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Trouble at t'Mill?

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Will a recent backlash against binding consumer arbitration in the United States make its way to Europe? JAMS International mediator Charles Gordon believes not.

In the United States, Fortune 500 company **General Mills** recently attempted to impose binding arbitration on consumers which buy its products online or sign up for a discount or special offer. As a result of a backlash on **Twitter**, General Mills backtracked within days and abandoned any attempt to impose binding arbitration.

Much of the adverse comment in the US revolved around the suggestion that arbitration tends to be 'business friendly', with damages likely to be much less than those awarded in jury trials. Concerns were also raised that consumers would have been giving up the opportunity to join class action lawsuits if they were forced into binding arbitration.

The General Mills story was first broken in the New York Times. The paper was extremely critical of the proposal. However, as one commentator put it: "The paper conflates the individual right to sue with the right of lawyers to assemble a huge group of consumers, typically without their knowledge or participation, into zombie armies that can compel companies into settling on lucrative terms."

The commentator referred to a recent class action relating to consumers which purchased the popular breakfast cereal **Mini Wheats**. While the suit was settled for USD 4 million, after the subtraction of expenses and the lawyers' 25% cut in the damages, each individual consumer became entitled only to USD 5.

It is certainly extremely common both in the US and the UK for consumers to agree online terms and conditions at the time of purchase. It is probably less common for such conditions to be imposed in advance when a discount voucher or special offer is accepted, or a web site visited or 'liked'. Yet it does not appear to be common for such online terms and conditions to include binding arbitration, and the General Mills' backlash probably explains why.

ARBITRATION SCHEMES

There is much less hostility in Europe to the idea of arbitration, combined with mediation or other forms of ADR, as a means of settling not only business disputes, but those between consumers. This is likely because of the general absence of inflated jury awards and the lack of a class action culture – or, indeed, court rules to support such actions.

Rather, the voluntary referral of disputes to arbitration is gaining ground rapidly. Prominent examples include the Financial Ombudsman Service in the UK, which both mediates and provides binding arbitration awards in respect of financial services disputes. Insurers, banks and other financial product providers are required to accept binding

arbitration with the FOS, but consumers have the choice whether to litigate in court as an alternative.

The European Commission recently proposed a directive requiring European member states to provide for mediation and possibly binding arbitration for consumer disputes in all industries. The UK government apparently supports the broad thrust of this draft directive. Additionally, a number of European industries have signed up to a code of practice requiring them to have an ombudsman/arbitration scheme in place to deal with all disputes within their supply chains.

Given the much lower level of hostility to arbitration as opposed to litigation in Europe compared to the US, we can expect a growth of such arbitration schemes in the future. They represent a low cost and quicker alternative, generally, to litigation – and, if combined with mediation, can provide a really effective method of resolving disputes quickly and preserving commercial relationships, to say nothing of reputations.

One question, however, relates to the availability of good quality mediators and arbitrators. Countries have spent centuries building up their legal systems and methods of training and judges to act impartially and competently. We can likely expect greater efforts to regulate private sector initiatives in order to weed out incompetent inefficient or, at worst, fraudulent practitioners in the ADR industry.

CONSUMER-FRIENDLY

The question remains whether the General Mills initiative was a good idea that simply got headed off by adverse publicity via social media. In my view, it is perfectly acceptable and indeed often beneficial for binding arbitration combined with mediation to be provided for in business-to-business contracts.

It is however a very different proposition to impose such methods of dispute resolution on private individuals when purchasing goods and services. We should instead seek to change behaviour so consumers can see that ADR, in its broadest sense, represents a sensible, cost effective and speedy way of resolving disputes. Litigation is now out of reach of most consumers due to the absence of Legal Aid and, in the UK, the inevitable award of legal costs against the losing party.

Given that we cannot expect additional public funding of litigation, companies that want to be seen as good citizens may well be rewarded for introducing their own methods of dispute resolution. Doing so may, ironically, encourage consumers to raise more disputes but at much lower costs, both to the consumers themselves and ultimately to the companies against whom complaint has been raised.

Online transactions increasingly involve parties in more than one country. Litigation is notoriously inefficient at resolving international disputes, particularly if they do not involve large sums of money. ADR, both mediation and arbitration, may well be the way to provide effective international dispute resolution for consumers.

ABOUT THE AUTHOR

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