

# **DELOS GUIDE TO ARBITRATION PLACES (GAP)**

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## **REPORT ON ARBITRABILITY OF CONSUMER DISPUTES**

BY

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## GAP REPORT: ARBITRABILITY OF CONSUMER DISPUTES

A number of interesting elements emerge from the GAP chapters on the arbitrability of consumer disputes (see the table that follows), of which the most remarkable may be this: quite against the probable conventional wisdom that the more *laissez-faire* a country's overall economic and political model is, the more it will make consumer disputes unrestrictedly arbitrable, in fact it appears that liberal economies with sound rule of law (as measured against technical indices) tend to favour arbitrability with restrictions. This brief Foreword explains what this means, and how we got there. Before that, let us recall some basic points about the arbitrability of consumer disputes and offer some context.

To be clear, arbitrability means to most people in most jurisdiction (with the notable exceptions of the USA and Canada, and possibly a few others which are not known to these authors) that a certain category of disputes *can go* to arbitration. Not how or when they can go to arbitration. *Whether* they can, categorically, go to arbitration or not. For these most people in most jurisdictions, a non-arbitrable dispute *cannot go* to arbitration no matter what. This notion is thus to be opposed to, for instance, the enforceability of an arbitration clause against a particular party at a particular time. A law which, for instance, would say that arbitration clauses for a certain category of disputes (for example consumer disputes) are only enforceable against a given party (for example the consumer) if they have been entered into after the dispute has arisen – such a law would not be dealing in arbitrability in that common sense of the concept. We might say it is dealing in restrictions accompanying the arbitrability of such disputes, but not in arbitrability itself.

In a nutshell then, a jurisdiction which considers that consumer disputes are arbitrable without particular accompanying restrictions considers that consumer disputes can go to arbitration like any other commercial dispute. A jurisdiction which makes consumer disputes non-arbitrable (or 'unarbitrable' or 'inarbitrable', depending on one's grammatical inclination) considers that such disputes are categorically unfit for resolution by arbitration, no matter what the parties want. And one which takes the position that consumer disputes are arbitrable but adds restrictions to how they can be brought to arbitration (only after the dispute has arisen, only if the claim is above a certain value, etc) is a jurisdiction which considers that consumer disputes can in principle be resolved by arbitration but certain safeguards have to be in place.

Now, why would a state be against, or in favour of, the resolution of consumer disputes by an arbitral tribunal? Reasons may vary, and can range from the ideological to the legal technical, by way of the economic, the political, and the allocation of public resources. More precisely, one might for instance mention, in no particular order: the typical lack of judicial assistance for impecunious consumers; the costs of arbitration procedures compared to litigation for small (often really small) cases; the right to bring an action before the national courts in the place where the consumer is domiciled; significant and predictable inequality in the access to dispute resolution resources; systemic biases created by repeat-player problems (the consumer is always a new person, the business repeatedly the same company); the prevention of class actions or collective actions which would be available in court litigation; problems of confidentiality, when arbitration makes problems disappear from public discussion which belong there because the disputes are potential tips of icebergs that society should see coming (matters of public safety, public health, systematic fraud, systematic abusive practices, etc.); difficulties with the arbitrators' overall ethos (in the sense of their overall ideology and usual political orientation), which is normally more pro-large-business than pro-small-people, and thus creates a possible systemic bias. But also the political attitude that most disputes, including consumer disputes, are the parties' problem, not society's concern, and that the parties should be allowed to agree (in more or less any manner) how to resolve their dispute (an attitude which typically translates into a radical contract-ontology approach to arbitration or just a heavy-handed invocation of contractual freedom). Or, to round off the list from a different angle, the documented fact that the more arbitrators, and probably arbitration practitioners as a whole, a country has, the more pro-arbitration the country subsequently becomes (a simple political economy point, think of the German *Autobahnen* and their carmakers for a parallel).

Last but not least, the possibility of reducing public court backlogs bothered by trifle disputes which would best be resolved in an adapted, quick-and-easy procedure; and the possibility of experimenting with new ways of resolving disputes in increasingly contentious societies. Online arbitration and automated arbitration for very low-value disputes come to mind, for instance. On this point, it should be noted that in Europe, the development of online dispute

resolution platforms, desired by both European and national legislators (for example see in France, the reform of 23 March 2019 governing online arbitration), presupposes prior recognition of the arbitrability of consumer disputes. It is only on this condition (and even on the condition that the arbitration agreement is enforceable against the consumer?) that this new arbitration market, quite distinct from that of traditional commercial arbitration, will be able to consolidate.

