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United States Department of Commerce and
Federal Trade Commission
via e mail to adr@ftc.gov

Re: Alternative Dispute Resolution in the Borderless Online Marketplace

Gentlepersons:

Introduction

You have sought comment to inform your discussion regarding the use of alternative dispute resolution for online consumer transactions. I submit these comments on behalf of the Association of Trial Lawyers of America (ATLA). ATLA is a voluntary national bar association whose 50,000 members primarily represent persons seeking to vindicate their legal rights in personal injury tort actions, civil rights cases, and commercial litigation, including litigation under consumer protection statutes.

The mission of ATLA includes the protection of the right trial by jury in civil cases.¹ In an age of statutes, to an audience of persons who administer statutes through regulation, we feel a need to remind you of the importance of that right, without which the Constitution would not have come into existence, and of the right's unappreciated history. Your Notice of Request for Comment similarly moves us to remind you of basic values of democracy, sovereignty, and federalism. We will do this immediately, and will discuss juries and arbitration in more detail below.

We treasure the jury, in part, as a democratic control on abuse of aggregated power. Two other democratic mechanisms for this end are passing laws regulating commerce and administering

¹ The Seventh Amendment of the United States Constitution and the constitutions of 48 states, *See Paul B. Weiss, Comment, Reforming Tort Reform: Is There Substance in the Seventh Amendment?*, 38 Cath. U. L. Rev. 737, 739 n.11 (1989) (listing state constitutional provisions), guarantee access to jury trials for resolving civil disputes.

common law rules that require responsibility for misuse of power. Arbitral schemes diminish these sovereign powers of states. In general, arbitration, unlike adjudication in courts, is not transparent, is not publicly accountable, and does not enforce the rules of positive law by which sovereign people have decided to live.

Disturbingly, your Notice of Request for Comment notes, “Complying with the laws of numerous jurisdictions and being vulnerable to lawsuits in multiple courts could significantly increase the cost of doing business online.” I want to emphasize what a remarkable statement this is. The American experience requires that complying with the laws of jurisdictions in which business is transacted and being subject to suit in those jurisdictions is the baseline of conduct from which to project business costs. Costs to business do not “increase” from that baseline.

A more telling way of framing the issue would be for your Notice to recite, “The cost of doing business could be decreased by exempting e-businesses from complying with the law.” That formulation clearly raises concerns of democratic control of business. You might engage the public in a debate about whether that is desirable, but there should be no ambiguity about what is being debated.

The Fundamental Right to Trial by Jury in Civil Cases

Any incursion on the right to jury trial is of significant interest to ATLA and its members. Any scheme of binding arbitration premised on pre-dispute waiver of the right to trial by jury – this is what I refer to as “mandatory arbitration” – is an incursion on that right. I will describe here, briefly, the history of the adoption of the Seventh Amendment. This history informs criticisms of mandatory arbitration.

The jury trial is not merely a procedural feature of our civil justice system. It is a fundamental political right. A war was fought, and lives lost, to win this right. The right to jury trial has become unappreciated. See Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 *Hastings L.J.* 579 (1993).

The colonists closely followed the lawsuits of John Wilkes and his printer against officials bent on preventing his allegedly seditious publication and exulted in a large jury award of punitive damages. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). The colonists were concerned with being deprived of civil jury rights. “Because of the jury’s power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies.” Landsman, *supra*, at 596.

A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. See Carl Ubbelohde, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 209-11 (1960); Roscoe Pound, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 654 (1973). The colonists complained bitterly of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. Landsman, *supra* at 595-97.

After the successful Revolution, the adoption of the Seventh Amendment was crucial to ratification of the Constitution which would govern the former colonies. On Sept 12, 1787, as the Constitutional Convention was nearing the end of its work in Philadelphia, Delegate Wilson

observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.” A motion to add that right to Art. III, §2, cl.3, which guaranteed trial by jury in criminal cases, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966). That omission suggested to many that the constitution represented “virtual abolition of the civil jury” and very nearly doomed ratification of the entire constitution. Henderson, *supra*, at 295-98; Wolfram, *supra*, at 672 n.89.

