# USE OF ARBITRATION CLAUSES IN CONSUMER CONTRACTS: FAIR OR UNFAIR?

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## ABSTRACT

"Look at how conflicts are managed nowadays, and there has been a minor but observable change. Arbitration, something you could have only expected to find in large business transactions between companies, has gradually found its way into our lives and your bank account agreements, your food delivery application, and even your OTT subscriptions.[1] And, frankly, most of us do not pay any heed to them. It would be wrong for it to be termed as a choice; it is more like a reflex to avoid reading those complex and lengthy terms. That is exactly how the problem arises, as technically the consent is present, but it is not felt truly, as the consumer has not made an informed decision.

Part autonomy is one the defining and most fundamental principles of Arbitration.[2] Party autonomy implies that parties to the arbitration proceeding have mutually consented for the dispute to be resolved in such a manner.[3] This, in theory, sounds completely fair. However, consumer protection laws come from a very different place. It makes certain rather realistic assumptions that consumers do not negotiate even on equal terms with corporations. Then the question is: are they actually arbitration clauses that relate to choice, or are they just another term quietly slipped in, like delivery fees you only find out about at the checkout?

The paper explores that tension by taking a closer look at such laws as the Arbitration and Conciliation Act, 1996[4] and the Consumer Protection Act, 2019[5], as well as the way in which they have been interpreted by the courts. It also draws the examples of the US and the EU, as, somewhat surprisingly, they have approached the same problem in rather different ways. What begins to appear is a somewhat awkward image. Many of these arbitration provisions are not based on actual agreement, but are convenient to the party of strength. Companies write the conditions, establish the regulations, and

[1] *Arbitration Clauses in Everyday Contracts: What They Are and Why They're Everywhere*, CLA LEGAL, https://clalegal.com/arbitration-clauses-in-everyday-contracts-what-they-are-and-why-theyre-everywhere/
[2] Garvit Ramchandran and Shiva Singh, *Evolution of ADR in India*, Vol.1 Issue 3, Jus Corpus Law Journal.
[3] Dr. Nisha Amol Chavhan, *Evolution of ADR in India: Stepping to Effective Justice System*, Vol.5 Issue 5, International Journal for Multidisciplinary Research, 2023.
[4] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[5] Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India).

are aware that the majority of the consumers will not ask questions as at the end of the day, people simply need the service.[6] This said power imbalance is very significant, but if often overlooked. The entirety of the concept of consent is based on this principle.

Arbitration in itself is a very efficient practise of dispute resolution, but there might be certain fields or areas where certain limitations affect its effectiveness.[7] It has loads of benefits and advantages as we already know. However, its incorporation in consumer contracts does not harmonise well with the concept of consumer interest protection and consumer welfare. Hence, the practise of arbitration in itself, is not bad, but its current application and incorporation in consumer contracts might actually be undermining consumer interest"

**INTRODUCTION**

In the past couple decades, we have seen a significant change or shift in the mechanisms of dispute resolution. Earlier, as we all know, litigation was the only method to resolve disputes between parties, no matter who the parties are or what the subject matter of the dispute is. But, in today's modern world, with the emergence of new judicial trends inclining towards Alternative Dispute Resolution mechanisms, people have started opting for such "*out of court*" resolution methods, which includes arbitration, primarily, the most popular one out of the several ADR mechanisms. ADR has its own benefits, like being time and cost efficient, along with lessening court backlog. The proceedings are more informal and hence allow for more flexibility than suit proceedings in courts or tribunals. Then, further with the development of international laws, like the UNCITRAL Model Laws on Arbitration[8], and other trends in the developed countries, Indian laws have also been influenced. Hence, even in India, arbitration has now found its footing, mainly in commercial and cross border matters.

