



# Consumer Debt Collection Due Process Protocol Statement of Principles

National Task Force on the Arbitration of Consumer Debt Collection Disputes  
October, 2010

## I. Background

### A. The Consumer Due Process Protocol

Under the auspices of the American Arbitration Association® (“AAA®”), a National Task Force on the Arbitration of Consumer Debt Collection Disputes was convened in 2009 with a twofold mission. First, to consider the efficacy of arbitration to resolve consumer debt collection disputes. Second, if arbitration was determined to be an efficacious method of resolving such disputes, then the Task Force would propose fairness and due process standards for the equitable resolution of consumer debt disputes.

A starting point for the work of the Task Force was to consider the protections provided for in the *Consumer Due Process Protocol*, which was promulgated in April, 1998 (the “*Protocol*”).<sup>1</sup> The Protocol established a bedrock foundation with regard to the essential features necessary for the creation of a fair arbitration program involving consumers. The *Protocol* has been influential among arbitration providers, arbitrators, and organizations that design and implement arbitration programs between businesses and consumers.

In the years since its development, the *Protocol* has been widely cited and discussed.<sup>2</sup> The legitimacy and regard for the Protocol resulted in large respect because, under the auspices of the AAA, it was drafted by a National Consumer Disputes Advisory Committee that was comprised of a tripartite membership of consumer representatives, dispute resolution provider representatives, and “nonaligned” members, including academics, retired judges and government officials.

The key provisions of the Protocol address matters that include the necessity of independent administration, an equal voice among consumers and businesses in the selection of the arbitrator, the ability of parties to retain the right to seek relief in small claims court, reasonable cost to the consumer, the availability of all remedies in the arbitral forum as would otherwise be available in court, and the encouragement of the use of arbitration.<sup>3</sup>

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1 The Protocol is available at <https://www.adr.org/aaa/faces/rules/codes>.

2 The Protocol has been cited or discussed in over 140 journal and law review articles in addition to various state and federal court decisions, including Justice Ginsburg’s dissenting opinion in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), n. 2.

3 The complete list of the 15 Principles enumerated in the Protocol are 1. Fundamentally-Fair Process; 2. Access to Information Regarding ADR Program; 3. Independent and Impartial Neutral; Independent Administration; 4. Quality and Competence of Neutrals; 5. Small Claims; 6. Reasonable Cost; 7. Reasonably Convenient Location; 8. Reasonable Time Limits; 9. Right to Representation; 10. Mediation; 11. Agreements to Arbitrate; 12. Arbitration Hearings; 13. Access to Information; 14. Arbitral Remedies; and 15. Arbitration Awards.



In the intervening years since the development of the *Protocol*, the Courts have followed with a line of cases that invigorated the national policy favoring arbitration as reflected in the Federal Arbitration Act, and enforced arbitration agreements in consumer contracts so long as they complied with the type of basic fairness standards contained in the Protocol.<sup>4</sup> Aided by this judicial support, the number of businesses that started to include arbitration agreements in their contracts with consumers increased.

Along with the increased use of arbitration in the consumer area came some increased scrutiny. In March 2009, the House of Representatives Domestic Policy Subcommittee of the Committee on Oversight and Government Reform commenced an investigation on the issue of debt collection arbitration.<sup>5</sup> The Subcommittee sought various types of information from the AAA, along with other arbitration providers, but ultimately focused more specifically on a subset of consumer arbitration cases, namely, consumer debt collection arbitrations.

In conjunction with the Subcommittee's investigation, the AAA examined and reflected upon its own experience with debt collection arbitration practices. As indicated in the AAA's testimony that was submitted in connection with the hearings the Subcommittee held, the AAA identified a number of unique characteristics of debt collection arbitration which set that caseload apart from other types of arbitration and consumer arbitration programs.<sup>6</sup> Those unique characteristics include the extent to which consumers receive notice of a debt collection proceeding, the manner in which arbitrators are appointed, unequal pleading and evidentiary standards, difficulties that consumers encounter raising defenses and counterclaims, and the need for arbitrators to have knowledge of the relevant and applicable law.

