Indic Legal Law Journal

ISSN: 2583 - 6385

Volume No. 2
Issue No. 4
Dec 2023 - Jan 2024
Pages: 81 - 87
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MANDATORY ARBITRATION CLAUSES IN CONSUMER CONTRACTS

ABSTRACT

The objective of the article is to analysis and examine the mandatory arbitration clause in consumer contract. This article basically follows the Collective/doctrinal research method in which the compilation, interpretation and systemizing the primary and secondary source of data has been done. The research has been the done from the various articles and judgments from different websites of American/Indian Government which pinpoints the data that are collected. After collecting the data, the researched article conducted the in-depth analysis of the content through which it concluded that the data is historic, descriptive and contains analytical views. The study of these articles is organized and systematized from the secondary source material. However, every study has their limitation. The study of mandatory arbitration clauses in consumer contract is very wide and extensive which is why it is impossible to study each and every judgments and articles from different websites. Moreover, all the judgments, theories are not possible to discuss and describe in details. Only the prominent portions are curved out from the websites and are mentioned in this researched article.

Further, it is apt to mentioned the discussion of the Supreme Court views with regard to the arbitration clauses. Moreover, it discusses the unfairness of the arbitration clause in the consumer contract. Furthermore, in this article it discusses about the Indian Law compared to that of United States of America. As a result, the article discusses about the arbitrary power in which the company or the entity holds.

INTRODUCTION

Under growing number of disputes, the companies are resolving the consumer/employee dispute by way of arbitration. In the United States, at least all the consumer/employee are subject to mandatory arbitration. They are bound to signed the contract that already exist the

arbitration clause in which the consumer is unaware of it. The United States arbitration follows the Federal Arbitration Act which was enacted 1925 to ensure the validity and enforcement of arbitration agreement in maritime transaction or contract evidencing transaction through commerce. In United States, the courts have adopted the pro- arbitration proceedings and it will be always upheld whenever an individual challenges in the court of law.[1]

In the country like US, consumer and business authorities do not have equal power. These consumer contracts are generally perceived as a contract of adhesion. Further, these consumer contracts are drafted by big shot sophisticated attorney, employed by the companies and imposed the mandatory arbitration clauses without even giving proper notice. Moreover, the consumer is forced to arbitrate whenever the dispute arises and they were not given opportunities to bargain for any arbitration provision. In addition, the companies play bossy and force the consumer to agree the arbitration clauses in order to do business with them. Therefore, burden of proof in on the business entities in order to show the effect of Arbitration clauses exist in the contract of adhesion. Thus, this article will describe numerous cases, legal questions and the flaws of the mandatory arbitration agreement.[2]

PRE-DISPUTE ARBITRATION CLAUSES

In US, Mandatory arbitration clause requires one party to another to accept pre-dispute arbitration clause. This arbitration clauses helps the party to settle outside the court. They exist in contractual agreement. The mandatory arbitration clause is a way to avoid the corporate accountability to the consumer and binds them with pre-dispute arbitration. Therefore, consumers before they get to know the pros and cons of arbitration versus litigation, they are drag and forcefully binds them with pre-dispute arbitration.

More so, the consumer might have to bear the cost which is very high in pre-dispute arbitration as compared to post dispute arbitration as in pre-dispute there are no competition on cost providers. However, in post dispute the parties can negotiate with the service of arbitration providers.

Further, recently in United States due to the existing problem with the consumer in regard to the arbitration. there were some reforms in mandatory arbitration clause. United States senator and the Congress Man introduced the bill known as Arbitration Fairness Act to reinstate the

[1] Mandatory Arbitration and the federal Act 20 September 2017,https://fas.org/sgp/crs/misc/R44960.pdf.

[2] The arbitration epidemic, https://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-19.

FAA (Federal Arbitration Act) the original intent. The key changes proposed and the most significant one is that 'No pre-dispute agreement shall be valid or enforceable if it requires arbitration of employment, consumer or franchise dispute or any matter related to protection of civil rights. With this proposed bill the AFA guarantees that there will be only arbitration when the dispute has arisen. Moreover, it also guarantees the disclosure of arbitration clause whenever the parties tend to resolve the dispute. Further, it will give the consumer an option to either litigate or go for arbitration. This, will help the consumer to accumulate their problems to some degree.[3]

CONSUMER FORBIDDEN OF PURSUING CONSUMER DISPUTE WHEN THERE IS ARBITRATION CLAUSE.