With such widespread and swift spread of adoption of Arbitration in our legal system as a method of dispute resolution, it's a bit troubling with how its creeped into day-to-day consumer dealings also.[9] Arbitration is no longer only limited to big multinationals, with matters relating to international parties. It has rather been silently incorporated into everyday consumer contracts, like, terms and conditions you agree to when you open a new bank account or

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[6] *Arbitration Clauses in Consumer Agreements*, ADVOCATE RIDGE, https://advocateridge.com/arbitration-clauses-in-consumer-agreements/.
[7] Fair Air Engineers (P) Ltd. V. NK Modi [(1996) 6 SCC 385]
[8] UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006).
[9] *supra* note 1.

download an app. These aren't exactly negotiated or discussed terms.[10] These are rather in the form of a package deal, that, in order for the consumer to avail the product or service, he/she needs to click on "I agree" otherwise he/she may not do so. And in today's fast-moving world, no consumer actually has the willingness to actually go through all such terms. These consumer contracts hence work on a take it or leave it model.[11] It may appear that the consumer does have a choice, i.e., not to accept the terms, but, that's an artificial choice, not truly a choice, as otherwise, in no manner can the consumer use the product or avail the service. And hence, the vast majority of consumers just ignore all such bulky and complex terms, and skip straight to "I accept".

This situation seems to be complicated. Consumers don't actually have bargaining power over such big corporations.[12] In a power comparison, you would find a big imbalance. The arbitration clauses inserted in such day-to-day consumer contracts are also not negotiated prior to insertion, they're just there, in fine print. Technically, it seems to be valid consent, but it is not, it's more of an artificially coerced consent.

Now, if we take the legal maxim "*Qui sentit commodum sentire debet et onus*" in consideration, that, if you take benefit, you ought to take the burden as well, in theory it seems justified. But, in real sense, it's not like the consumers had any choice while accepting such consumer contract's terms? When you are offered to use some simple services such as a bank or a digital platform under such conditions, then it is not a choice, it is more of a compulsion. Arbitration was not actively adopted by the consumers by their own choice, it was rather forced upon them, as a result of necessity of the consumer to engage in such contemporary economic transactions. And, the distinction between necessity and consent fades away. Here, what one could argue is a valid consent, is in actuality, a necessity, and the corporations inserting such clauses in such contracts are taking undue advantage of their power over consumers.

Hence, with this paper, I intend to critically analyse this problem. The main question being posed is that whether the consent in such contracts exist in fact or is it simply a lawful mandate

[10] *Consumer Rights and Arbitration Agreements*, LAWFORIA, https://lawforia.com/consumer-rights-and-arbitration-agreements/.

[11] Samir Malik, Mahip Singh & Ayushi Pandey, *Arbitration Is the Consumer's Choice: Hon'ble Supreme Court of India on Non-Arbitrability of Consumer Disputes*, DSK LEGAL (July 22, 2025), https://dsklegal.com/arbitration-is-the-consumers-choice-honble-supreme-court-of-india-on-non-arbitrability-of-consumer-disputes/.

[12] National Seeds Corporation Ltd. V. M. Madhusudhan Reddy [(2010) 2 SCC 506]

that is formed by mere acceptance of routine?[13] Furthermore, although such clauses are technically valid, but can they override safeguards or protections provided under consumer laws?[14] These questions hit at the very core of the relationship between arbitration and consumer law and how they interact in the present day.

## THEORETICAL FOUNDATION

To put simply, arbitration clauses in consumer contracts lie in a grey area between two competing concepts and laws and their intention. On the one hand, there is party autonomy, the notion that individuals ought to be left to choose on how their conflicts are solved.[15] On the other, there is the necessity to safeguard the consumers against arrangements, which, frankly speaking, are not necessarily fair.[16] The idea behind arbitration has long been based on the premise that both parties are rational agents, who are able to negotiate conditions, such as the decision not to use courts but to resolve the dispute privately. Theoretically that makes sense.