## B. Creation of the Task Force

As a result of the due process and fairness concerns the AAA had identified as part of its study of consumer debt arbitration programs, the AAA placed a moratorium on the administration of any further such caseloads. At the same time, the AAA committed itself to convening a committee of individuals with expertise in consumer debt and arbitration to consider what particular safeguards and fair-play standards needed to be addressed before the AAA would consider administering any further debt collection arbitrations. That committee thereafter came to be known as the National Task Force on Issues Related to the Arbitration of Consumer Debt Collection Disputes (the "Task Force").

The Task Force was chaired by Theodore J. St. Antoine, the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan Law School. Like the committee which considered the *Protocol*, the Task Force was composed of a broad cross section of stakeholders on the issue of debt collection arbitration. Task Force members, listed below, consisted of representatives of the AAA, former state and federal judges, consumer advocates, creditor representatives and debtor representatives, and NGO and government officials. The Task Force met in person in New York on November

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4 See, e.g., *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 Harv. L. Rev. 1170 (2009) ("Over the past twenty years, the Supreme Court has made arbitration agreements easier to enforce and arbitration proceedings harder to review.")

5 In the days prior to the Subcommittee convening hearings on the issue of debt collection arbitration in July, 2009, the Minnesota Attorney General filed suit against the National Arbitration Forum, a for-profit arbitration provider that focused almost exclusively on the administration of debt collection arbitration. The suit alleged that NAF violated various state consumer protection laws as a result of the alleged cross ownership of NAF with major collection law firms representing the credit card companies. NAF settled the suit brought by the State of Minnesota within a week, which resulted in an agreement by the NAF to permanently cease administering any consumer arbitrations.

6 The testimony presented on behalf of the AAA before the Subcommittee is available at <http://www.adr.org/si.asp?id=5770>.



11, 2009, January 29, 2010 and March 2, 2010. To ensure that the broadest possible range of views was considered by the Task Force, the AAA also sought the views of a Commentary Group which consisted of nineteen additional individuals. The Commentary Group was advised of the work of the Task Force, and each individual was asked to provide input on the work of the Task Force. Many of the individuals in the Commentary Group were also considered to be leading voices on the issue of debt collection or consumer arbitration. As a result of the input of the Task Force members themselves, in addition to those invitees of the Commentary Group who spoke in person or via written submissions, a full range of issues and views on debt collection arbitration were raised.

The mission statement of the Task Force committed the group to consider questions about the fairness and due process protections presented by consumer debt arbitrations. Those questions included concerns regarding evidentiary standards, procedures for arbitrator selection and disclosure of conflicts, default procedures and type of notice to be provided to consumers, and whether both pre and post agreements to arbitrate debt collection disputes should be enforceable. Further the mission statement explained that the purpose of the Task Force was to “bring together an informed, representative and diverse group of individuals to examine the efficacy of arbitration to resolve consumer debt collection disputes, and if finding same to be possible to propose fairness and due process standards and procedures for the equitable resolution of consumer debt collection disputes.”



## II. Is There a Role for Arbitration in Consumer Debt Collection?

During the Task Force meetings, it was posited that arbitration had the potential to play an important and positive role in the resolution of debt collection disputes. First, as a baseline it was noted that substantial problems existed with the *litigation* in court of debt collection disputes. In comparison, and particularly in light of the criticisms of debt collection proceedings in the judicial forum, arbitration may have the potential to provide a fairer, more effective and more expeditious forum.

