

"Mandatory" Binding Arbitration: Panacea or Corporate Tool?



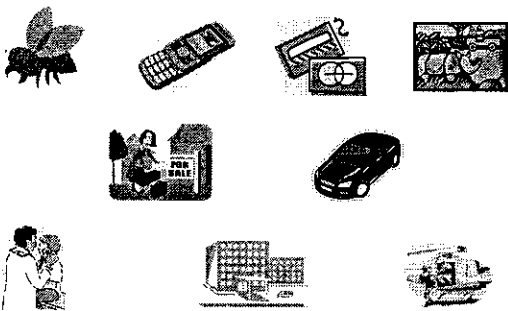
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What is "Mandatory" Binding Arbitration?

- What is arbitration? (different from litigation or mediation)
- What is binding arbitration?
- What is "mandatory" binding arbitration, and why the quote marks?



Contexts for "Mandatory" Arbitration



Panacea or Corporate Tool?



- So, we have lots of this "mandatory" arbitration.
- Is that a good thing or a bad thing?

In the Interest of Full Disclosure



- You should know that I have written quite a bit that is critical of mandatory binding arbitration.
- Still, I will do my best to give you a sense of the arguments that are made in defense.
- Also, please know that I like other forms of ADR (non-litigation dispute resolution) a great deal.

The Legal Status of MBA



- In general, under current federal and state law, MBA is "legal" in this country.
- MBA clauses are treated as contracts and are typically enforced even when they are in small print, unsigned, and not entered knowingly.
- Limited Exceptions:
 - "unconscionable" clauses (*D.R. Horton v. Green*, 96 P. 3d 1159 (Nev. 2004) goes way further than most such cases)
 - clauses that by their terms prevent statutory enforcement
- Other countries are different, maybe we will change.

Some Argue MBA is Good, Saying:



- The arbitrators are fair
- The process is cheaper, quicker more accessible than litigation
- The money companies save on litigation will be passed on to consumers in lower prices and employees in higher wages

Some Argue MBA is Bad



- Bad for individual?
 - Biased arbitrators
 - Skewed law/remedies/procedures
 - High costs
- Bad for society?
 - Private decisions
 - Lack of precedents
- To a large degree MBA is really about class actions

Which Side is Right?



- Some studies exist, but they are not conclusive
- The problem of lack of access to the data
- Studying results in arbitration is not enough:
 - Which claims being studied? (secrecy, selection)
 - What impact on deterrence?
 - What impact on settlement? Motions?
- Studies focus on individual not societal impact

Using Regulation to Get Best of Both Worlds



- Why not prohibit the “unfair” MBA and allow the rest? (Some proposed legislation would do this)
- Is any MBA “fair”? Fair to the public too?
- If the regulators prohibit one set of unfair practices will the companies just come up with some more?
- Any legislation must be done at federal level.
- Is the free market a better way to ensure fairness?

Arbitration Fairness Act of 2007

- Introduced July 2007 in House and Senate
- Bill would prohibit enforcement of predispute arbitration agreements in employment, consumer & franchise contexts
- Chance of passage this term seems slim



Your Questions and Comments