However, as soon as you enter the consumer arena, this supposition begins to shake. Consumer law does not work based on the notion of equality between the two parties, but rather acknowledges, in a very realistic manner, that they are not. The difference is quite uneven and due to this, the law acts in a more protecting manner. The question then is, are arbitration clauses in consumer contracts, in fact a manifestation of free choice, or are they simply extrapolating the concept of freedom into a set of circumstances where there is not much of it to start with?[17]

Here, the concept of the freedom of contract not being absolute comes in.[18] It is long established that courts would not believe that contractual freedom should not be considered with caution when there is a clearly more powerful side. This is somewhat misleading to call autonomy in consumer contracts where the terms on both sides are written by one side and merely accepted by the other. It begins to appear to be more of a legal fiction, something which exists in paper

[13] *supra* note 1.
[14] *supra* note 6.
[15] Avtar Singh, Law of Arbitration and Conciliation, (12ed. 2024), Priyanka Ganguly, *Navigating Legal Horizons: An in-depth Analysis of ADR in India – Trends, Challenges and Future Prospects*, Vol.10 Issue 4, International Journal of Research and Analytical Reviews, 2023.
[16] M. Hemlata Devi and Others v. B. Udayasri [(2024) 4 SCC 255]
[17] *supra* note 1.
[18] Avtar Singh, Law of Contracts, (12ed. 2024)

but not in fact.[19] However, that is not all we want; we want to know what type of consent it is.

And when you consider bargaining power, it gets even more apparent. Millions of consumers contracts are drafted in an elaborate and standardised manner by big companies. It is not a negotiation, it is not a back and forth, it is acceptance. To majority of consumers, it is either yes or yes, otherwise they can leave the service completely. That leaves not a lot of room to make any meaningful decisions.

What we, then, refer to as consent, is often but a form.[20] The law recognizes it as a valid one of course, but that is not necessarily informed or voluntary in any substantive sense. It's more of a checkbox than a considered decision. The whole case is further complicated by the doctrine of separability. Because the arbitration clause is not considered a part of the main contract, it may exist even in case the remainder of the contract is disputed. It may be true in business where the sides are more equal. However, it can further the balance when dealing with consumer contracts. A consumer who may have doubts about the fairness of the contract itself may be forced to go into arbitration to prevent his or her access to courts or consumer forums. To some extent, it promotes the same imbalance that consumer law is meant to correct.

All this taken together implies that the question of using formal consent in itself does not actually answer the larger question. It is the reality under it, the extent of choice available to the consumer, power distribution, and whether the process is really fair or not.[21] The absence of which means that arbitration will become less a question of dispute resolution that is conducted with efficiency, and more a question of regulating how, and where, even disputes can be brought.[22]

## NATURE OF CONSUMER CONTRACTS

When you take a closer look, what most consumer contracts do not do nowadays is to consider the consumer. The words are written by the company and are followed by all the people, be it opening a bank account, purchasing insurance, or simply opening a new application. Business-wise it is efficient. It saves time, is consistent. But to the consumer? Nearly no time to negotiate,

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[19] *Id.*
[20] *Id.*
[21] Citicorp Finance (India) Ltd. V. Snehasis Nanda [(2025) SCC OnLine SC 594], *supra* note 7.
[22] *supra* note 6.

ask questions or even know what is under the contract.[23]

These we usually refer to as take it or leave it contracts and that is exactly what they are. You can take all the terms as they are or just do not receive the service. No half way covenant. Think about something as routine as downloading a payment app or subscribing to a streaming service, you're faced with pages of terms that you can't edit, and realistically, won't read.[24] And in the law, your acceptance of such terms is regarded as fully informed consent.[25]

The emergence of online platforms has merely increased this. It has become instinctive, almost automatic to click on I agree. However, speaking honestly, the majority of people do not read when what they are assenting to. Can that be termed as consent? Or is it merely a prerequisite to access the service?

What is more worrying is the fact that crucial clauses such as arbitration clauses are usually entrenched below such conditions.[26] Consumers will not even know that they have consented to settle disputes by alternative dispute resolution and that they may be waiving their right to court.[27] That is where the imbalance is difficult to see. These terms are inside out to companies and outside out to consumers who are normally groping their way through them.

So even though these contracts are legally binding, there exists some uneasiness. They demonstrate an evident power and information asymmetry. The system is efficient to businesses but to consumers it seems that they have signed an agreement they never had an opportunity to learn, leave alone to negotiate. That is something that the law cannot afford to ignore.