It has been well documented that debt collection disputes have inundated courts. In 2006, approximately 320,000 consumer debt cases were filed in New York City alone.<sup>7</sup> The tremendous strain on the overburdened courts was also presented as a fact that weighed in favor of the use of arbitration. As a result of those backlogs, some Task Force members suggested that a court order enforcing an arbitration award may often be obtained sooner than a court order in an action brought there initially. Among other concerns, in debt collection litigations consumers rarely appear to defend themselves, are almost never represented by counsel, and default judgments are commonly awarded against them even though the documentation reflecting the debt may be insufficient. Further, consumer debt collection litigations are frequently commenced by debt buyers who purchased debt from the original creditor rather than by the company that originally issued the debt.<sup>8</sup> Problems arising out of cases brought by debt purchasers are more likely because such purchasers are less likely to have complete or accurate information about the debt that was bought. Finally, once debt collection litigation has commenced in court, various procedural obstacles facing debtors have been recognized.<sup>9</sup>

Notably, the Federal Trade Commission has conducted a substantial evaluation of debt collection litigation and arbitration and other debt collection practices in the United States.<sup>10</sup>

Some Task Force members noted the commonly proposed advantages of arbitration as a faster, cheaper and more informal way of resolving disputes as compared to litigation as factors that result in arbitration being viewed favorably in debt collection arbitrations. With regard to the relative informality of the arbitration process as compared to litigation, some suggested that the arbitration process could be made substantially more accessible and easier for debtors to navigate than the current court process for debt collection litigation.

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7 *Debt Weight, The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, p.3. The Urban Justice Center, October 2007, available at [www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf). The Federal Trade Commission's publication *Collection Consumer Debts –The Challenges of Change*, available at [www.ftc.gov/bcp/workshops/debtcollection/dcw.pdf](http://www.ftc.gov/bcp/workshops/debtcollection/dcw.pdf), describes substantial problems with the debt collection practices and the legal structure that governs this subject more generally. That publication cites to sources which report that 60% of the 120,000 small claims cases filed in Massachusetts in 2005 were filed by debt collectors, and that in Cook County Circuit Court in Chicago, 119,000 cases against alleged debtors were pending as of June 2008. *Id.* at p.55

8 *Id.* at pp. 2-3.

9 The report *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, issued by the organization New York Appleseed explains various barriers to court and other systematic barriers facing debtors in New York City Civil Court. The report is available at <http://ny.appleseednetwork.org>.

10 That initiative includes the publication of the report in February 2009, *Collecting Consumer Debts –The Challenges of Change*. The FTC also conducted three extensive roundtables throughout the United States in the late summer and winter of 2009 that examined consumer protection issue in debt collection proceedings against individual consumers. The FTC also issued a comprehensive report summarizing its findings on the issue of debt collection litigation and arbitration in the July 2010 publication *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, available at [www.ftc.gov/os/2010/07/debtcollectionreport.pdf](http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf).



More specifically, the possibility of providing additional information or forms, the use of telephonic hearings, less formal pleading, documentary and evidentiary requirements, video conferencing, and other less formal means of communicating could be potentially advantageous to consumers. The possibility of the arbitration process to be structured to encourage settlement through informal discussions was also observed.

Finally, it was suggested that the use of arbitration might provide a mechanism to create uniform standards for the resolution of consumer debt disputes, as opposed to the patchwork of systems that exist in state and local courts which hear those types of disputes around the country.

However, some concerns were expressed regarding the ability of arbitration to resolve consumer debt disputes. One practical issue raised by debt collection attorneys was that the need for speed in obtaining a judgment is of significant importance to creditors, and as explained by them, arbitration involves a two-step process, the first of which is obtaining an arbitration award.

Once that is obtained, a second step is required in which an action in the appropriate court is commenced to confirm that arbitration award and have that award converted to a judgment. Even though confirmation of an arbitration award involves an expeditious court proceeding which does not involve a re-litigation of the merits of a dispute, the fact that a confirmation proceeding needs to be commenced could cause arbitration to be viewed less advantageously by debt collectors. Stated differently, creditors may view arbitration as a preliminary step to a court action.

Another concern expressed about debt collection arbitration involves the perception that businesses which include arbitration agreements in their contracts with consumers gain an advantage since debt collectors have the opportunity to present numerous cases to the same arbitrator, whereas the individual consumer might only appear before the arbitrator on a single occasion.<sup>11</sup>

While the Task Force was in the process of deliberating over the issue of debt collection arbitration, the Searle Civil Justice Institute, based at Northwestern University School of Law, issued an interim report titled *Creditor Claims in Arbitration and in Court*,<sup>12</sup> ("the Searle Report") which addressed a number of the issues the Task Force was considering, and in particular, compared the outcomes in consumer debt disputes in court and in arbitration.

