



A Guide to Understanding the American Arbitration Association's Consumer Due Process Protocol and Consumer Arbitration Rules

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This article will examine the *Consumer Due Process Protocol* (Protocol) and the *Consumer Arbitration Rules* (Rules or Consumer Rules), which were written in accordance with the Protocol. The goal is to give consumer arbitration participants, drafters of consumer arbitration clauses, educators, and the public insight into how the American Arbitration Association® (AAA®) continues to further its longstanding commitment to a fundamentally fair process. It will also examine the process and procedures used by the AAA in ensuring compliance with the Protocol in the administration of consumer arbitration matters.

The Impact of the Consumer Due Process Protocol

Since the inception of the Protocol, the AAA has demonstrated leadership in providing a fair arbitration process for all involved by requiring all consumer arbitration agreements naming the AAA to comply with the Protocol and Consumer Rules. Through a standardized process, an administrative review of every consumer arbitration agreement is conducted by specially-trained staff experienced in the fairness principles set forth in the Protocol and Rules. If it is determined after the administrative review that the contract does not comply with the Protocol and Rules, the AAA will request the business waive the provision of the agreement that does not comply before providing administration of matter.

This commitment has been integrated into the Rules, specifically Rule R-1(d), which states:

The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Starting in 2014, the Rules included a provision more formally establishing the administrative review process and the first-of-its-kind publicly accessible Consumer Clause Registry (Registry). Rule R-12 states that the AAA will review agreements submitted to us for inclusion in our Registry. The AAA's review of a consumer arbitration clause and determination whether to administer arbitrations pursuant to that clause is an administrative determination by the AAA and cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause.

The Registry not only formalized the review process, it brought additional transparency to consumer arbitration. When the AAA determines that a clause meets the requirements of the Protocol and Rules, we will include the clause in our Registry. When a clause is added to the Registry, contact information for the business is also provided.

Before we discuss the specific principles in the Protocol in more detail, it is important to understand the origin and goals surrounding the creation of the Protocol.



The Origin of the Consumer Due Process Protocol

In the spring of 1997, the American Arbitration Association (AAA) announced the establishment of a National Consumer Disputes Advisory Committee (Advisory Committee). The mission of the Advisory Committee is:

To bring together a broad, diverse, representative national advisory committee to advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes.

The Protocol further explains its scope and application:

The *Consumer Due Process Protocol* (Protocol) was developed to address the wide range of consumer transactions [including] those involving the purchase or lease of goods or services for personal, family or household use. These include, among other things, transactions involving: banking, credit cards, home loans and other financial services; health care services; brokerage services; home construction and improvements; insurance; communications; and the purchase and lease of motor vehicles and other personal property.

Across this broad spectrum of consumer transactions, the Protocol applies to all possible conflicts from small claims to complex disputes. In light of these realities, the Advisory Committee sought to develop principles which would establish clear benchmarks for conflict resolution processes involving consumers, while recognizing that a process appropriate in one context may be inappropriate in another. Therefore, the Protocol embodies flexible standards which permit consideration of specific circumstances.

The final product was a set of standards that promote fundamental fairness in the resolution of these disputes. Over nearly three decades, these standards have been cited by legislators, courts, regulators and counsel as the foundation of a fair consumer arbitration process. It cannot be overstated how the Protocol has shaped consumer ADR for nearly three decades.

The AAA not only convened and led the Protocol development effort, we drafted Consumer Rules that modeled the due process considerations and dedicate significant administrative resources to reviewing consumer arbitration agreements to ensure compliance with the Protocol. The AAA ultimately set forth a policy that would decline to provide administration services for consumer dispute unless the clauses complied with the Protocol or non-compliant provisions were waived by the drafting party.

Now that we have examined the genesis, scope, and impact of the Protocol, it is time to look at each Protocol Principles and in order to provide practical information about the AAA's administrative clause review process and how the AAA incorporates the due process concepts into the Consumer Rules.



01. Fundamentally Fair Process

All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.

Due to the very broad nature of this Principle, the AAA understands this Principle as applicable to often unique and uncommon situations found in consumer arbitration clauses. As we will see as we move forward through the Principles, most other Principles reflect a more specific, straightforward commitment to fairness. So while rare, one example of a provision that does not comply with Principle 1 is where a clause requires only the consumer to arbitrate their claims:

At [business's] sole discretion, it may require you to submit any disputes...to final and binding arbitration under the rules of the American Arbitration Association...

