

Mandatory Binding Arbitration: Unfair & Everywhere

Homeowners of Texas summarizes key points about Mandatory Binding Arbitration, using information from Public Citizen¹, Wikipedia² and other articles.



- **Fairness** – Arbitration is Justice for Hire fueled by the fine print in contracts. This privatized adjudication process gives consumers no choice and businesses a “home court” advantage. It provides few, if any, deterrents against negligence or foul play. Arbitration firms are naturally biased in favor of the companies they rely on for repeat business, including homebuilders. They have every incentive to keep these clients happy.
- **Ubiquity** – The use of mandatory binding arbitration is widespread in the new home industry. At least 90% of the nation’s top builders require mandatory binding arbitration in their contracts and/or warranty agreements and ban class actions. We believe this industry-wide practice is a restraint of trade when buyers have no choice, such as in The Woodlands, a Houston suburb where all 13 builders include binding arbitration in their non-negotiable contracts.
- **Costs** – Businesses tout arbitration as being a faster and cheaper form of dispute resolution than a civil suit – cheaper for them maybe, but not for consumers. The cost of initiating an arbitration case far exceeds that of filing a civil suit. Beyond that, arbitrators’ fees can easily run into five figures, and arbitration companies often impose extra fees on an ala carte basis as the case proceeds. In contrast, court filing fees are modest, judges’ salaries are paid by the public, and courts don’t deter inquiry through added costs every step of the way.
- **Risks** – Arbitration poses additional risks to consumers. Arbitration awards themselves are not directly enforceable, and parties must seek judicial remedies to “confirm” an award. Consumers may be charged tens of thousands of dollars to pay for the other side’s lawyers with no opportunity to recover their own attorney fees. And arbitration clauses can threaten retribution, impose gag orders and enable builders to sue buyers for breach of contract – in courts no less.
- **Rights** – Mandatory binding arbitration clauses strip consumers of their right to go to court over disputes when they apply for a job, open a bank or credit card account, obtain cell phone service, get healthcare, hire a stockbroker, or buy a house. Gifted home warranties often indemnify builders and force buyers into arbitration even if they can opt out of arbitration clauses in sales contracts.
- **Competence** – The arbitration tribunal can decide on its own jurisdiction, and arbiters often have technical expertise in the industries they serve. Arbiters, however, aren’t required to have the legal training of a judge or attorney, and discovery may be more limited in arbitration. Still, their decisions are legally binding with little opportunity for meaningful appeal (even when a ruling ignores the law).
- **Oversight** – Arbitration occurs in secret with little meaningful oversight. These secretive arbitration tribunals provide scant data for empirical study, don’t contribute to the evolution of common law, and are subject to very few checks against misconduct, conflicts of interest, ignorance of the law, or even deliberate disregard for the law.
- **Victory?** – Arbitration awards are often hollow victories for consumers. Proponents of arbitration often cite “win” rates to argue that the process is fair, but homebuyers who “win” in arbitration typically have little to show for their victories. Meager awards help pump-up arbitration statistics without actually providing consumers relief or even refunding the cost of going through the process.

Solutions (summarized from *Home Court Advantage*³):

- **Congress** – Pass the Arbitration Fairness Act⁴, which makes forced pre-dispute arbitration clauses unenforceable in consumer and employment contracts.
- **States** – Pass laws that ban the use of mandatory binding arbitration in contracts pertaining to the purchase or insurance of a homestead and clarify that home warranties qualify as insurance products. At least 17 states already have laws preventing builders from requiring arbitration of insurance disputes. Texas does not.

¹ “Forced Arbitration: Unfair and Everywhere,” Public Citizen, 09/14/09, <http://www.citizen.org/documents/UnfairAndEverywhere.pdf>

² “Arbitration,” Wikipedia, <http://en.wikipedia.org/wiki/Arbitration>

³ “Home Court Advantage: How the Building Industry Uses Forced Arbitration to Evade Accountability,” 05/20/09, <http://www.fairarbitrationnow.org/uploads/HomeCourtAdvantage.pdf>

⁴ “Arbitration Fairness Act (House Bill HR-1020 and Senate Bill S-931),” <http://www.fairarbitrationnow.org/>