After comparing data from AAA administered consumer debt collection arbitrations with certain consumer debt collection litigation caseloads in federal court and Virginia and Oklahoma state courts, the Searle Report found that while creditor win rates are high everywhere, they were actually lower in AAA administered arbitrations than in court. In the court programs studied, creditors won some relief in 98% to 100% of the debt collection cases that went to judgment. However, in the AAA cases studied, the rates in which creditors obtained some relief were 97.1% for the debt collection program administered by the AAA, and 86.2% in individual AAA debt collection arbitrations.

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<sup>11</sup> Principle 8, *infra*, addresses this concern.

<sup>12</sup> The Chair of the Searle Civil Justice Institute's Consumer Arbitration Task Force is Christopher Drahozal, who was also a Task Force member. The Searle report is available at <http://www.law.northwestern.edu/searlecenter/issues/index.cfm?ID=17>.



The importance of the Searle Report was twofold. First, it was the first independent research study which compared the outcomes of debt collection arbitration and litigation. Second, while it confirmed the extent of a number of problems with consumer debt collection caseloads, it concluded that “[h]igh creditor win rates and recovery rates appear to be due to characteristics of debt collection cases rather than the venue—court or arbitration—in which those cases are resolved.”<sup>13</sup>

The Task Force thereafter concluded that whether or not arbitration of debt collection disputes takes place in any substantial numbers in the future, the Task Force would focus on discussing how debt collection arbitration could be structured so that it would be effective, efficient, and fair to the creditors, collectors and consumers. Specifically, the Task Force’s major task would be to define “due process” or procedural protections above and beyond those that were already contained in the *Consumer Protocol*. Thus, the Principles contained in this *Consumer Debt Collection Due Process Protocol* supplement, but do not supplant, the protections contained in the *Consumer Protocol*.

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<sup>13</sup> Searle Report, at 27.



### III. Major New Procedural Standards Required

The due process and fairness standards provided for in the *Consumer Due Process Protocol* should be applied to all consumer arbitrations including arbitrations that involve consumer debts. In addition, the following additional Principles should be applied in debt collection arbitrations. Consequently, all of the principles of due process protection provided for in the *Consumer Due Process Protocol* should be supplemented by the principles in this *Consumer Debt Collection Due Process Protocol*.

**Principle 1. Debt Collection Arbitration should be commenced in a manner that provides substantial certainty that the debtor will receive the notice or demand for arbitration.**

One of the greatest concerns about consumer debt collection, whether in arbitration or in court, is that debtors frequently do not appear or otherwise defend collections actions. As a result, some have called into question whether consumers have actually received notice that a proceeding has been commenced against them.<sup>14</sup> Where the parties' contract provides that disputes are to be resolved by arbitration, some suggested that those concerns are heightened. The reason for the greater concern in arbitration proceedings results from the fact that arbitrations generally are commenced in a manner that is substantially less formal than the service requirements specified in state and federal laws. For example, Rule 39 of the AAA's *Commercial Arbitration Rules* provides that any papers associated with the initiation of an arbitration can be served by mail, or alternatively by overnight delivery or fax.<sup>15</sup>

Since so many consumers do not respond to notices regarding debt collection proceedings, the requirements to assure they actually receive notice of demands for arbitration must be heightened. Specifically, claimants should serve their demands in a manner in which they will obtain confirmation that the demand was received by an appropriate person. Demands for arbitration could, for example, be served in a manner similar to the way that a summons and complaint would be served under applicable state or federal law. Alternatively, creditors could serve demands for arbitration via overnight delivery in a manner in which they would obtain a signature from the party that received the overnight letter.