The National Consumer Disputes Advisory Committee notes in their comments to this Principle that consumer clauses found by a court not to be fundamentally fair can be found unenforceable, and that a fundamentally fair process is critical since these agreements are presented as “take-it-or-leave-it” contracts, with the consumer having little to no bargaining power. This Principle sets the stage for all of the following Principles. At a minimum, clauses should provide that all arbitration agreements are bilateral but, beyond this the overarching principle, the overall process set forth in the parties' agreement needs to be fair.

02. Access to Information Regarding ADR Program

Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.

To provide consumers with the necessary information on arbitrating their consumer disputes with the AAA, the AAA developed extensive resources for parties to learn about the arbitration process. Parties can obtain such information by visiting our website, www.adr.org. Parties should consider referencing our website and the Consumer Rules within their agreements as a source for additional information about the ADR process.

03. Independent and Impartial Neutral; Independent Administration

1. *Independent and Impartial Neutral.* All parties are entitled to a Neutral who is independent and impartial.
2. *Independent Administration.* If participation in mediation or arbitration is mandatory, the procedure should be administered by an Independent ADR Institution. Administrative services should include the maintenance of a panel of prospective Neutrals, facilitation of Neutral selection, collection and distribution of Neutral's fees and



expenses, oversight and implementation of ADR rules and procedures, and monitoring of Neutral qualifications, performance, and adherence to pertinent rules, procedures and ethical standards.

3. *Standards for Neutrals.* The Independent ADR Institution should make reasonable efforts to ensure that Neutrals understand and conform to pertinent ADR rules, procedures and ethical standards.
4. *Selection of Neutrals.* The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute.
5. *Disclosure and Disqualification.* Beginning at the time of appointment, Neutrals should be required to disclose to the Independent ADR Institution any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution should communicate any such information to the parties and other Neutrals, if any. Upon objection of a party to continued service of the Neutral, the Independent ADR Institution should determine whether the Neutral should be disqualified and should inform the parties of its decision. The disclosure obligation of the Neutral and procedure for disqualification should continue throughout the period of appointment.

Requiring independent and impartial neutrals and case administration is a hallmark of a fair dispute resolution process.

As a public service, not-for-profit organization, the AAA is an independent, neutral administrator of disputes as called for in this Principle. The AAA also maintains a roster of independent and impartial arbitrators to hear consumer disputes. These arbitrators are bound by a code of ethics, and their neutrality and disclosure requirements are set forth in the Consumer Rules. Rules R-15 through R-19 provide for a fair and impartial selection process, requiring that appointed arbitrators disclose to the parties any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent. A disqualification process allows the parties to raise objections throughout the process. In sum, the Consumer Rules establish a process to provide parties an independent and impartial neutral.

Parties' arbitration agreements often provide for specific criteria and different appointment processes than those set out in the Consumer Rules. This is fine, so long as the criteria do not deviate from the underlying impartiality principles. Examples of appointment procedures that have been found non-compliant include allowing the company to be the sole decision-maker on who is appointed as an arbitrator or limiting the background and expertise to such an extreme level of specificity that it raises concerns over impartiality or independence. An example of a contract provision that violates this Principle is:

The arbitrator shall be selected by you from a panel of arbitrators acceptable to and chosen by the Club Manager from the AAA's pool of arbitrators.

The key takeaway here is that parties with consumer ADR clauses can name the AAA's *Consumer Arbitration Rules* to satisfy this Principle of the Protocol, as long as the arbitrator selection process is unaltered or otherwise complies.



04. Quality and Competence of Neutrals

All parties are entitled to competent, qualified Neutrals. Independent ADR Institutions are responsible for establishing and maintaining standards for Neutrals in ADR Programs they administer.

Arbitrators chosen from the AAA's roster are competent and qualified to hear consumer disputes. Arbitrators and mediators are not employees or contractors of the AAA, which maintains an arms-length relationship with its panelists. They do, however, receive industry-leading dispute resolution training by the AAA.