## STATUTORY FRAMEWORK AND JUDICIAL APPROACH

On the face of it, Indian consumer contracts of arbitration are fairly simple you sign them, they bind you. However, when you go a little deeper, things are not so straightforward. The entire matter is a crossroad of two vital laws, which are the Arbitration and Conciliation Act, 1996[28] and the Consumer Protection Act, 2019[29]. And, quite interestingly, they do not necessarily pull

[23] *supra* note 1.
[24] *supra* note 1, *supra* note 6.
[25] *supra* note 18.
[26] *supra* note 10.
[27] *supra* note 16.
[28] *supra* note 4.
[29] *supra* note 5.

in the same direction.

The law of arbitration is founded on the concept of choice, i.e., party autonomy.[30] It presupposes that in case parties have already decided whether by signing a form or clicking on I agree, the decision made must be taken into consideration. Although the clause might be hidden in the standard form contract, the law tends to consider it as valid. Courts are also supposed to withdraw and allow arbitration to handle such an agreement once it exists. On paper, it all sounds so much the same: you say, you say, you say, you arbitrate.

However, the consumer law comes into the scene and changes the tune a bit. The Consumer Protection Act, 2019[31] does not examine the contracts in a strictly technical manner. It is more worried with whether the consumers get a fair opportunity to justice.[32] This is why it establishes consumer forums, which are supposed to be faster, cheaper and more accessible than courts.[33] And importantly, it makes it clear that these remedies are in addition to others. Therefore, even in the presence of an arbitration clause, a consumer is not precluded of such forums.[34]

It is here that the actual tension appears. Arbitration upholds the principle of "*honouring the agreement*".[35] Consumer law operates when safeguards are compromised. Practically, with respect to precedents and court rulings, we can see that our judiciary is inclined towards the latter, while trying to harmonise between the two concepts. Our judiciary has taken a pro-consumer interest stance and has hence entertained cases even where such arbitration clauses were present.[36]

If we look at this conflict, it appears as a battle between philosophies. Arbitration is more efficient, flexible and entertains little to no judicial intervention. Whereas, consumer law is based more on the doctrines of fairness and understanding the consumer's point of view and standing, that, they don't always have the same footing as that of such corporations. It acknowledges a power imbalance and hence provides safeguards for consumers. If the courts

[30] *supra* note 2, *supra* note 3, *supra* note 15, Hon'ble Justice S.B. Sinha, Judge Supreme Court of India, *ADR and Access to Justice: Issues and Perspectives*, (2021), Priyanka Ganguly, *Navigating Legal Horizons: An in-depth Analysis of ADR in India – Trends, Challenges and Future Prospects*, Vol.10 Issue 4, International Journal of Research and Analytical Reviews, 2023.
[31] *supra* note 4.
[32] *supra* note 11.
[33] *supra* note 4.
[34] *supra* note 7, *supra* note 12, *supra* note 16.
[35] *supra* note 15.
[36] *supra* note 12.

come to a conclusion that if the arbitration clause is applied too strictly and that would genuinely hamper consumer interest and welfare and deny them their statutory rights, then courts will ensure that such does not happen.

Our judiciary has acknowledged long ago that not all kinds of matters are arbitrable.[37] Certain matters, by their very nature, are not meant for the typical arbitration we use in practise now.[38] Consumer protection and welfare is one such domain of matters that truly cannot be resolved by arbitration, without compromising the interest of consumers.

In 1996, in one of the very first cases regarding arbitration (as the latest legislation came into effect in 1996), the Supreme Court ruled in the landmark case of *Fair Air Engineers v. NK Modi*[39] that "*the Consumer Protection Act provides a special statutory remedy that cannot be waived by private contract."* Courts have consistently held the view that statutory protections provided to consumers cannot be ousted by such arbitration clauses.

In the landmark case of *National Seeds Corporation Ltd. v. M. Madhusudhan Reddy*[40]*,* the Supreme Court firstly reiterated the view of a previous landmark judgement of *Fair Air Engineers v. NK Modi*[41] and then pronounced that the inclusion of an arbitration clause in consumer agreements does not mean that consumer protection forums lose their authority and jurisdiction. A simple clause cannot deprive consumer forums of their authority. If that were allowed, it would completely defeat the entire purpose of the consumer protection laws.