So, in sum, the likely reasons for a state to allow consumer disputes to go to arbitration, or not, is a complicated and multifaceted question.

As one would expect from a multifaceted and complicated question, most countries with a sound rule of law (as measured by the usual indicators used by political scientists and economists) tend to take a balanced approach to the matter. If one takes an empiricist's view at the table below compiled by Delos Dispute Resolution from the GAP chapters, of countries where consumer disputes are arbitrable, non-arbitrable, or arbitrable with accompanying restrictions, some statistical evidence takes shape: arbitrability with accompanying restrictions are present in countries displaying levels of economic freedom and rule of law that are above the average of the sample mean.

More precisely, countries with accompanying restrictions on arbitrable consumer disputes have an average economic-freedom score *and* an average rule of law score that are both almost one standard deviation above the means for these two scores within the overall sample. In plain English and somewhat simplified: countries which allow consumer disputes to go to arbitration but place safeguards on how this can be done (for example only after the dispute has arisen) are on average (a) countries which are significantly more respectful of economic freedom than the average (as measured, for instance, by reference to size of government, freedom to trade internationally, business and labour regulation, and the protection of property rights) and (b) countries where agents trust and abide by the rules of society to a significantly higher degree than the average. Yet further simplified: freedom to trade + law and order = consumer disputes are arbitrable with restrictions.

Conversely, both arbitrability with no restrictions and straightforward non-arbitrability are observed in countries scoring below average (again one standard deviation below the average) in both economic freedom and rule of law. In plain English again: countries in which consumer disputes are either non-arbitrable or 'fully' arbitrable (no particular conditions for the validity of consumer arbitration clauses) are countries which on average have significantly lower respect for economic freedom and significantly lower general levels of trust and abidance for the rules of society.

Remarkably then, countries placing important constraints on economic freedom are nevertheless, statistically, likely *not* to put restrictions on how consumer disputes can be submitted to arbitration. As already pointed out above: there is no linear increase of arbitrability freedom the more laissez-faire a country's model is.

These observations suggest that liberal market economies take into account consumer protection as part of the market rights they seek to enforce (by placing limits on how consumer disputes can be brought to arbitration), within a general economic framework that also favours free economic initiative (by allowing for the possibility of consumer disputes going to arbitration).

Geographically, OECD members show a higher resort to restrictions accompanying the arbitrability of consumer disputes than non-OECD countries. The latter largely place no constraints on the arbitrability of such disputes or in fewer cases reject their arbitrability altogether.

Geographically also, it is remarkable to note that in the three major South American countries covered by the GAP – Argentina, Brazil and Peru –, consumer disputes are not arbitrable, demonstrating the scepticism of a fringe of this continent towards arbitration as an appropriate forum for disputes between structurally imbalanced parties. This is quite the opposite in North America where consumer disputes are fully arbitrable with no restriction in the United States or arbitrable with restrictions, depending on the provinces, in Canada. Does this mean that legal tradition also plays a role in the recognition of arbitrability of consumer disputes, alongside the criterion of the importance of the rule of law in a given system? Although the authors of this report are aware of the limitations of a classification by family of law, which is becoming increasingly anachronistic, the GAP chapters highlight a more liberal trend with regard to the arbitrability of consumer disputes in countries belonging to or having a common law heritage. In addition to the United

States and Canada, the arbitrability of consumer disputes is also recognized in Australia, New Zealand, India, Hong Kong, Nigeria and Mauritius.

It is important to note that these are statistical averages, and that individual countries of a given category may significantly deviate from the average of its category.

It would be judgmental (and quite a bit Eurocentric navel-gazing) to claim that the more 'sophisticated' legal systems are those that allow in principle consumer disputes to be resolved by arbitral tribunals but put limits on how such disputes can be brought to arbitration. It would probably be technically correct to claim that those countries where the law plays a more central societal role than average and which take the freedom to do business seriously are the ones most likely to neither treat consumer disputes like common commercial disputes nor keep them entirely away from privatized justice.