The AAA requests feedback from parties on arbitrators for each case in order to evaluate the performance of arbitrators, and appointments to our panel are for no set term or duration. The AAA is quick to address any performance issues, including by removing them from the AAA's panel. Parties to consumer ADR clauses can name the AAA's *Consumer Arbitration Rules* to satisfy this Principle of the Protocol—again, as long as the arbitrator selection process is unaltered or otherwise complies.

05. Small Claims

Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.

Consumer arbitration agreements cannot foreclose the possibility of resolution via small claims court for disputes that qualify. Accordingly, Rule R-9 of the Consumer Rules discusses either party's option to bring a case to small claims court if it qualifies.

As the National Consumer Disputes Advisory Committee remarked in its comments to the Protocol, access to small claims court may provide the most efficient method for resolving small disputes, and thus made that option available under Principle 5. The Committee also noted the effectiveness of "desk arbitration" and telephone hearings for resolving low-dollar claims.

An example of a clause that violates this principle is one that specifically prohibits the filing of cases with an applicable small claims court. Parties to consumer ADR clauses can name the AAA's *Consumer Arbitration Rules* to satisfy this Principle of the Protocol.

06. Reasonable Cost

1. *Reasonable Cost.* Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.



2. *Handling of Payment.* In the interest of ensuring fair and independent Neutrals, the making of fee arrangements and the payment of fees should be administered on a rational, equitable and consistent basis by the Independent ADR Institution.

The National Consumer Disputes Advisory Committee commented, “A fundamental principle of our civil justice system is that a person should never be denied access to a court due to an inability to pay...”

The AAA's Costs of Consumer Arbitration keep fees for individuals capped at a low amount, currently \$225. Fees for businesses are similarly set forth to make costs more predictable. Consumer ADR clauses cannot require the consumer to pay more than the fee listed for individual consumers. This fee is only for AAA administrative fees, and consumer parties are not required to pay arbitrator compensation. Businesses can choose to pay some or all of the consumer's initial fee but cannot develop an ADR agreement that requires the consumer party to pay more than the amount set forth in the AAA's fee schedule. Doing so would deviate from this Principle.

The Consumer Rules, in R-44(c), provide authority for an arbitrator to consider allocating arbitrator compensation, expenses, and AAA administrative fees to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous.

Rule R-4 of the AAA's Consumer Rules establishes that consumers who are unable to pay the fees required by our rules may have the fees waived due to extreme hardship. In 2023, the AAA waived \$309,819 in fees for consumer parties. As part of our administrative services, the AAA also facilitates payments to the arbitrator in accordance with subsection 2 of Principle 6.

An example of a clause that does not comply with Principle 6 is:

“The costs of the arbitration filing fee will be paid equally by both parties.”

Businesses can comply by leaving the clause silent as to payment of fees or by referencing that fees are to be paid as set forth in the AAA's *Consumer Arbitration Rules*. Any further language about fees administrative fees and arbitrator compensation in the arbitration agreement should not deviate from the AAA's consumer fee schedule.

07. Reasonably Convenient Location

In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.



The commentary for this Principle in the Protocol notes that:

[L]ocation terms may put one party at a great disadvantage, significantly increasing the cost and logistical complexity of dispute resolution...Forum selection clauses may be overcome [in court] if it can be demonstrated that their incorporation in the contract was the result of fraud, undue influence, or an extreme disparity in bargaining power, or if the selected forum is so inconvenient that it would effectively deprive a party of a day in court...Such considerations may also affect the enforceability of an agreement to arbitrate.

Rule R-11 of the Consumer Rules references this Principle in describing how the AAA will resolve disputes between the parties as to locale. Consumer arbitration clauses must allow for any in-person hearing to be held in a location that is reasonably convenient to the individual consumer. Many hearings now take place virtually, but the arbitrator has the authority under the Consumer Rules to determine that an in-person hearing is required; accordingly, the location must be reasonably convenient to the individual consumer.

The AAA closely looks at clauses with such specific locales noted when conducting administrative reviews. Generally, clauses that name a specific locale, like “Any arbitration hearing shall take place in Philadelphia, PA” are not acceptable unless it is apparent that all of the business’ customers are located in that same area. Requiring a consumer party to travel a considerable distance to participate in a hearing is often determined to not comply with this Principle. Therefore, in drafting consumer dispute resolution agreements, it is vital to look at where the potential parties are located.