**Principle 2. the initial communication from the ADR provider should be delivered in a manner that reflects an effort to communicate in a way that would normally result in a substantial certainty that the debtor will receive the communication.**

Similarly, the ADR provider's initial communication informing a consumer that the arbitration is commencing and setting forth procedures relating to an arbitrator's appointment or a hearing should also be sent in a manner other than by regular mail. The reason that first class mail is not viewed as a suitable method of providing an initial communication regarding a debt collection arbitration is that an individual debtor without a significant prior understanding of the arbitration process might not perceive a demand for arbitration as having sufficient importance if it is sent by first class mail. The provider's initial communication should be sent by certified mail return receipt requested, overnight mail, or in the manner specified for service of a summons or complaint under state or federal law, each of which would reflect

<sup>14</sup> Significant portions of the FTC Roundtables referenced supra in footnote 11 were devoted to the problems associated with service of process in debt collection litigation.

<sup>15</sup> To the extent that the AAA administered debt collection arbitrations, the AAA *Commercial Arbitration Rules* and the *Supplemental Procedures for Consumer Arbitrations* guided these proceedings.



a heightened level of importance for the information contained in the letter. Multiple means of communicating with consumers may also help ensure that debtors receive and review initial communications regarding debt collection arbitrations.

**Principle 3. Communications regarding the debt collection arbitration should be drafted in a manner that is easily understood by individuals who are not lawyers or knowledgeable about arbitration or legal proceedings.**

Many, if not most, consumers have not had experience with litigation, nor do they necessarily understand legal terminology or other language that is typically contained in a communication regarding the commencement of an arbitration proceeding. The demand for arbitration and other communications regarding the arbitration process should be written at a reading level and in a manner that would be easily understood by a wide variety of consumers.

A related issue is that many consumers have not had experience with arbitration, and may not understand that it is a process that results in an award that is final and binding and totally preclusive of court litigation. Communications should provide information about the arbitration process, the importance of participating in the proceedings, and the fact that failure to do so can result in a binding award that is not appealable. In addition, arbitration's more informal characteristics should be emphasized, as well as the consumer's opportunity to enter into meaningful discussions with the creditor regarding possible settlement or other adjustments to the claim.

**Principle 4. In addition to English, consideration should be given to communicating in the primary language of the respondent where it is known that the consumer's primary language is not English.**

It is not uncommon that some consumers do not or are not able to sufficiently communicate in English, with respect to legal, or quasi-legal, proceedings. So that those consumers understand the ramifications of the debt collection process, effort should be made to communicate as appropriate in a language other than English.

**Principle 5. Claims must be accompanied with documentation, sufficient to establish a prima facie claim.**

Consistent with the relatively informal nature of arbitration, demands for arbitration are sometimes filed with only minimal information about the claims asserted and minimal documentation to back up that claim. In the context of debt collection arbitrations, significant numbers of cases are filed which proceed without any appearance by the debtor. As a result, the potential exists for non-meritorious claims proceeding to an award.<sup>16</sup> To avoid that result, a claim should include the following, absent a stipulation or admission by the consumer:

1. The relevant contract, or a specific description of the relevant contract provisions;
2. The relevant arbitration provisions;
3. Indicia of actual use of a credit card or account;
4. The amount and date of the charge off;

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<sup>16</sup> Regardless of the inclusion of otherwise appropriate documentation, there should not in the strict sense be default awards in arbitration proceedings. For example, Rule 29 of the AAA's Commercial Arbitration Rules states that "An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award."



5. If the claimant is not the original creditor, the name of the original creditor;
6. The chain of title for the debt, if any, reflecting the original creditor and each succeeding owner of the debt; and
7. The total amount owed as of the date the arbitration is commenced, including a breakdown of, in addition to the amount owed at charge off, the interest and additional amounts sought in arbitration.

