

Like It, Lump It... or Arbitrate It? **By Jo DeMars and Ben Schuster**

Dispute resolution on school playgrounds often follows the “take it or leave it” approach. The person with the power sets and interprets the rules, and the rest of the kids have to listen. The one with the ball is the one who calls the game. Argue? He may just take the ball and go home. End of game.

Research in low-level consumer dispute resolution shows the “take it or leave it” system is still prevalent, and the party with the power still sets the rules. In 2011, the Customer Care Alliance (www.ccareall.org) conducted its latest study in customer complaint handling and found 45% of those polled reported having a serious problem in the last year. Almost half (47%) reported that, when they tried to resolve the problem, they “got nothing.” These respondents gave up, or “lumped it,” as Marc Galanter has called it. Most respondents (81%) said their problem was caused by a “big company.” When asked what they wanted, 89% said they wanted to be treated with respect – yet only 40% reported they were treated respectfully.

All this fermenting frustration translates into billions of dollars at risk due to eroded loyalty and to negative word of mouth, which is, incidentally, still the most commonly cited reason for choosing a product or service. In 2011, customers who were satisfied with the actions taken by a business told an average of 7.8 people about their experiences. Customers who were not satisfied told an average of 25.1 people about their story, and 27% of those dissatisfied customers posted about it on at least one website. The study showed that:

- 50,400,000 US households experienced at least one consumer dispute last year
- 13,608,000 households posted information about their problem on at least one website
- \$58,262,400 of revenue was at risk, based on mean cost of products and services subject to the most serious problem, multiplied by the number of households experiencing the problem.

On average, consumer disputes are low value, most commonly less than \$1000. However, the loss can feel very real, particularly the loss of face. It’s the principle of the thing, they say, it’s about justice.

Arbitration offers a cost-effective solution to address disputes stemming from low-value transactions, especially financial disputes. Online dispute resolution (ODR) offers these additional benefits:

- Consumers are able to participate in a place and at a time that are convenient to them;
- ODR eliminates the need for both parties to attend a hearing in real time;
- Asynchronicity allows the parties to take a “time out” to collect documents, cool down, or translate.

Low-level financial disputes are a particularly good fit for ODR because the disputes usually have existing sets of documents, applicable law and contracts to use as guides.

Recent actions have placed the arbitration of consumer dispute resolution under the microscope. As Edna Sussman has pointed out, in passing the Wall Street Reform and Consumer Protection Act of 2009, “Congress has already enacted arbitration legislation that may ultimately be a game-changer for consumer arbitration. However, the Act’s provisions for requiring a review of arbitration have drawn little attention.”

Right now, before there’s any game changing, we have a unique window of opportunity to design credible, ethical arbitration processes to resolve the persistent and annoying disputes that customers

experience. We can demonstrate the value of alternative dispute resolution in the consumer context. We can restore the sense of justice to which President Kennedy alluded in the Consumer Bill of Rights:

- The right to information,
- the right to choice, the right to safety,
- the right to be heard and
- the right to redress.

Numerous resources are available to help guide the design and implementation of ODR mechanisms, such as the American Bar Association's Recommended Guidelines for Arbitration, the American Arbitration Association's Consumer Due Process Protocol and the United Nations Commission on International Trade Law (UNCITRAL), which has specifically addressed the issues related to e-commerce and international disputes.

Recommendations

After 30 years of observing and participating in the resolution of consumer disputes, here are suggestions we consider worthy of debate and/or testing:

1. Use ODR for resolving consumer banking disputes, such as fees, missed payments, late penalties, etc. Offering a voluntary arbitration process tells the customer, "We think our determination is correct, but if you disagree, here is an independent process you can use, and we'll agree to let a neutral party decide it."
2. Make the process free to the consumer, similar to warranty arbitration programs operating under the Federal Trade Commission Part 703 Guidelines. Properly designed, the cost can be modest. Banks and other businesses would realize bottom-line benefits with increased customer loyalty and the reduced customer relationship management costs connected with handling persistent and vindictive customers.
3. Develop a pre-arbitration checklist and position statement for both the consumer and the business to use. The checklist aids both parties in preparing a full and complete file. The position statement articulates the parties' key arguments, which the arbitrator can use to formulate the decision. The position statement "levels the playing field" by providing one-time users with a list of the critical components of the case. This helps to avoid having the consumer feel "blind-sided." The position statement may also prompt the arbitrator to collect additional data during the hearing.
4. Assemble a basic list of applicable law and other information relevant to the dispute to address potential criticism that arbitrators lack pertinent knowledge. Prior to appointment, the arbitrator can "test out" or use an online tutorial to demonstrate professional competence.
5. Draft the arbitration rules to specifically address time limits, postponements, and post hearing activity (if any). Rules that are written in easily understood language help instill confidence and provide guidance to one-time users. Such rules offer a reasonable expectation for closure. The problems that parties experience will always vary depending on the particular industry at issue, and the unique nature of these problems should be considered in design development. Usually, consumer disputes have large sets of facts that are known and indisputable when cases are filed. The fact that so little remains to be discovered provides a strong argument for short timelines and simplified processes. In cases where the relevant facts are on record at the time of filing, there is little reason to protract the decision making process.

Attracting customers takes considerable time and expense. Closing the sale adds to the effort. Strategies for keeping the customer, when done right, pay enormous dividends in repeat sales and positive referrals. Arbitration can form a key component in assuring customers that a business cares about and respects them. ODR makes it fast and easy to administer the arbitration process; the accessibility of the online medium makes it less likely that customers will feel like the kids on the playground without the ball.

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