The Seventh Amendment was designed to limit judicial power and enhance self government through the participation of ordinary citizens in jury trials:

Reacting to their experiences at the hands of autocratic British judges, The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979)(Rehnquist, C.J., dissenting).

The right to jury trial in civil cases was recognized as similarly important in state constitutions. See, e.g., Federalist No. 83, in which Hamilton argues that the lack of a guarantee of civil jury trial in the federal courts in no way impinges that interest, as most general, civil cases will continue to be adjudicated in state courts, where the right is guaranteed.

The Right to Jury Trial as a Limitation on Agency Power

I have attended meetings, also attended by representatives of both the FTC and the Department of Commerce, at which consumer and industry representatives have begun to describe concerns with resolving disputes that arise in the “borderless online marketplace.” Although almost all participants in those meetings have indicated no interest in establishing any regime of mandatory arbitration, that feeling is not unanimous. Because of the Seventh Amendment, it would be outside the power of either agency - or even of Congress - to impose such a regime. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A]n act of the legislature, repugnant to the Constitution, is void.”); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (“[T]he use of the name of the state to enforce an unconstitutional act ...is a proceeding without the authority of...the state in its sovereign or governmental capacity. It is simply an illegal act...void because unconstitutional.”)

Mandatory Arbitration as Bad Policy

It incurs on state sovereignty

It would be unwise to permit or facilitate such a regime, and wise to prohibit one. As noted above, mandatory arbitration significantly diminishes the sovereign power of states (generically – I mean both nation states and states of our federated republic) to regulate commerce. See *Allied-Bruce Terminix Companies, Inc., v. Dobson*, 513 U.S. 265, 284-285 (1995)(Scalia, J., dissenting) (adherence to doctrine requiring enforcement of mandatory arbitration “entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.”). See also David S. Schwartz, *Enforcing Small Print To Protect Big Business*, 1997 Wis. L. Rev. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash. U. Law Q. 637 (1996), and articles cited at 712, n.3.

It takes place absent actual consent by the consumer

Actual consent of the consumer is notably absent from mandatory arbitration. Mandatory arbitration usually is imposed through contracts of adhesion, where actual consent by definition is absent. Such contracts, in general, are enforceable only when their provisions are “reasonable and just.” Restatement of Contracts, Second §211. *See also* Uniform Commercial Code § 2-302, enacted by almost every state, invalidating unconscionable provisions of contracts for the sale of goods. Consumers have been found not to understand the magnitude of a consent to arbitrate. In a recent “groundbreaking collaboration,” *Prescribing ADR*, 84-Oct A.B.A. J. 91 (October 1998), several of the most prestigious professional groups in America interested in arbitration of health care claims - the American Bar Association, the American Medical Association, and the American Arbitration Association - found that pre-dispute arbitration agreements *never* could be knowing and voluntary. *See* AMERICAN ARBITRATION ASSOCIATION, AMERICAN BAR ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, COMMISSION ON HEALTH CARE DISPUTE RESOLUTION, DRAFT FINAL REPORT, http://www.adr.org/hcdrc_final_report.html, p. 4. The Commission noted, “In disputes involving patients, binding forms of dispute resolution should be used *only* where the parties agree to do so after a dispute arises.” *Id.* (emphasis supplied). This is “the *only* way to guarantee that the agreement to arbitrate is both knowing and voluntary,” and is necessary to ensure “that the parties’ constitutional and other legal rights are protected.” (emphasis supplied).

Waiver of the right to trial by jury, which inheres in mandatory arbitration, generally must be knowingly, intelligent, and voluntary. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444 (waiver of a constitutional right must be “voluntarily, knowingly, and intelligently” given); *Hittle v. Santa Barbara County Employees Retirement Association*, 39 Cal. 3d 374, 389-90 (1985) (noting that waiver of a constitutional right can be made only knowingly and intelligently, with actual and demonstrable knowledge of the right that was waived, and imposing a burden of proving waiver by clear and convincing evidence, with doubtful cases resolved against finding waiver). No such standard is met when pre-dispute arbitration is mandated in an adhesion contract.