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#### Technical specifications

The economic freedom index used here is taken from the World Index compiled by the Fraser Institute (Gwartney, J., Lawson, R., Hall, J., & Murphy, R. (2022). *Economic Freedom Dataset. Economic Freedom of the World: 2022 Annual Report*); it comprises 21 indicators including size of government, freedom to trade internationally, business and labour regulation, the protection of property rights. The rule of law index is taken from the World Bank's Rule of Law, part of the WB Governance Indicators, which is here standardised and taken for the year 2020 (Kaufmann, D., Kraay, A., & Mastuzzi, M. (2010). *The worldwide governance indicators: A summary of methodology, data and analytical issues. World Bank Policy Research Working Paper*, 5430); it conceives Rule of law as the extent to which agents trust and abide by the rules of society, also including indicators of the general enforceability of contracts, in addition to aspects like perceptions of crime rates and reliability of the judiciary.

The information below is presented in summary form. Additional detail is available in the GAP chapters, to which you can click through via the hyperlinked jurisdiction names. Please note that the information presented in this reference sheet does not constitute legal advice and the contributing law firms and Delos Dispute Resolution decline any and all responsibility. The arbitrability of consumer contracts can be a highly technical subject, with multiple exceptions and variations, and you should accordingly consider seeking legal advice.

Jurisdiction	Arbitrable?	Commentary
<a href="#">Algeria</a> , by Bennani & Associés	Presumed yes	No restrictions noted.
<a href="#">Angola</a> , by Miranda & Associados	Yes	The general rule is that natural or legal persons may enter into arbitration agreements, minors and persons with diminished capacity being the only exception.
<a href="#">Argentina</a> , by Bomchil	No	Article 1651 of the Civil and Commercial Code determines that the following matters are not arbitrable: ... (c) those involving the rights of users and consumers; (d) adhesion contracts, whatever their purpose is.
<a href="#">Australia</a> , by Squire Patton Boggs	Yes, with restrictions	There is no express restriction on consumers being party to arbitration agreements. However, depending on the circumstances, an arbitration agreement with a consumer (e.g., included as part of a standard form contract or a contract of adhesion) may not be enforceable, either as an unfair contract term or because inclusion of the term amounts to unconscionable conduct.
<a href="#">Austria</a> , by Knoetzl	Yes, with restrictions	Consumers may validly enter into arbitration agreements in relation to consumer disputes, but subject to considerable restrictions: pursuant to section 617 of the Code of Civil Procedure, an arbitration agreement involving a consumer is only valid if it is concluded in a separate document after the dispute has arisen. Foundations (" <i>Privatstiftungen</i> ") and minority shareholders of corporations are, in certain circumstances, considered consumers.
<a href="#">Belgium</a> , by Fieldfisher	Yes, with restrictions	When it comes to arbitration agreements entered into with a consumer, the latter benefits from certain protections in accordance with the Belgian Code of Economic Law. Even though this Code does not expressly prohibit arbitration clauses, in practice, courts tend to protect the consumer, by considering that arbitration agreements entered into with consumers before the dispute has arisen are abusive. The consumer will therefore be granted a choice of bringing a dispute before the courts, regardless of any pre-dispute arbitration agreement.
<a href="#">Benin</a> , by Oya	Presumed yes	No restriction noted.
<a href="#">Brazil</a> , by TozziniFreire Advogados	No	Arbitral clauses inserted in consumer contracts are null and void according to Art. 51, VII, of the Code of Consumer Defence and Protection (Law No. 8.078 of September 11, 1990). This provision enables the parties to circumvent the competence-competence principle and go straight to the Judiciary.
<a href="#">Bulgaria</a> , by Kambourov & Partners	No	Since January 2017, disputes involving consumers are non-arbitrable.
<a href="#">Canada</a> , by Borden Ladner Gervais (BLG)	Depends on province	Applicable provincial legislation provides guidance on whether particular matters are arbitrable. In areas such as consumer contracts, some jurisdictions have statutory restrictions with respect to arbitration. In Quebec, for instance, any stipulation that obliges the consumer to refer a dispute to arbitration that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the

