed decisions. The bureau's own arbitration study found that only 15.8 percent of credit card contracts and 7.7 percent of checking account contracts include arbitration provisions.[10]

For consumers who are comfortable with arbitration provisions, the bureau could compile and provide additional information, such as which financial institutions offer the lowest arbitration filing fees or have the highest minimum recovery. This data would encourage companies to compete on those terms and allow consumers to make informed choices about the dispute resolution process that best fits their needs.

Policing Arbitration

In addition to foregoing the advantages of educational and transparency initiatives, arguments for the arbitration rule's broad-brush solution often ignore the constructive role the bureau can and should play in policing arbitration agreements. The bureau routinely reviews customer agreements and consumer complaints, and could do the same in the arbitration context. The bureau's examination of regulated entities under its existing authority could ensure that arbitration agreements are transparent to consumers and that regulated entities are living up to the commitments in those agreements. To the

extent the bureau identifies legal issues with a particular arbitration agreement or program, it has supervisory and enforcement powers to address them directly.[11] The CFPB could also add a category to its consumer complaint program for complaints about unfair or deceptive practices relating to arbitration. By prioritizing such complaints, the Bureau can help consumers promptly resolve questions and concerns relating to arbitration, and also identify systemic issues.

This type of multipronged approach — coupling education with consumer assistance, supervision and enforcement — fits well with the bureau's past attempts to use its full "toolbox" to address what it sees as a systemic problem.[12]

Promoting Fair Arbitration

Finally, the bureau's first resort should have been to search for ways to improve — rather than restrict — arbitration of consumer disputes. Such an effort would have allowed the bureau to work collaboratively with industry, advocates and arbitrators themselves. That opportunity will still exist if the arbitration rule does not go forward. Potential projects to support arbitration include developing best practices for disclosures, sample pleadings for consumers, and arbitration rules that would ensure that the process remains fair and efficient for all involved. Such changes could give consumers greater confidence in the system, thereby encouraging greater usage. For example, these parties could collaborate with the bureau on an arbitration "bill of rights" — standards defining what a fair arbitration looks like — that would serve as the common platform for arbitration going forward.

Online arbitration is another opportunity with enormous potential to allow consumers to reach an impartial arbitrator from the comfort of their own homes. The bureau could bring together consumers, advocates, technology providers, arbitration forums, and financial services companies to identify a path forward toward a system of dispute resolution that is not only impartial, but that takes a fraction of the time and expense of traditional arbitration or litigation.

Financial institutions have been refining the arbitration process for decades, and are likely to join in any such good-faith effort, particularly if it would provide a safe harbor. Meanwhile, if Congress disapproves the arbitration rule, consumer advocates may have a new willingness to work with industry to help identify and implement improvements in a system they have so far criticized rather than improved. Unfortunately, the bureau's arbitration rule, by constraining the use of arbitration, stands in the way of such innovation.

Conclusion

The current debate over the arbitration rule is focused on the relative costs and benefits of the current arbitration system. However, those costs and benefits are not fixed, and there is ample reason to believe that arbitration — if it survives the arbitration rule — could be improved so that its costs remain low and its benefits increase substantially. As the foregoing demonstrates, there is a way forward that preserves consumers' ability to choose arbitration while making arbitration more accessible and consumer-friendly. The path to that better future would begin with a rejection of the arbitration rule, and a new commitment by the bureau to use the many tools at its disposal to improve, rather than discourage, arbitration agreements.

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[1] Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[2] Many companies have indicated that they will not offer arbitration under the constraints imposed by the rule. See, e.g., Consumer Bankers Association, American Bankers Association, and Financial Services Roundtable, Comments on the Bureau's Consumer Arbitration Study at 8 (July 13, 2015), <https://www.regulations.gov/document?D=CFPB-2016-0020-4294> ("The proposed rule also threatens to have an adverse impact on consumers because arbitration is likely to disappear almost entirely if class action waivers are eliminated.").

[3] See Consumer Fin. Prot. Bureau, Arbitration Study (2015), Section 5.6.6, p. 41 and Section 8.3.3, pp. 27-28 ("Arbitration Study").

[4] Fed. R. Civ. P. 23(a) sets out four requirements for class certification — numerosity, commonality, typicality, and adequate representation. A plaintiff may proceed with a class action "only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (internal citations and quotations omitted).

[5] Arbitration Study at Section 1.4.3, p. 11.

[6] Arbitration Study at Section 1.4.2, p. 11..

[7] See, e.g., Richard Cordray, Director, Consumer Fin. Prot. Bureau, Prepared Remarks at the Financial Literacy and Education Commission Meeting (May 24, 2017), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-financial-literacy-and-education-commission-meeting-2017/>.

[8] The bureau's homepage already offers a series of "consumer tools" — including educational information, FAQs and guides — about specific products and services to help consumers navigate complicated financial choices. See Consumer Tools, Consumer Fin. Prot. Bureau, <https://www.consumerfinance.gov>.

[9] See Arbitration Study at Section 2.5.1, pp. 31-32 (noting that there are opt-out provisions in 17.6 percent of prepaid card arbitration clauses, 26.2 percent of checking account clauses, 27.3 percent of credit card clauses, 50.7 percent of storefront payday loan clauses, and 83.3 percent of private student loan clauses).

[10] *Id.* at Section 2.3, p. 8.

[11] The fact that the bureau has never brought an enforcement case involving an arbitration agreement or result suggests that it has not found the arbitration process to be a source of consumer harm.