Not so Fast!

There is no doubt that mandatory arbitration procedures are sometimes used to stack the deck in favor of companies over individuals. But some recent news coverage has gone one step further, raising the question of whether there is something inherently wrong with arbitration that gives rise to an unfair result.

Extreme positions create the risk that very real benefits can be lost through overreactions to anecdotes. Who could fail to see the benefit, at least in certain matters, for an expert in a given field to evaluate cases quickly and efficiently in contrast to a judge swamped with a crowded and congested court calendar?

Arbitration is inherently no less fair or less favorable to individuals than trial. Let’s not forget that arbitration has a deep and respected heritage that is embedded in the fabric of American jurisprudence. George Washington included an arbitration provision in his will and Abraham Lincoln himself acted as an arbitrator. Those who denigrate arbitration outright and in all forms are missing both the boat and the opportunity to help the very people and issues they purport to care most about.

“Arbitration is inherently no less fair or less favorable to individuals than trial.”

Often lost, in examples of bad conduct and statistics that claim that consumers get the short end of the deal in arbitration, is that fact that many disputes that make it to arbitration have a long history behind them. As part of effective customer services approaches, many companies have incorporated alternative dispute resolution. So when faced with an issue with their credit card or cell or cable provider, many consumers call customer service and have their problem resolved.

Many companies also have Ombuds, hotlines or other internal dispute resolution mechanisms that resolve their disputes pre-arbitration. As a result, standalone mandatory pre-dispute arbitration programs are not at all
common in the workplace environment. Employee dispute resolution programs generally have a stepped process where an employee goes to mediation before arbitration. Often claims are resolved in these processes before an arbitration is even filed. So where a comprehensive dispute resolution process is in place, it is not surprising that cases that are adjudicated are often those that have the least merit.

Since, its inception more than 35 years ago, my organization the International Institute for Conflict Prevention & Resolution (CPR) has been about providing alternatives to traditional litigation and choice to parties. CPR operates primarily in the business-to-business context; however, under CPR’s employment arbitration procedures CPR insists upon certain due process protections for employees, related to costs, fairness in the selection process and access to relevant information, which we encourage all companies to adopt in their own employment ADR programs.

More broadly, our rules in all contexts also expressly provide for, and prevent, the possibility of conflict of interest, “repeat player” and other fairness issues described in the recent New York Times series of articles on arbitration.

CPR maintained its focus on both encouraging arbitration availability but also fairness. In 2009, we submitted comments to proposed amendments to the Federal Arbitration Act (FAA) under the Arbitration Fairness Act stressing that both individuals and businesses disfavor resolving disputes in heavily congested courts; that procedural due process protocols would fully address
the concerns underlying the amendments; and that the proposed amendments would unreasonably interfere with court safeguards of the individuals’ rights to arbitrate. We concluded by saying that “If Congress is to play a constructive role in the protection of individual rights and society’s goal of a just, efficient and less expensive dispute resolution, it could focus on encompassing in a new Chapter 4 of the FAA provisions embodying a national procedural due process protocol which require fairness through procedural safeguards for individuals in arbitration, including adequate notice, an equal voice in the selection of neutral and impartial arbitrators, responsibility for limited and reasonable costs of the arbitration, an arbitral forum near the individual’s home town and reasonable pre-hearing disclosure of information supporting a claim or defense.”

“We call upon other ADR providers, the business community and consumer groups to join us in implementing the procedures and safeguards CPR has long advocated – and to be very clear in setting out best, and calling out unacceptable, practices – in order to allow arbitration to realize its full potential as a fair and thoughtful alternative to litigation.”

We stand by these statements with regard to the current reintroductions of the Arbitration Fairness Act. We also call upon other ADR providers, the business community and consumer groups to join us in implementing the procedures and safeguards CPR has long advocated – and to be very clear in setting out best, and calling out unacceptable, practices – in order to allow arbitration to realize its full potential as a fair and thoughtful alternative to litigation.

The unfortunate reality is that any system can be adversely impacted by the wrong motivation. Arbitration is susceptible to misuse and abuse and some of the examples are troubling and inexcusable. But when it comes to being prone to abuse, litigation (and certainly class action litigation) takes no back seat to arbitration. And those that condemn arbitration often are driven by incentives that are adverse to the individual consumer. Anyone who has received pennies from a class action settlement where legal fee awards are in the many millions of dollars can attest to these examples.

Arbitration was conceived to create a level playing field, and nothing about it precludes that from being the case so long as it is utilized properly. We can not only save the baby here, but cleanse the bath water as well.

—By Noah Hanft, International Institute for Conflict Prevention & Resolution Inc.
Noah J. Hanft
President and Chief Executive Officer
+1.646.753.8248
nhanft@cpradr.org

Noah J. Hanft is President and CEO of the International Institute for Conflict Prevention and Resolution (CPR). Prior to joining CPR, he was General Counsel and chief franchise officer for MasterCard, Inc.

ABOUT CPR

CPR is the only independent nonprofit organization whose mission is to help global business and their lawyers resolve commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

CPR
575 Lexington Avenue, 21st Floor
New York, New York 10022
Phone: +1.212.949.6490
Fax: +1.212.949.8859
www.cpradr.org