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		consumer of the right to be a member of a group bringing a class action, is prohibited. Arbitrability in Canada is generally considered a requirement for jurisdiction as opposed to a condition of validity of the arbitration agreement, with the possible exception of arbitration agreements in the consumer protection context where a lack of arbitrability of such disputes may lead to invalidity.
<a href="#">China (Mainland)</a> , by Herbert Smith Freehills	Presumed yes	No restrictions noted.
<a href="#">Côte d'Ivoire</a> , by Dogue - Abbé Yao & Associés	Yes	There are no express restrictions to arbitrability within the OHADA area or in Côte d'Ivoire; Indeed, any natural or legal person may resort to arbitration with respect to any rights on which she has free disposal.
<a href="#">Cyprus</a> , by Christos Georgiades & Associates	Presumed yes	No restrictions noted.
<a href="#">Dominican Republic</a> , by Jimenez Peña	Presumed yes	No restrictions noted.
<a href="#">Egypt</a> , by Zulficar & Partners	Presumed yes	No restrictions noted.
<a href="#">England &amp; Wales (UK)</a> , by White & Case	Yes, with restrictions	Section 91(1) of the 1996 Arbitration Act provides that arbitration agreements relating to claims under £5,000 in consumer contracts are unfair and therefore unenforceable. For claims over £5,000, the arbitration agreement may still be considered unfair and unenforceable if it causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
<a href="#">Ethiopia</a> , by Aman Assefa & Associates	No	The Arbitration Law provides that the matters relating to consumer protection are non-arbitrable. The boundaries of this haven't yet been tested in court.
<a href="#">Finland</a> , by Castrén & Snellman	Yes, with restrictions	Consumers are not bound by arbitration agreements concluded before a dispute has arisen.
<a href="#">France</a> , by August Debouzy	Yes, with restrictions	In a ruling of 30 September 2020, the Court of cassation considered the validity of an arbitration agreement in a consumer contract between a French national and a Spanish law firm. It was decided that the provisions of EU law that protect consumers against unfair terms prevail over the "kompetenz-kompetenz" principle. As such, the Court of Cassation confirmed the decision of the Versailles Court of Appeal that had considered that an arbitration clause contained in an agreement for the provision of legal services was an unfair term within the meaning of the EU Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and thus discarded it. It is uncertain whether the solution adopted in this ruling is of general application as there has been no other recent decision on this point. However, it should be stressed that in order to conclude that the arbitration clause was an unfair term, the Versailles Court of Appeal relied heavily on the circumstances of the case, and the specific fact

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		that the clause had not been subject to any negotiation and that it was standardised. As such, it would be premature to conclude, based on this single decision, that any arbitration agreement stipulated in an international consumer contract will be considered by French judges as unfair term under EU law.
<a href="#">The Gambia</a> , by Farage Andrews Law Practice	Presumed yes	No restrictions noted.
<a href="#">Germany</a> , by CMS Hasche Sigle	Yes, with restrictions	Special form requirements apply to arbitration agreements in which one party is a consumer: they must be contained in a standalone document (unless if made with a notary) and signed by the parties by hand or by means of a qualifying electronic signature.  Arbitration agreements recorded on a blockchain are recognized in B2B transactions. However, this is not the case if a consumer is party to the transaction.
<a href="#">Greece</a> , by KLC Law Firm	No	Any private law dispute may be referred to arbitration as long as the parties are vested under law with the power to freely dispose of the dispute's subject matter. Accordingly, the following categories of disputes, have been considered to be non-arbitrable: ... consumer-related matters;
<a href="#">Guinea</a> , by Thiam & Associés	Presumed yes	No restrictions noted.
<a href="#">Hong Kong</a> , by Fangda Partners	Yes, with restrictions	Arbitration agreements can be enforced against a consumer under Hong Kong law, provided that the consumer provides their written consent after the differences have arisen, or has themselves had recourse to arbitration to enforce the agreement. The court will also scrutinise the substance of the agreement to determine if the consumer is in fact dealing as a consumer. For example, an experienced businessman who instructs solicitors frequently in the course of their business was not treated as a consumer for the purposes of an arbitration agreement contained in a solicitor's retainer.
<a href="#">Indonesia</a> , by KarimSyah Law Firm	Presumed no	The crux of the Arbitration Law is to ensure that where parties have agreed to arbitrate their disputes, the Indonesian courts do not have and may not take jurisdiction over such matters. This right is limited to commercial disputes, being those that the parties have the authority to resolve themselves, thereby giving them the right to delegate that authority to an arbitral tribunal and divest the courts of jurisdiction.  Furthermore, incorporation by reference is not recognized in Indonesia unless it can be shown that the party contesting actually read and agreed to the arbitration clause in the document sought to be incorporated.
<a href="#">Iran</a> , by Gheidi & Associates	Presumed yes	No restrictions noted.
<a href="#">Iraq</a> , by Eversheds Sutherland	Presumed yes	No restrictions noted.