A good example of a travesty involving enforceability of an arbitration clause, absent any real consent and contrary to the spirit of the law, is *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (1997), in which a customer bought a computer over the phone and was subject to an arbitration clause packed inside the box.

It is structurally subject to bias

Mandatory arbitration also is structurally subject to bias. Mandatory arbitration is generally created by merchants, who become “repeat players” before arbitrators who depend for their livelihood on repeat business and who resolve disputes with a parade of unrelated consumers. Actual bias among arbitrators in this kind of arrangement is well-known, well-documented, and has a name: “repeat player bias.” *See* Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 Ga. L. Rev. 419, 493 (1997) (citing authorities) (“The “repeat player” phenomenon in labor and employment settings has meant a much higher victory rate for employers and other institutional players who regularly engage in arbitration, in contrast to one-shot players such as employees or consumers. In employment arbitration cases, one study ‘found that the odds are 5-to-1 against the employee in a repeat-player case.’”). *See also* General Accounting Office, *How Registered Representatives Fare in Discrimination Disputes*,

GAO/HEHS-94-17 (March 30, 1994) (finding and expressing concern about racial bias among arbitrators); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. Law Q. 637, 684 n. 273 (1996).

This kind of bias only can be exacerbated when arbitrators bind together as commercial entities and market themselves to the repeat players. The *Washington Post* has reported that, in one such arrangement, the repeat player won 19,618 cases and consumers won 87. Caroline E. Mayer, "Win Some, Lose Rarely?" *Washington Post*, p. E. 1, March 1, 2000.

Consumer arbitration was not meant to be governed by the Federal Arbitration Act

Contrary to common belief, the Federal Arbitration Act was not designed to encourage arbitration of this kind. It was not designed to apply to actions in state courts, and certainly it never was designed to apply to disputes between merchants and consumers. See *Southland Corporation v. Keating*, 465 U.S. 1, 22 (1984) (O'Connor, J., joined by Rehnquist, C.J. dissenting). Justice O'Connor's views on these points are explicitly endorsed by a majority of the sitting members of the Supreme Court. *Id.* at 17 (Justice Stevens, concurring in part and dissenting in part, noting that Justice O'Connor's analysis of Congressional intent was correct); *Allied-Bruce Terminix Companies, Inc., v. Dobson*, 513 U.S. 265, 284-285 (1995) (Scalia, J., dissenting); *Id.* at 285 (Thomas, J., dissenting).

Interaction with the Draft Hague Convention on Enforceability of Judgments

Both agencies are aware of ongoing negotiations, instituted by the United States, to draft, under the auspices of The Hague, a treaty creating a regime for the international recognition and enforcement of domestic judgments. Because the United States is among the world's most open jurisdictions, where foreign judgments are regularly and readily enforced, it sought a regime under which its judgments would be treated similarly by foreign courts. A European insistence that the United States, domestically, make its courts less open has stalled negotiations. Progress has been further slowed as ramifications of the draft language on e-businesses is separately considered. In this context, ramifications of sovereignty receive explicit discussion.

The agencies should continue to monitor closely the debates on this treaty – including comments from advisory panels to the United States delegation and debates among the delegation itself – as they evolve policy regarding dispute resolution in cyberspace.

Brief Thoughts Regarding On-Line Voluntary Arbitration of Small Consumer Disputes

Obviously, our objections to mandatory arbitration are strong. We note, however, that our criticisms do not necessarily apply to the creation and maintenance of inexpensive, on-line mechanisms for the resolution of small consumer disputes. It seems possible that fair mechanisms, offered post-dispute to truly consenting consumers, could evolve. Any such voluntary system should address the concerns we have raised.

Conclusion

Thank you for the opportunity to comment. As you proceed in your work, keep in mind that the right to public resolution of disputes, by juries, is central American jurisprudence. Keep in

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mind also that actual, informed consent to waive that right is a necessary element of any alternative dispute resolution system.

We will be happy to work with you in this process and we are available for further comment or discussion.

Very truly yours,

John Vail, for ATLA