Over the past years, the problem has become common regarding insertion of arbitration clause into the contract with the consumer. This has appeared to be innocuous but this clause lacks a powerful punch. The mandatory arbitration clauses prevent the consumer to go to court if they have dispute rather, they will proceed according to the arbitration clause and file a complaint to private institution or forum in which they are less likely to prevail and moreover, less likely to recover their due. Therefore, consumers really find difficult to win their cases in the arbitration proceedings.[4]

Further, it is the forum who decides the fairness of protection in the arbitration proceedings. Moreover, the consumer can try and challenge the enforcement in the court but the ability to challenge is very limited. The awards given by the arbitrator are not appealable. Due to that reason, the consumer receives very less damages in arbitration as compared to courts. Further, in the past few decades the courts adopted pro-arbitration doctrines that arbitration clauses are always upheld when challenged in the court. In fact, courts also uphold the arbitration clauses even when the consumers show that arbitration proceeding are too expensive. As a result, important consumer disputes and their rights of the consumer can no longer be bought to the court subject to mandatory arbitration clauses in the contract agreement.[5] Reliance placed on the judgment ***Prima Paint Corp. v. Flood & Conklin Mfg. Co,*** in which supreme court states that "when a party claimed that a contract it had signed was induced by fraud, that party had to

[3] Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System,https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1625&context=law-review.

[4] The Case Against Mandatory Consumer Arbitration Clauses, https://www.americanprogress.org/issues/economy/reports/2016/08/02/142095/the-case-against-mandatory-consumer-arbitration-clauses/.

[5] Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System,https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1625&context=law-review.

assert its claim in arbitration." "That is, even if the entire contract (in that case, a commercial lease) was invalid, the arbitration clause survived because, the Court found, the promise to arbitrate was separable from the rest of the contract. This holding is called the "separability doctrine."[6]

UNFAIRNESS OF MANDATORY ARBITRATION CLAUSE

Mandatory Arbitration clause for the consumer are unfair, discriminatory and one-sided process. Mandatory arbitration clause and pre dispute arbitration clause waived of the rights of the consumer to access the court. The problem that are faced by the consumer who are forced for the arbitration by contracts are given herein below: -

a. The fees imposed by mandatory arbitration clause may make it very expensive for the consumer. As the arbitrator's charges thousands of dollars in filing the case and also for the hearings. However, the consumers unable to pay the fee and precluded the remedy. Furthermore, the fees in respect is much higher than the claim of the consumer and due to the employment dispute, the consumer are endangered from pursuing anti-discrimination claims.
b. Companies used mandatory arbitration clauses in order to avoid the class action. Moreover, it is difficult for the consumer/employee with small claim and to seek advices from any legal expert. Therefore, the companies gain lot of benefit through this small gain to a large number of people.
c. Mandatory arbitration clause frequently selects the venue which favours the incorporation. In this way the consumer/employee has to travel quite a lot to make their claim heard.
d. Mandatory arbitration clause gives the power hand to select the arbitrator from the arbitration organization. It is obvious that the company has established long term relationship with the arbitration company and thus in return the arbitration organization always favours the company. Moreover, the arbitration organization does not keep any public archive. Therefore, the consumer/employee unable to check the biasness of the arbitrator, even when they have the same role in choosing the arbitrator.
e. There is lack of public record in arbitration proceedings as there are no written submission and the facts and dispute raised in the arbitration proceedings must be kept confidential. There are no legal precedent and individuals cannot cite previous decision to favours their own case.
f. The parties in arbitration proceeding have very limited judicial review of an arbitration award but no review on merits of the award. As it is mentioned above that there are not public records of any facts and law made of the arbitration proceedings. Therefore, the burden of proof lies on

[6] 388 U.S. 395.

the consumer to show the extraordinary bias and partiality of the arbitrator towards the company.[7]

Reliance placed on the judgment ***Moses H. Cone Memorial Hospital v. Mercury Construction Corp*****,** that "when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favour of arbitration". It said that such a presumption furthered the "liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[8]

VALIDITY OF MANDATORY ARBITRATION

The validity of mandatory arbitration in United States goes back to when Federal Arbitration Act 1925 was enacted to ensures the validity and enforcement of the arbitration agreement in commercial transaction, consumer contracts, contract evidencing transaction involving commerce. However, the states have played a crucial role in the arbitration agreement and around 50 states along with FAA have govern the validity of the arbitration agreement. Further, the state legislature and the state court provided various restriction on the arbitration agreement and proceedings particularly for the people who have unequal bargaining power between the parties.