By contrast, clauses that focus on the consumer’s locale are normally compatible with the Protocol. For example:

- “Any in-person hearing shall take place in a location reasonably convenient to you.”
- “Any in-person hearing shall take place within 60 miles of your residence.”
- “Any in-person hearing shall take place within your federal judicial district.”

08. Reasonable Time Limits

ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process and, where necessary, set forth default procedures in the event a party fails to participate in the process after reasonable notice.

Under the Consumer Rules, a party cannot delay the arbitration process by failing to answer or appear. The Rules set timeframes to complete many stages of the process, providing an efficient framework to resolve the dispute in a reasonable timeframe. The Rules also provide the arbitrator with the authority to set deadlines, order parties to comply with those timeframes, and ultimately render a final and binding decision based on the case presented by the participating party—even if the other party chooses not to participate in the process. Where a business fails to pay its administration fees or arbitrator compensation, the AAA will decline to administer the case and either party can bring the case to a court of competent jurisdiction as per Rule R-1(d).



The data shows that these provisions actually provide a more efficient process to consumers. In 2023, the median awarded consumer case took 9.6 months from filing to award, whereas the median time to trial in U.S. District Court was 35.6 months.

Simply by naming the AAA's Consumer Rules, drafters can comply with this Principle.

09. Right to Representation

All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing. The ADR rules and procedures should so specify.

Rule R-25 of the Consumer Rules indicate that a party may participate with representation as long as the choice isn't prohibited by applicable law and at least three days' notice is given prior to the first hearing where they will appear.

The Rule also indicates that parties may appear without an attorney or other representation, but that parties may want to consider consulting an attorney because arbitration is a final and binding process.

Naming the AAA's *Consumer Arbitration Rules* satisfies the requirement of this Principle. An arbitration clause cannot control whom a party chooses as a representative as long as such choice is allowable under applicable law. In addition, a consumer arbitration clause should not prohibit a party from having a representative during the arbitration as that would be a deviation from this minimum fairness standard.

10. Mediation

The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes.

The comments to Principle 10 tout mediation's voluntary, informal, and flexible nature and its emphasis on the needs of the parties.

The AAA makes mediation available to parties on all consumer arbitration matters, and we encourage drafters to consider mediation or other informal dispute resolution as part of their arbitration clause. As part of its administrative process, the AAA encourages the parties consider mediation throughout the life of the arbitration.

11. Agreements to Arbitrate

Consumers should be given:

- a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;*



- b. *reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;*
- c. *notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,*
- d. *a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.*

The Reporter's Comment to Principle 11 states:

[T]he Committee developed Principle 11 with the intended purpose of providing guidance to the AAA and similar Independent ADR Institutions in the development of specific arbitration programs within the context of existing law enforcing pre-dispute arbitration agreements. Within this context, Principle 11 emphasizes the importance of knowing, informed assent to arbitration agreements.

The National Consumer Disputes Advisory Committee recommends:

Consumers should have clear and adequate notice of the arbitration provision and basic information regarding the process at the time of assent. The appropriate method of giving notice and providing essential information will vary with the circumstances. For example, electronic transactions involving software licensure agreements require different notice procedures than face-to-face negotiations or paper transactions. In all cases, however, there should be some form of conspicuous notice of the agreement to arbitrate and its basic consequences (including comparison to court process, cost information, etc.). In addition, the Consumer should be given the opportunity to acquire additional information regarding the arbitration process. The latter might be obtainable through a mail or Web site address, an 800 number or other means for Consumers to obtain additional information regarding arbitration rules and procedures (such as a brochure available on request).

Parties may find information about the arbitration process by visiting www.adr.org (subsection (b) above), are free to proceed in small claims as per R-9 (subsection (c)), and can find filing information at www.adr.org, in the Rules, and on the Demand for Arbitration form.

It is also important to note that, when conducting administrative reviews of the consumer arbitration clauses, the AAA focuses solely on the arbitration clause itself and not other parts of the parties' agreement or any external information. Parties are always free to raise any concern that their arbitration agreement does not comply with Principle(s) of the protocol to an arbitrator for a final determination. The arbitrator has the authority to decide their own jurisdiction to hear the issue.

12. Arbitration Hearings

1. *Fundamentally-Fair Hearing.* All parties are entitled to a fundamentally-fair arbitration hearing. This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial



decision-makers. In some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party.

