Banking on Arbitration

Big Banks, Consumers, and Checking Account Dispute Resolution

NOVEMBER 2012

The Pew Charitable Trusts is driven by the power of knowledge to solve today's most challenging problems. Pew applies a rigorous, analytical approach to improve public policy, inform the public, and stimulate civic life.

The Safe Checking in the Electronic Age Project, a project of The Pew Charitable Trusts, aims to restore transparency, fairness, responsibility, and free-market principles to one of the most common consumer financial products—the checking account.

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For additional information, visit www.pewtrusts.org/safechecking.

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Introduction

Checking accounts are the cornerstone of household financial management, with nine out of 10 Americans using them to deposit earnings, pay bills, manage money, and build an ongoing relationship with a financial institution. However, despite this widespread use, consumers often are unaware of the terms of their checking account agreements. For instance, Pew found that many consumers are unaware that account agreements restrict their options if they have a dispute with their financial institution.

Pew's prior research on terms and conditions of checking account agreements revealed that limitations on dispute resolution, including mandatory binding arbitration clauses, are common. These clauses require consumers to submit all complaints against their financial institution to a third-party decision maker (called an "arbitrator") instead of to a court.

Building on earlier research, this report studies the account agreements of the 100 largest retail banks and credit unions by deposit volume to determine the prevalence of mandatory binding arbitration clauses and other dispute resolution terms. Of these, Pew was able to obtain 92 checking account agreements (85 banks and 7 credit unions). (See Appendix A for list of financial institutions.) The focus was only on what was disclosed in these agreements, not additional rules and procedures required by the private arbitration companies.[1] Additionally, Pew commissioned a survey of 603 consumers to ascertain American attitudes toward mandatory binding arbitration in checking accounts. (See Appendix B for additional discussion of methodology.)

Views on mandatory binding arbitration as an alternative dispute resolution process are mixed. Financial institutions favor arbitration because it is seen as a more flexible, faster, and cheaper alternative to court.[2] Those who question the widespread use of the process raise concerns that arbitration deprives the consumer of certain remedies, bars a consumer from joining a class action lawsuit, curtails certain judicial civil procedures and due processes such as a consumer's ability to appeal decisions, and raises conflict of interest issues if the financial institutions provide arbitration companies repeat business.[3] When surveyed, consumers expressed support for arbitration as a means of streamlining the dispute resolution process, but also indicated they believe certain individual features of the proceedings are unfair.

Pew's research found that most financial institutions limit consumer options for dispute resolution in checking accounts. Of the 92 financial institutions studied, 64 percent restricted dispute resolution in one or more of the following ways: mandatory binding arbitration, class action bans, jury trial waivers, restrictions on damages, and shortened statutes of limitations.[4] Of the 50 largest financial institutions, 77 percent limited consumers' dispute resolution options, and of the next 50 largest, 50 percent did so. In addition, the study revealed that agreements containing arbitration clauses are more likely to include a provision barring consumers from joining a class action lawsuit than checking account agreements that do not contain an arbitration clause.

In response to Pew's survey, consumers, when presented with possible features of arbitration, overwhelmingly find the components of the process unacceptable. At the same time, however, consumers support arbitration's goal of being a simpler, less costly alternative to court.

KEY TERMS

ARBITRATION
A private dispute resolution process in which a third-party decision maker resolves disputes between opposing parties. Unlike mediation, in which disputants can choose whether to settle, the arbitration decision is binding with narrow opportunity to appeal.

ARBITRATOR
The third-party decision maker who renders a binding decision in the formal process of arbitration.

ARBITRATION CLAUSE
A contractual provision that requires that a dispute about rights, duties, and liabilities be taken to arbitration instead of to court.

Findings—Prevalence of Dispute Resolution Clauses

Checking account agreements often limit how and in what venue a consumer may resolve a complaint against his or her financial institution. Of the 92 financial institutions studied, 43 percent contain mandatory binding arbitration clauses.[5] This number increases to 47 percent when considering only banks, because none of the credit unions studied include an arbitration clause in their account agreements.