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<a href="#">Italy</a> , by Legance	Yes, with restrictions	In relation to consumers, according to the EU Directive 93/13 (transferred into Italian law by the Consumer Code, Art. 33.2.v-bis, Legislative Decree 6 September 2005, no. 26), an arbitration clause inserted in a consumer contract is presumed to be abusive and cannot be efficiently enforced against the consumer against his/her will. However, once the dispute has originated, the consumer and the professional can convene to defer the specific dispute to arbitration, following the standard requirements put forward by Article 807 of the Code of Civil Procedure.
<a href="#">Kenya</a> , by ALN Kenya - Anjarwalla & Khanna	Presumed yes	No restrictions noted.
<a href="#">Lebanon</a> , by Obeid Law Firm	Presumed yes	No restrictions noted.
<a href="#">Libya</a> , by MKE Lawyers	Presumed yes	No restrictions noted.
<a href="#">Mauritius</a> , by Peeroo Chambers	Yes, with restrictions	Section 8 of the International Arbitration Act 2008 expressly allows arbitration involving a consumer, provided that the relevant arbitration clause is confirmed after the dispute has arisen by means of a separate written agreement of the parties.
<a href="#">Mexico</a> , by Von Wobeser	Presumed yes	No restrictions noted.
<a href="#">Morocco</a> , by Gide Loyrette Nouel	Presumed yes	No restrictions noted.
<a href="#">New Zealand</a> , by Chapman Tripp	Yes, with restrictions	An arbitration agreement is enforceable against a consumer only if the consumer enters into a separate written agreement with the other party to the contract, after a dispute has arisen out of or in relation to the contract, certifying that the consumer has read and understood the arbitration agreement and agrees to be bound by it (Arbitration Act, s 11(1)).
<a href="#">Nigeria</a> , by Broderick Bozimo & Company	Presumed yes	No restrictions noted.
<a href="#">Norway</a> , by Wikborg Rein	Yes	Certain formality requirements apply to arbitration agreements with consumers.
<a href="#">Pakistan</a> , by Raja Mohammed Akram & Co. (RMA&CO)	Presumed yes	No restrictions noted.
<a href="#">The Philippines</a> , by SyCip Salazar Hernandez & Gatmaitan	Presumed yes	No restrictions noted.
<a href="#">Poland</a> , by Clifford Chance	Yes, with restrictions	In the case of disputes with consumers, the parties may agree to arbitrate only after a dispute has arisen (Articles 1164 and 1164 <sup>1</sup> §1 Code of Civil Procedure).
<a href="#">Portugal</a> , by Morais Leitão, Galvão Teles,	Presumed yes	No restrictions noted.

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Jurisdiction	Arbitrable?	Commentary
Soares da Silva & Associados (MLGTS)		
<a href="#">Romania</a> , by Iordache Partners	Yes, with restrictions	Disputes arising from contracts with consumers, or individuals purchasing goods or services outside of a trade, are in principle arbitrable, in that they adjudicate rights of which the parties may dispose, which is the legal test of arbitrability <i>ratione materiae</i> . However, while this may not be technically an arbitrability point, it is worth noting that exclusive arbitration provisions in consumer contracts may be vulnerable under consumer protection legislation as “abusive terms” (Law 193/2000, which implements the Council Directive 93/13/EEC on consumer contracts).
<a href="#">Russia</a> , by Freshfields Bruckhaus Deringer and Stonebridge Legal	Presumed yes	No restrictions noted.
<a href="#">Singapore</a> , by Shearman & Sterling	Yes	No restrictions noted.
<a href="#">Spain</a> , by Garrigues	Yes, with restrictions	Arbitration with consumers is regulated by the Royal Decree 1/2007 of 16 November 2007, on the Revised Text of the General Defence of Consumers and Users. The Arbitration Act will therefore only apply to those issues that are not addressed in the Decree.
<a href="#">Switzerland</a> , by Lévy Kaufmann-Kohler	Yes	No restrictions noted.
<a href="#">Taiwan</a> , by Formosa Transnational	Yes	No restrictions noted.
<a href="#">Tanzania</a> , by A&K Tanzania	Yes	No restrictions noted.
<a href="#">United Arab Emirates (UAE)</a> , by Al Tamimi & Co.	Presumed yes	No restrictions noted.
<a href="#">United States of America (USA)</a> by Arent Fox for California, Boies Schiller Flexner for Florida, New York and Washington D.C., and Vinson & Elkins for Texas	Yes	The Federal Arbitration Act pre-empts state law - statutory or common law - that prohibits arbitration of a particular type of claim. As a result, although some states have attempted to create rules limiting the ability of corporations to include agreements to arbitrate in consumer contracts, the U.S. Supreme Court has struck down such provisions as contrary to the Federal Arbitration Act's principle of non-discrimination against arbitration agreements.

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