**Principle 6. Procedures should be implemented to identify claims that, at the time of filing, are beyond the applicable statute of limitations or are otherwise time-barred.**

If a claimant files a demand for arbitration of a claim beyond the applicable statute of limitations, the claim could proceed to an award unless some systematic process is implemented to check the demand against the statute of limitations that applies. ADR providers or arbitrators, even where a respondent does not appear, should take the affirmative step of reviewing the demand for arbitration and the supporting documentation to determine that the demand is not time barred, or should require creditors to affirmatively demonstrate that the statute of limitations has not run. Alternatively, the creditor could be required to affirmatively state that the claim is brought in good faith and that the creditor knows of no good faith debtor defense including any statute of limitations.

**Principle 7. Answering a debt collection demand for arbitration should be simplified.**

Answering a demand for debt collection arbitration should be simplified to the extent possible. One manner in which the answering process may be simplified is to create forms and checklists that would permit consumers to respond by indicating applicable defenses, which may include general denials, claims of improper service, identity theft, lack of standing, statute of limitations as well as others.<sup>17</sup> Another is to encourage the permissible use of email.

**Principle 8. Arbitrators should be appointed in a manner that enhances the perception of their neutrality.**

The neutrality of any arbitrator appointed to hear a dispute is critical. However, in the context of debt collection arbitrations, the perception of arbitrator neutrality may be equally as critical. One of the most influential sources regarding the ethical conduct of arbitrators is the *AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*.<sup>18</sup> Although the provisions of the Code of Ethics are applicable in the context of debt collection arbitrations to the same extent as other types of commercial arbitrations, particular note should be made of the need for arbitrators to remain diligent regarding the disclosure of interests or relationships that are likely to affect their impartiality or which might create an appearance of partiality. Such disclosures would include whether an arbitrator has served on prior cases involving a party to a debt collection arbitration, and if so, the approximate number of cases in which he or she has done so.<sup>19</sup>

Some members of the Task Force raised a concern that if the same creditors appear regularly before a particular arbitrator, the perception could exist that the arbitrator may be inclined to decide cases in their favor. Other members

<sup>17</sup> The use of forms to enable respondents to more effectively indicate their defenses has been used in courts as well. See Appleseed report, *supra*. The report *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, issued by the organization New York Appleseed explains that New York City Civil Court provides various ways that a defendant may answer a lawsuit. The report is available at <http://ny.appleseednetwork.org>. Those include providing an oral defense to the court clerk who then completes an oral answer form, and a computer program that allows defendants to answer on line or at the courthouse. A list of defenses on these forms is also included, which can facilitate a defendant's participation in a proceeding.

<sup>18</sup> Available at <http://www.adr.org/si.asp?id=4582>.

<sup>19</sup> This subject is addressed in Canon II of the Code of Ethics for Commercial Arbitrators.



of the Task Force emphasized that this concern is exaggerated, because most arbitrators handle cases for a wide range of parties and are not dependent upon any one party for their livelihood.

Whether or not these concerns are justified, an administering agency should attempt to preserve the perceptions of impartiality by limiting the number of arbitrations an arbitrator may hear involving a particular party. Further, arbitrators and organizations administering debt collection arbitrations should not be biased and should take appropriate steps to avoid perceptions of bias.

Further, each arbitrator appointed in a consumer debt collection arbitration must disclose the number of prior and active arbitrations they have served on, and whether they have knowledge that they might be invited to serve on future arbitrations involving one of the parties to the arbitration. Each respondent would thereafter be entitled to raise an objection to the continued service of the arbitrator.<sup>20</sup> Finally, arbitrators in debt collection arbitrations should be appointed on a random, rotating basis so that arbitrator appointments generally will be evenly distributed among potential panelists, to avoid any appearance of bias in favor of a party. To the extent that additional information is available regarding an arbitrator's prior service on certain cases, such as reports required under California's disclosure statutes, parties should be informed where they can obtain such information.

**Principle 9. the use of mediation and other less formal means of resolving debt collection disputes should be incorporated into the debt collection dispute resolution process.**

There was widespread agreement among the Task Force that settlement discussions between creditors and consumers should be strongly encouraged and facilitated within the dispute resolution process. Creditor advocates urged that consumers ought to receive multiple opportunities to discuss alternative arrangements for working out debts. Further, mediation was viewed as a procedure that could be favorably implemented in a programmatic way.