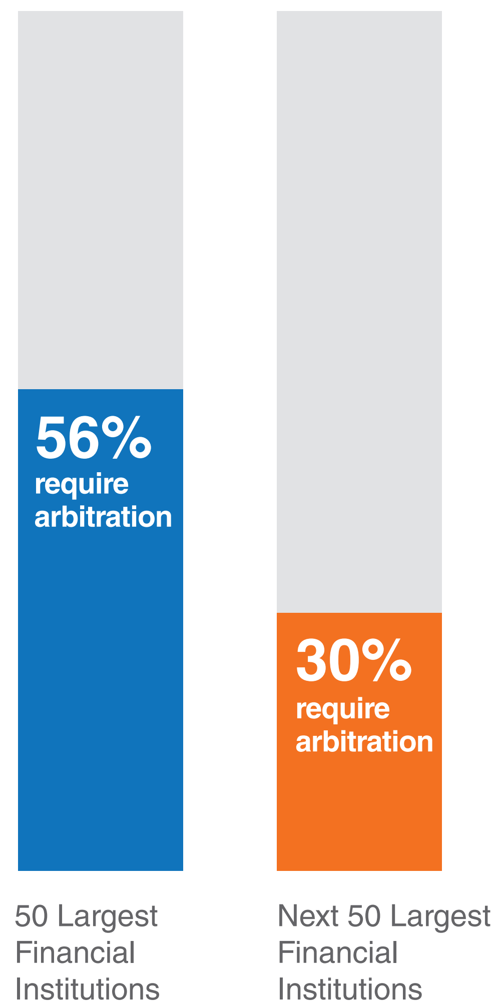
In addition to mandatory binding arbitration, some checking account agreements contain other restrictions on dispute resolution. These constraints include class action bans; jury trial waivers; shortened statutes of limitations; and exclusions for lost profits and consequential, punitive, and/or incidental damages.[6]

The larger the financial institution, the more likely an account agreement will contain a clause requiring mandatory binding arbitration.

A wide disparity exists between the 50 largest financial institutions and

EXHIBIT 1:

LARGEST FINANCIAL INSTITUTIONS MORE LIKELY TO USE ARBITRATION AGREEMENTS



SOURCE: The Pew Charitable Trusts, 2012.

those ranked 51 to 100 (defined hereinafter as "next 50 financial institutions"). More than half (56 percent) of the 50 largest institutions have arbitration clauses in their account agreements, while only 30 percent of the next 50 financial institutions do (Exhibit 1).

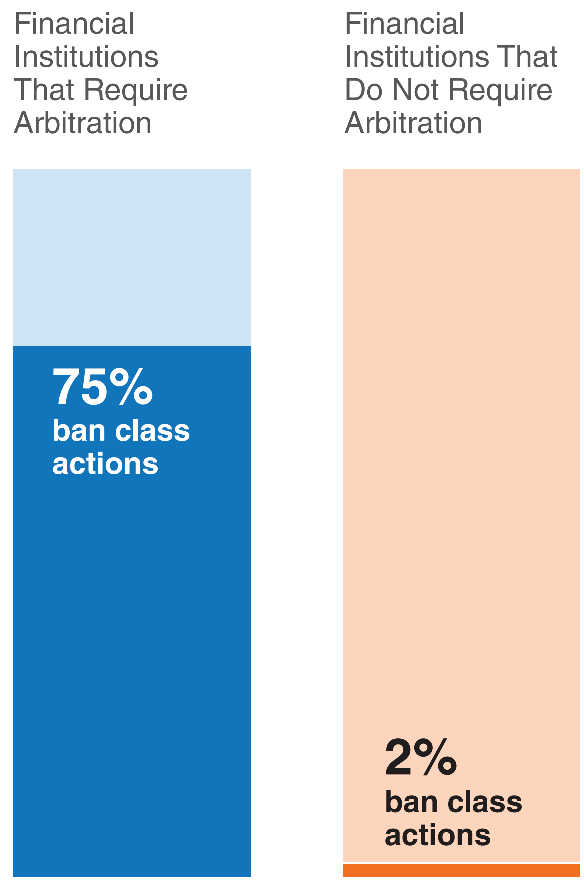
Of the financial institutions that require arbitration, some allow consumers to avoid the arbitration process either by opting out within a set period of time or by filing their claim in small claims court.

Just over one-quarter (28 percent) of financial institutions permit customers to opt out of mandatory binding arbitration. These institutions require the consumer to opt out within a median of 38 days from the date the account is opened, or the date the customer receives notice that their account agreement now includes arbitration, before being bound to arbitration as the sole means for resolving a dispute.[7]

Almost half (48 percent) of the financial institutions that require arbitration allow the consumer to resolve a dispute in small claims court instead of through arbitration. However, only consumers who have claims for damages below a defined amount have access to this option.[8]

EXHIBIT 2:

FINANCIAL INSTITUTIONS THAT REQUIRE ARBITRATION MUCH MORE LIKELY TO BAN CLASS ACTIONS



SOURCE: The Pew Charitable Trusts, 2012.