As the Supreme Court interpreted that section 2 of the FAA that "limits the grounds for denying enforcement of 'written provision[s] in ... contract[s]' providing for arbitration," and due to this section, FAA pre-empt the state law and judicial rule. However, state legislature has tried to invalidate the mandatory arbitration clauses which they believe that the dispute settle through arbitration would be unfair but the questions whether the FAA pre-empts the state law or judicial rule has come numerous times Infront of the state court and in these cases, the courts always considered that FAA supersedes the state requirements to restrain the validity and enforceability of the mandatory arbitration.[9] The United States Courts has given various judgment in regards to the validity of mandatory Arbitration Agreement. Reliance placed on the judgment ***Red Cross Line v. Atlantic Fruit Company*** is "believed to have opened the door for federal legislation that recognized the validity of arbitration agreements".[10] In a more recent case, ***Preston v. Ferrer***, "the Court held that the FAA pre-empted a state law that initially

[7] Mandatory Arbitration clause are discriminatory and unfair, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/.

[8] 460 U.S. 1 (1983)

[9] Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention. of the Judicial System,https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1625&context=law-review.

[10] 264 U.S. 109 (1924)

referred certain state law claims to a state administrative agency before parties could arbitrate questions arising out of a contract". "The Court ruled, in an 8-1 decision written by Justice Ginsburg, that the FAA pre-empted the state law."[11] In its opinion, the Court relied on an earlier FAA case, **Buckeye Check Cashing, Inc. v. Cardegna**, in which the Court determined "challenges to the validity of a contract providing for arbitration ordinarily 'should ... be considered by an arbitrator, not a court".[12] A landmark judgment on ***Southland Corporation v. Keating*** state that "the Court held that the Act superseded a state provision that effectively compelled resolution of a dispute exclusively through the courts". "In enacting § 2 of the federal Act, Congress declared a national policy favouring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." "There were only two statutory exemptions: that it was applicable only a written maritime contract or a contract "evidencing a transaction involving commerce". Following the judgment on **Keating** as mentioned above the court has determined the section 2 of FAA that prescribes special condition on mandatory arbitration agreement. Further, under current construction the states prevent the singling out of arbitration proceeding on the basis of suspect status. Therefore, the supreme court also address the state law pre-emption under saving clause of section 2 of FAA in which states that "an arbitration agreement may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract."[13]

COMPARISION OF US LAW WITH INDIA

Arbitration clauses in consumer law in the country like United States are omnipresent. However, in India it is a different issue compare to other nations. In India, the Supreme Court give unilateral decision in regard to the issues related to unilateral arbitration clauses, employer and employee disputes and consumer dispute.[14] Reliance placed on this judgment **Skypak Couriers Ltd. Etc. Etc vs Tata Chemicals Ltd** which state that "Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to certain deficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer

[11] 552 US 346 (2008)
[12] 546 U.S. 440 (2006)
[13] 465 U.S. 1 (1984).
[14] The validity of Mandatory Arbitration Clauses in unequal Contracting Relationships, https://www.barandbench.com/columns/npacs-arbitration-review-the-validity-of-mandatory-arbitration-clauses-in-unequal-contracting-relationships.

Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force".[15]

In the United States, the consumer contracts are known as a contract of adhesion. It is when they have to pass the test of unconscionability. It is described from case to case basic or when the consumer is at disadvantage and unequal bargaining power. However, in India reliance placed on the judgment ***Emaar MGF Land Limited v. Aftab Singh,*** in which Supreme court states that "The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."[16]

CONCLUSION

In the past decades, the Supreme Court enable the large corporation to forcefully apply arbitration proceeding for all sort of disputes and violations, including violations of law for frauds, consumer wrongdoing, compensation of wages, protection of consumer rights etc. Moreover, the courts also ask the corporation to make their own rules and regulation so that whenever the disputes arise out of the consumer contract then the corporation have all the power to adjudicate and settle the disputes. Further, the court permits the corporation to ban on class actions suits thereby preventing the consumers from challenging the corporate entity. However, FAA under section 2 has saving clause that provides such grounds in which the agreement is invalidated.

The Arbitration Fairness Act is currently under consideration before congress and yet to be introduced as a bill. It is the best hope to restore the justice for the consumers. It is utmost important that this Arbitration Fairness Act gets the support of the majority so that it can protect the rights of the consumers.

[15] Appeal (civil)2500 of 1994.

[16] REVIEW PETITOIN (C) Nos. 2629-2630 OF 2018 in CIVIL APPEAL NOS.23512-23513 OF 2017.