Further on, in the landmark case of *Emaar MGF Land Ltd. v. Aftab Singh*[42]*,* the question that was raised was whether courts were bound to refer consumer disputes to arbitration under section 8 of the Arbitration Act[43]. The Supreme Court replied negatively, and said that the Consumer Protection Act is a special legislation, designed with a specific purpose, and therefore can't be overridden by a more general law, i.e., the Arbitration Act. This reasoning is supported by the legal maxim "*generalia specialibus non derogant*". The main reasoning given by the court in this case was that special laws prevail whenever there is a conflict between a special law and a general law. This approach of the Indian judiciary has prevailed in several

[37] *supra* note 16.
[38] *supra* note 7.
[39] *supra* note 7.
[40] *supra* note 12.
[41] *supra* note 7.
[42] Emar MGF Land Ltd v. Aftab Singh [(2019) 12 SCC 751
[43] *supra* note 5.

case thereon, it wasn't a one-off situation.

Additionally, in the landmark case of *Citicorp Finance v. Snehasis Nanda*[44], the Supreme Court ruled that *"the position taken in M. Hemlatha Devi v. Udayasri, that a consumer cannot be forced into arbitration, is to be strengthened. The right to arbitrate must be freely and consciously exercised by the consumer alone. A powerful message in an era of algorithmic consent and digitally accepted clickwrap contracts."*

The 2015 Amendment of the Arbitration and Conciliation Act[45] introduced section 8(1)[46] in a new form and manner, which basically gave directions to the courts to refer matters to arbitration "*notwithstanding any judgment, decree or order of the Supreme Court or any court.*"[47] This amendment can be seen to be pro-arbitration. This supported the acts of several corporations of incorporating arbitration clauses in their everyday consumer contracts. Companies found support in the fact that once a valid arbitration clause would be found, courts wouldn't have any discretion on the matter and would have to refer the matter for arbitration, mandatorily.

The Consumer Protection Act is a welfare legislation, with the aim to protect consumer interest and provide for timely and effective adjudication in consumer matters by establishing specialised courts.[48] This statutory framework is particularly significant because, unlike commercial contracts between sophisticated entities, consumer transactions often involve an inherent inequality in bargaining power. Arbitration clauses in such contexts, especially when imposed via boilerplate terms, can function as procedural roadblocks rather than dispute resolution tools.

The Supreme Court also noted in the landmark case of *M. Hemalatha Devi*[49], that *"The Consumer Protection Act is in addition to, not in derogation of, other laws, meaning its remedies are optional add-ons, not subordinate alternatives.*

1. *Consumer forums offer remedies like punitive damages or penalties, which are not*

[44] *supra* note 21.
[45] Arbitration and Conciliation Act, (amendment act of 2015).
[46] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), § 8(1).
[47] *Id.*
[48] *supra* note 4.
[49] *supra* note 16.

*available in arbitration.*

*Thus, consumer protection is more than just a procedural option; it is a public policy requirement that no contract can waive."*

While the judiciary has tried to balance such conflicting concepts, complete harmony is yet missing. Courts don't deject arbitration clauses outright, but if they encroach on consumer protection safeguards, courts do not permit such overreach and encroachment. It is what makes arbitration provisions in consumer agreements such a controversial area, even to this day.

## ARBITRATION IN CONSUMER MATTERS

Before heavily criticising arbitration, it would not be just if we didn't look at its benefits, advantages and why it is increasingly gaining popularity in the dispute resolution area. In business and commercial matters, it is the most favoured approach as it is faster, more flexible and offers more autonomy and confidentiality to the parties. In this sphere of commercial and business matters, arbitration fits perfectly, like a puzzle piece, but in consumer matters, there is some sort of misfit.

For example, let's consider the advantage of efficiency. Arbitration is regarded as a quicker way to resolve matters, as courts are not resorted to and hence the complex procedure of courts need not be followed, which saves the parties' time. In consumer cases though, it may be a different experience. Arbitrators are often time-consuming to appoint, costs may creep in unnoticed and does not always run as smoothly as it may appear. More to the point, to the majority of consumers, it is not necessarily the speed, rather accessibility and fairness of the process. Technically faster but practically challenging or expensive to implement, a system does not actually do much good.