**Principle 10. Participation in the arbitration process should take ample advantage of technology and other means of allowing parties to participate in the arbitration process.**

One advantage of the arbitration process is that parties are not limited by the strict pleading requirements and other formalities associated with litigation. As a result, the debt collection arbitration process should be structured to allow easier access to hearings and other proceedings through telephonic and video conferencing capabilities. In some circumstances it would be highly convenient for both creditor and consumer to hold arbitration hearings or settlement discussions via telephone or video conferencing. Doing so would save the parties the time and expense associated with attending in-person proceedings, and in addition, the consumer's schedule could presumably be accommodated by having hearings take place outside customary office hours. Even if the final hearing is held in person, submission of documents or preliminary information should be handled by email, mail, on-line, or by telephone when that is feasible.

It should also be noted, however, that parties who are unfamiliar with on-line or similar technologically based processes should not be required to use communication devices where doing so would impose an undue burden, or would otherwise place that party at an economic or tactical disadvantage.

<sup>20</sup> Such disclosure is also consistent with Canon II of the *Code of Ethics for Arbitrators in Commercial Disputes*, which is captioned, "An Arbitrator Should Disclose any Interest or Relationship Likely to Affect Impartiality or Which Might Create an Appearance of Partiality."



## Class Actions

A substantial and vigorous discussion among the Task Force was devoted to the topic of the use of class actions in consumer debt disputes including debt collection disputes. The law with regard to class actions and how that type of litigation intersects with arbitration remains in flux.

The views of the Task Force members on the issue of class actions generally fell into three groups: Those who strongly argued that the availability of class actions needed to be maintained, and those who strongly argued that the class action process was not appropriate in the arbitration context. Still other members of the Task Force recognized that reaching agreement on the issue would not be possible but believed that the Protocol could be valuable to creditors and consumers even if it did not address class action proceedings.

Those who support the availability of class action processes argue that these Principles should address that issue as well. They view class actions as essential to providing meaningful protection to individuals without burdening taxpayers with the expense of governmental regulation, and they point to concerns about the ability of corporations to manipulate the arbitration process to limit remedies, and insulate themselves from liability from illegal conduct.

Class action proponents further assert that class action waivers that are imbedded in arbitration clauses make it difficult for consumers to vindicate their rights, since many consumers do not realize they have been subjected to conduct for which they could assert a claim, and to the extent that they do, they do not know how to seek a remedy for that conduct. Further, for the small amounts of money typically involved in disputes that result in class actions, few would invest the time, expense and effort necessary to recover their damages. At the same time, a corporation improperly charging a small amount of money to millions of customers could equate to enormous profits, especially where that corporation does not face the prospect of returning those profits when they have been obtained as a result of improper conduct.

Class action proponents further assert that class action waivers impose enormous burdens and expense on individuals who seek remedies that would otherwise be made available through class actions that are provided for in federal and state statutes, and that corporations defending individual actions have an advantage over hundreds or thousands of consumers asserting claims involving common issues of fact and law. Further, because arbitrations do not typically result in reasoned decisions, illegal corporate conduct is not revealed to the public. Another positive attribute of class actions that is cited is their deterrence effect. Specifically, corporations will have an incentive to act ethically and with good business practices when faced with the prospect of defending a class action if they fail to do so.

The AAA's significant work enforcing their protocols through the review of consumer and employment arbitration agreements over many years has had a number of positive effects. That review has prompted some businesses that use arbitration to resolve consumer and employment disputes to bring their arbitration agreements into compliance with the Protocols. Some businesses also made the decision to remove the AAA from their consumer or employment agreements because they were not willing to abide by those principles. In other cases, the AAA declined to administer claims when it determined that the arbitration agreement did not comply with one of the Protocols. Those advocating for the availability of class actions suggest that these were courageous steps taken by the AAA and the experience gained from enforcing the Protocols and the unique role of the AAA as the leader in the arbitration field required that this



*Protocol* take the affirmative position that class arbitration should be available. The same rationale that makes the class action remedy available in litigation compels that it be available in the arbitration setting if arbitration provisions in adhesion contracts are to be enforced.