2. *Confidentiality in Arbitration.* Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues.

Rule R-26 indicates that notices of hearings would occur at least 10 days before the hearing, and R-29 states that any party can request an in-person or telephone hearing, and the arbitrator can decide that a hearing is necessary. Rules R-23(a) and R-34(c) address subsection 2 of this principle. The following example provision does not comply with Principle 12 because it forecloses the possibility of an in-person hearing:

Disputes involving claims, counterclaims, or requests for relief under \$25,000, not inclusive of attorneys' fees and interest, will be conducted solely on the basis of documents you and business submit to the arbitrator.

If this clause went on to provide that the arbitrator has authority to determine whether an in-person hearing is necessary, such provision would then comply with the Protocol. The National Consumer Disputes Advisory Committee notes in the comments to this Principle that an in-person hearing is not always necessary, and the requirement for a fundamentally fair hearing may be satisfied with a "documents-only" or telephone hearing. The AAA regularly recommends virtual hearings as satisfactory of this requirement, in lieu of in-person hearings. While parties are encouraged to consider alternative hearing processes to improve efficiency, an arbitrator does need discretion to order an in-person hearing.

A point about the concept of confidentiality mentioned in this Principle – contrary to common perception, arbitration is confidential—not secretive. Generally, parties are free to talk about their cases; it is the AAA and the arbitrators who are bound to keeping parties' confidences, similar to a judge and jury.

13. Access to Information

No party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute. Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.

This principle highlights that arbitration is designed to be less formal and more efficient than litigation. However, a consumer arbitration clause will not be compliant with this Principle where it prohibits or restricts discovery without leave for the arbitrator to provide for further discovery necessary for a fundamentally fair hearing.

Rule R-22 of the Consumer Rules discusses discovery under the Consumer Rules in a manner that aligns with this Principle. Where a consumer arbitration clause is silent as to discovery, the AAA will deem it compliant as adopting our Rules.



The Rule balances the need for information exchange, while acknowledging that that it should be an efficient process. However, the arbitrator has authority to order the exchange of information that is needed for a fundamentally fair process for the parties.

The commentary to this Principle indicates that some discovery may be necessary and appropriate to meet the due process rights of participants. This tradeoff may increase (or decrease) the length of the ADR process.

14. Arbitral Remedies

The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.

Rule R-44(a) of the Consumer Rules states the arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including attorneys' fees and costs, in accordance with applicable law.

Clauses that restrict the authority of the arbitrator to award any relief that could be available in court will not be found compliant with Principle 14. The drafters of the Protocol note, "The intent is to make clear that arbitrators deriving their authority from Consumer contracts should enjoy the same authority courts have to fashion relief, including awarding attorney's fees and punitive damages in appropriate cases." Legally available relief should be available in arbitration as it would be if the matter were in court.

A Protocol issue that arises in clauses is language that prohibits specific types of relief, like punitive damages and attorneys' fees, from being requested or awarded in the arbitration forum. Such prohibitions would be determined as not compliant with this Principle.

15. Arbitration Awards

1. *Final and Binding Award; Limited Scope of Review.* If provided in the agreement to arbitrate, the arbitrator's award should be final and binding, but subject to review in accordance with applicable statutes governing arbitration awards.
2. *Standards to Guide Arbitrator Decision-Making.* In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents.
3. *Explanation of Award.* At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.

Consumer arbitration agreements that call for the arbitrator's award to not be accompanied by at least a brief explanation of the reasons for the outcome therefore are not compliant with Principle 15. To ensure this, Rule R-43 requires arbitrators to provide concise written reasons for their decision unless the parties all agree otherwise.



Additionally, the consumer arbitration clause cannot prohibit all manner of review by a court, but may limit such modification or vacatur of an award that is provided for under the Federal Arbitration Act and any applicable state arbitration law.

Naming the AAA's *Consumer Arbitration Rules* and leaving the clause otherwise silent as to the form of the award will comply with Principle 15.

A Note on Loser-Pay Provisions:

While not specifically addressed in the Protocol, due to developments in the law in California and New Jersey, the use of a loser-pay provision within the parties' contract require the AAA to seek waivers from both parties similar to the waivers required when Protocol issues are noted. These laws are specifically directed at arbitration providers like the AAA and any arbitrators serving on cases.