Next is the claim of lessening the pressure on courts. This is logical in terms of the system as a whole. Courts have become congested and moving the disputes in other places may alleviate that congestion. But that advantage is a bit far away when viewed by the consumer. Consumer forums have been established to provide an easier and less expensive path to justice. When the disputes are instead taken to the private arbitration, it runs the risk of reversing that intention. The system may be good but the individual consumer may be not so good.

And when you take a step back, a pattern begins to form. Arbitration strengths, efficiency, flexibility, and less judicial burden appear to work best on an institutional level. They assist in running the system in a healthier way and tend to comply with the interest of the frequent players such as corporation. Affordability, being clear, and easy to access are more important to consumers who are often having to deal with the first instance of dispute. Arbitration does not always pay off on those fronts. The problem is not that arbitration is in itself flawed. It obviously has its location. But its use in consumer contracts needs to be looked at more carefully. It is not whether arbitration works, but whether it works to the benefit of consumers, or whether it has the effect of putting them in a disadvantaged position, without even their conscious knowledge.[50]

## CRITICAL ANALYSIS

Things begin to crack, however, once you take a closer look. Arbitration on paper should be neutral, efficient, even fair. But, in practicality, especially in the matters of consumer protection, this is not always the case.[51] Consumer matters are heavily influenced due to the power imbalance between consumers and companies.[52]

The main problem is what I would refer to as forced arbitration. The founding concept of arbitration is mutually consenting parties. But in consumer contracts, the terms are already written, the clause already exists and the only part of the consumer is accepting or rejecting it, which is often a mere "I agree", by clicking. It involves no discussion, no negotiation, no common consensus and no actual awareness. Hence, even though "technically" it is consent if we look at the black letter of law, but it is far from the true concept of consent if we look at the spirit of law. It is a mere technicality or formality in consumer contracts. The consumer is not even aware or conscious of what he/she is agreeing to, but that is because, nonetheless, to move on and do his/her needful work, he/she needs to agree to the terms, and companies take undue advantage of this necessity by disguising it as consent.

Next is cost and accessibility. Arbitration is a process that is usually sold as less expensive and less complicated than a court proceeding, but that is not usually the case. The cost of arbitrator fees, administrative fees and legal fees can be accumulated in no time. That is a genuine barrier to an average consumer. The consumer forums on the other hand were to be more friendly,

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[50] *supra* note 1, *supra* note 6, *supra* note 10, *supra* note 11.
[51] *supra* note 21.
[52] *supra* note 21.

cheaper, less threatening. When conflicts are pushed into arbitration in this regard it may in fact prevent even legitimate claims.

Another problem that lacks a discussion is transparency. Secrecy may be prudent in business conflicts, businesses usually like to keep things a secret. However, in consumer situations, the privacy can be a disadvantage.[53] Awareness, unveiling patterns and making companies accountable are assisted by public decisions. When all the processes are held in secret, problems can be overlooked that can be repeated, and injustices can be carried out silently.[54]

Altogether, these issues clearly reflect that's not a technical issue, but a major structural issue rather. Arbitration, in itself, as a mechanism of dispute resolution, is not bad, but is rather effective and super-efficient, but its current application in consumer contracts area is rather problematic. It can possibly override the statutory protections and safeguards provided to consumers, and therefore defeat the purpose of consumer protection laws, and undermine the spirit of law, and that is a real issue that needs to be addressed by our judiciary and legislature.

## COMPARATIVE ANALYSIS

As we can see from the above analysis, India takes a rather protective stance,[55] but the global scenario is mixed. In many advanced economies that have pro-arbitration regimes, courts have rather upheld such arbitration clauses over consumer interest and welfare in consumer contracts. Other legal systems take a more cautious approach, with much more scrutiny.

For example, the USA has the most pro-arbitration regime among such developed economies[56]. In the landmark case of *AT&T Mobility v. Concepcion*[57], the Supreme Court of the United States ruled in favour of such arbitration clauses, upheld their authority and hence essentially sidelined consumer protections.