Finally, it was noted that although the Task Force is focused specifically on arbitration of debt collections against individuals, the arbitration provisions in question are contained in agreements that do not contain class action waivers that are limited only to debt collection cases. Typically, all disputes, regardless of their characterization, are to be resolved by arbitration as a result of an arbitration agreement. Finally, class action proponents emphasized that while the AAA may provide an ethical, fair, and professional service to parties in debt collection matters, and may alleviate some of the mounting pressure on courts, there are other profound ramifications to enforcing class action waivers. Specifically, providing an arbitration forum without maintaining the availability of class actions enables corporations to alter or evade legal constraints that would otherwise apply to it. Permitting the arbitration of contract disputes which ban class actions or contain other limitations on remedies gives corporations the means to avoid consumer protections which were specifically designed to be enforced primarily through class actions.

Those who are sharply critical of class actions assert numerous reasons for their criticism, whether in the context of arbitration or litigation. Those reasons include the argument that class actions impose unfair and unwarranted costs on defendants, and that compensation for legitimate claims is possible and more efficient through other means. They further argue that regulatory agencies have the expertise to evaluate the class claims and value of any potential losses, and the authority to consider the financial impact on other consumers. With some frequency they can and do order the company to compensate consumers. Further, regulatory alternatives to policing wrongful conduct (that is not already deterred by competition) have greater potential for success and less potential for abuse.

In addition, those criticizing class actions assert that class actions frequently are organized principally by, and for the benefit of, lawyers. The named plaintiff, who represents thousands or millions of absent class members, often knows very little about the asserted claims and exercises little or no control or influence in the action. Putative class members are deemed to be class members without any affirmation that they ever consented to be included in the class or that they even know that they have been included. They are bound by decisions in which they did not participate, that are made by lawyers whom they had no role in selecting and with whom they likely will have little to no communication. It is also argued that the vast majority of class members know so little about the class resolution and that they ignore any class benefit. Despite the small class participation rate, class lawyers can reap enormous windfalls in fees. Additionally, it was suggested that the public at large has become cynical about the benefits of class actions.

Additional arguments made against class actions are that defendants' legitimate interests also are sacrificed through the loss of due process rights that are otherwise afforded to other litigants that face significant exposure. Some are concerned that courts pay too little attention to the curtailment of defendants' practical opportunities to defend themselves in class action litigation, and also ignore the other burdens imposed on defendants, before any merits adjudication occurs. Indeed, some courts sweep such problems away with the assumption that, once a class is certified, the parties simply will settle. And, as a consequence, many defendants are compelled to settle even weak class action claims, with the costs of these often unwarranted settlements passed on to all consumers.



Further criticisms against class arbitration are that the process presents the same problems that class actions in court present, but also presents additional problems. Most significantly, although the stakes in a class arbitration can be just as high as the stakes in class litigation in court, the losing party in a class arbitration has severely limited appellate review. Moreover, absent class members in a class arbitration may contend that they did not receive sufficient due process protection and, therefore, the class arbitration award is not binding on them.

Class arbitration loses the significant advantages that regular, bilateral arbitration provides to parties. The central purpose of arbitration is to provide a less expensive, less burdensome, less time-consuming, less adversarial, and less complicated alternative to litigation. In support of these concerns, the United States Supreme Court's observations in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), that class arbitration can be every bit as expensive, burdensome, time-consuming, adversarial, and complicated as class action litigation are cited.

In light of the strong but opposing views by various members of the Task Force on the subject of class actions, the Task Force was unable to come to a consensus on the issue except to "agree to disagree." Therefore, these Principles take no position on the issue of class actions, either within the context of debt collection arbitration, litigation or otherwise.



## Task Force Members

The following individuals were members of the National Task Force on the Arbitration of Consumer Debt Collection Disputes. However, regardless of their affiliations, each individual on the Task Force was present in their individual capacity, and not as representatives of their respective organizations.

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