Under these statutes, a loser-pay provision (LPP) is a clause anywhere in the contract requiring an arbitrator to award costs and/or fees against the consumer party if they do not prevail in the arbitration. If the clause states that the business will not be awarded their fees/costs if they are the prevailing party, but requires an award to a prevailing consumer, it is not a loser-pay provision. Further, where the arbitrator has *discretion* to award costs against the losing party, it is not a loser-pay provision. However, the statutes do apply to clauses that require either losing party to pay for costs and/or fees, as that would also require an award of fees and costs against the consumer if they lost.

Examples of LPPs are as follows:

- "The arbitrator shall award costs and fees to the prevailing party."
- "The prevailing party shall be entitled to an award of their costs and fees."

Where a consumer arbitration clause contains a LPP and New Jersey or California law apply, the AAA will ask for a waiver of the provision from both parties before proceeding with administration. Parties considering using such language in their consumer agreements are encouraged to review the applicable statutes.

A Note on Mass Arbitration

Mass arbitration is specifically defined as involving many parties who choose the same representative. The AAA developed rules, the *Mass Arbitration Supplementary Rules*, to streamline the administration of large volume filings involving the same party, parties, and party representative(s), or related party, parties and party representative(s). Parties have also looked to address the administration of mass arbitration caseloads by adding their own mass arbitration procedures to their arbitration agreements. Although the *Consumer Due Process Protocol* was created before the advent of Mass Arbitration, it applies nevertheless. At a fundamental level, mass arbitrations in the consumer context are still individual consumer cases that require the same application of due process principles.



Drafters who include a prohibition on mass arbitration from being filed at all are restricting the consumer's right to be represented by the counsel of their choosing solely based on the fact that the counsel is representing a number of other consumers in individual arbitrations against the same business. Such a prohibition does not comply with Principle 9 of the Protocol and a waiver would be required in order for the AAA to administer the arbitrations.

Another issue of note for parties to consider when creating mass arbitration procedures concerns the allocation of administrative fees and costs in the mass arbitration process. The reasonable costs principles stated in Principle 6 would be applicable, meaning that consumer parties' costs to participate in arbitration must remain reasonable. The AAA addressed this in the Consumer Mass Arbitration and Mediation Fee Schedule by establishing limited administrative fees for the consumer parties. The Fee Schedule also clarified that arbitrator compensation, expenses, and administrative fees are not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous. So when attempting to address fees and compensation on mass arbitration, parties need to ensure that any different allocations do not deviate from the Principle and the specific limitations established by AAA Rules and applicable fees schedules.

Some mass arbitration procedures developed to date are not clearly addressed within the Protocol and in such circumstances, the AAA will not take a position on these provisions. For example, the enforceability of bellwether provisions is also an evolving area of the law, and the AAA takes no position on these provisions or their enforceability. As the mass arbitration continues to develop, the AAA anticipates arbitrators and judges will clarify the ultimate enforceability of these mass arbitration provisions.

Conclusion

The *Consumer Due Process Protocol* and the *Consumer Arbitration Rules* demonstrate the American Arbitration Association's commitment to a fundamentally fair arbitration process for consumers. By requiring compliance with the Protocol and Rules for the administration of consumer arbitration agreements, the AAA ensures that procedural safeguards are upheld, maintaining a fair, reasonable, and transparent process. The introduction of the Consumer Clause Registry has further enhanced transparency and accountability. The establishment of clear principles, such as the right to a fundamentally fair process, access to information, impartial and competent neutrals, and reasonable costs and locations, underscores the AAA's dedication to balancing efficiency with fairness. This ongoing commitment not only reinforces the integrity of the consumer arbitration process but also provides a reliable framework for resolving disputes in a manner that is equitable for all parties involved. By adhering to these principles, parties benefit from a process that is both efficient and just, reducing the time and costs associated with traditional litigation while ensuring that their rights and interests are protected. As the landscape of consumer arbitration continues to evolve, the AAA's adherence to these principles will remain crucial in fostering trust and confidence in alternative dispute resolution mechanisms.

Parties can gain the benefits of the AAA's process by inserting the following clause into their consumer dispute resolution agreements:

Any disputes between the parties shall be decided by arbitration administered by the American Arbitration Association in accordance with its Consumer Arbitration Rules.