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[53] *supra* note 1, *supra* note 6, *supra* note 10, *supra* note 11.
[54] *supra* note 1, *supra* note 6, *supra* note 10, *supra* note 11.
[55] *supra* note 7.
[56] Samir Malik, Mahip Singh & Ayushi Pandey, *Arbitration Is the Consumer's Choice: Hon'ble Supreme Court of India on Non-Arbitrability of Consumer Disputes*, DSK LEGAL (July 22, 2025), https://dsklegal.com/arbitration-is-the-consumers-choice-honble-supreme-court-of-india-on-non-arbitrability-of-consumer-disputes/., Justinas Jarusevicius, *Consumer Arbitration – Will The Two Different Worlds Across The Ocean Converge?,* KLUWER ARBITRATION BLOG (Feb. 25, 2016), https://legalblogs.wolterskluwer.com/arbitration-blog/consumer-arbitration-will-the-two-different-worlds-across-the-ocean-converge/.
[57] AT & T Mobility LLC v. Concepcion [563 U.S. 333 (2011)]

A report published by the *American Association for Justice* in December 2023 stated that *"the number of forced arbitration cases in the US skyrocketed 467% in 2022, with only a 0.7%-win rate for consumers in such forced arbitrations"*[58]

On the other hand, in the European Union, arbitration clauses in consumer contracts are often given the pointy end of the stick and presumed to be unfair, unless such is rebutted.[59] The Court of Justice of the European Union, in the landmark case of *Elisa Maria v. Centro Movil*[60], held that *"domestic courts must strike down such clauses if deemed unfair, even if the consumer failed to object during arbitration"*

Further, in *Asturcom Telecommunications v. Cristina Rodriguez*[61], the Court further stated that *"courts must review the fairness of arbitration clauses ex officio and refuse enforcement of arbitral awards based on unfair terms"*

These precedents show and reflect the European Union's pro-consumer welfare and interest approach in cases of their conflict with arbitration clauses. These cases reflect how consumer protection is an integral part of the governance policy of the EU.[62]

India, too, has somewhat of a protectionist stance on this matter, inclining towards the EU policy framework, finding some similarities in the legal mindsets. Indian laws and judiciary limit the application of arbitration by consumer protection laws. Such clauses are not per se binding on consumers. This protective approach reflects a reasoned stance that our judiciary has taken, keeping in mind the practical aspects of such interactions.

## CONCLUSION

Hence, this poses a major issue that whether arbitration is being preferred by people or is it being forced on them silently, and they just end up accepting it? This would completely shake the entire concept of arbitration, which is founded on the principle of mutual consent. If arbitration is applied in such a manner that it is rather becoming a forced practise, then we are indeed moving away from the essence of what true and fair arbitration was. This is exactly what the case with consumer contracts is. The essence of arbitration, which rests on the

[58] *American Association for Justice*, December 2023.
[59] *supra* note 56.
[60] Elisa Maria Mostaza Claro v. Centro Movil Milenium SL, [CJEU, Case C-168/05]a
[61] Asturcom Telecommunicaciones SL v. Cristina Rodriguez Nogueria, [CJEU, Case C-40/08]
[62] *supra* note 56.

foundational principle of "*mutual consent*", is fading away due to such erroneous application.

Confidentiality in arbitration proceedings, while advantageous to parties in commercial and business matters, but rather harms the interest of the consumer in consumer disputes as they represent public interest at large, and are still being kept behind closed doors. Companies can escape public accountability by such proceedings, which is not in public interest.

The current arbitral framework does seem like it was made with the intent of resolving commercial, business and cross-border matters, rather than dealing with consumer matters. It doesn't take into account consumer realities. Such intent was absent at the time of drafting, and could only be incorporated by an amendment.

Hence, to conclude, I present the view that arbitration in itself is a much-needed resolution method, but its current framework is inadequate to incorporate consumer matters in its purview as well. At the end of the day, arbitration is a revolutionary tool for dispute resolution, if its application remains true to its essence, i.e., mutual consent principle.