Three-quarters (75 percent) of account agreements that contain mandatory binding arbitration clauses likewise contain a provision barring consumers from joining a class action against their financial institution, either in arbitration or litigation.

Class actions are used by a group of consumers who claim they have been similarly harmed by a financial institution. Through a class action, these consumers join together to try to hold a financial institution accountable for injuries that may be small when brought individually, but, when brought in the aggregate, amount to significant harm. Of the 52 financial institutions that did not have an arbitration clause, 2 percent contained a stand-alone ban on class actions (Exhibit 2). This finding indicates a clear correlation between mandatory binding arbitration clauses and class action bans.

Of the institutions in the top 50 that have arbitration clauses, 81 percent have class action bans. For the next 50 institutions, this number drops to 62 percent. Therefore, consumers who bank with larger financial institutions are more likely to be precluded from joining a class action than those who bank with a smaller financial institution.

Additional limitations on dispute resolution often are contained in checking account agreements.

- Almost three-quarters of the arbitration clauses (70 percent) make clear that the arbitrator's decision is final, with only narrow exceptions for an appeal.[9]
- Nearly half (45 percent) disclose a limitation on discovery, a pretrial process that requires the exchange of information between parties and provides access to financial institution documents that may affect the consumer's case.[10]
- Sixty percent do not require that the arbitrator have a law degree.[11]

However, it is important to note that arbitration companies' rules and procedures may contain greater detail about the requirements for the arbitrator and the process by which the arbitration must be carried out, while checking account agreements may contain relatively little information about the process.

More than half (59 percent) of the checking account agreements contain clauses whereby the consumer waives the right to a jury trial.

Arbitration clauses, by definition, require the consumer to waive his or her right to a jury trial. Accordingly, the 40 checking account agreements that contained arbitration clauses also preclude consumers from having their complaint heard by a jury. Of the 52 account agreements that did not have an arbitration clause, 14 contained a jury trial waiver. In total, almost 60 percent of the account agreements barred the resolution of disputes by a jury (Exhibit 3).

One-third of checking account agreements include provisions that limit a financial institution's liability for certain types of damages.

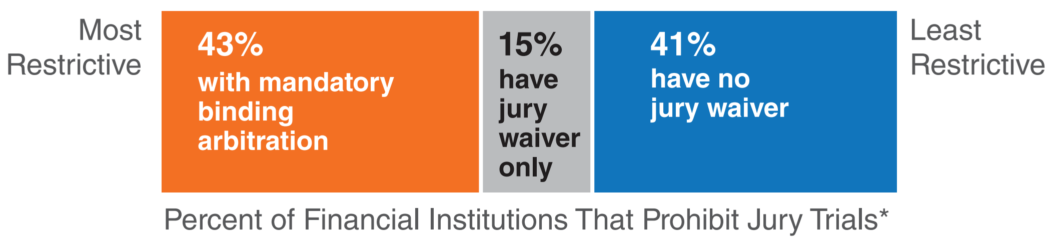
The most common limitations on liability include exclusions for lost profits and consequential, punitive, and/or incidental damages.[12] These clauses are more prevalent in the account agreements for the largest 50 institutions (44 percent) than for the next 50 financial institutions (20 percent).

More than one in 10 (13 percent) account agreements shorten the legally prescribed statute of limitations for consumers to bring disputes against their bank or credit union.

The range for these clauses is three months to two years, with a median of one year. The shortening of the statute of limitations is more prevalent in account agreements for the largest 50 financial institutions (17 percent) than for the next 50 financial institutions (9 percent).

EXHIBIT 3:

MORE THAN HALF THE ACCOUNT AGREEMENTS CONTAIN JURY TRIAL WAIVERS



*Does not add up to 100% due to rounding.
SOURCE: The Pew Charitable Trusts, 2012.

Findings—Consumers' Attitudes

In July 2012, Pew commissioned a national survey of checking account holders on their attitudes toward mandatory binding arbitration clauses. Consumers across age, gender, race, income, education, and political affiliation overwhelmingly find the components that constitute the arbitration process unacceptable.

Consumers overwhelmingly want a choice between going to court and entering arbitration.

More than two-thirds (68 percent) of consumers believe they should have a choice between taking their dispute to arbitration and taking it to court (Exhibit 4).

Likewise, an overwhelming majority (94 percent) of consumers believe that if they were required to go to arbitration, the arbitrator should be chosen by both parties involved in the dispute.[13] As illustrated in Exhibit 5, this belief is shared across demographics.

Almost nine in 10 consumers are concerned about the process of mandatory binding arbitration.

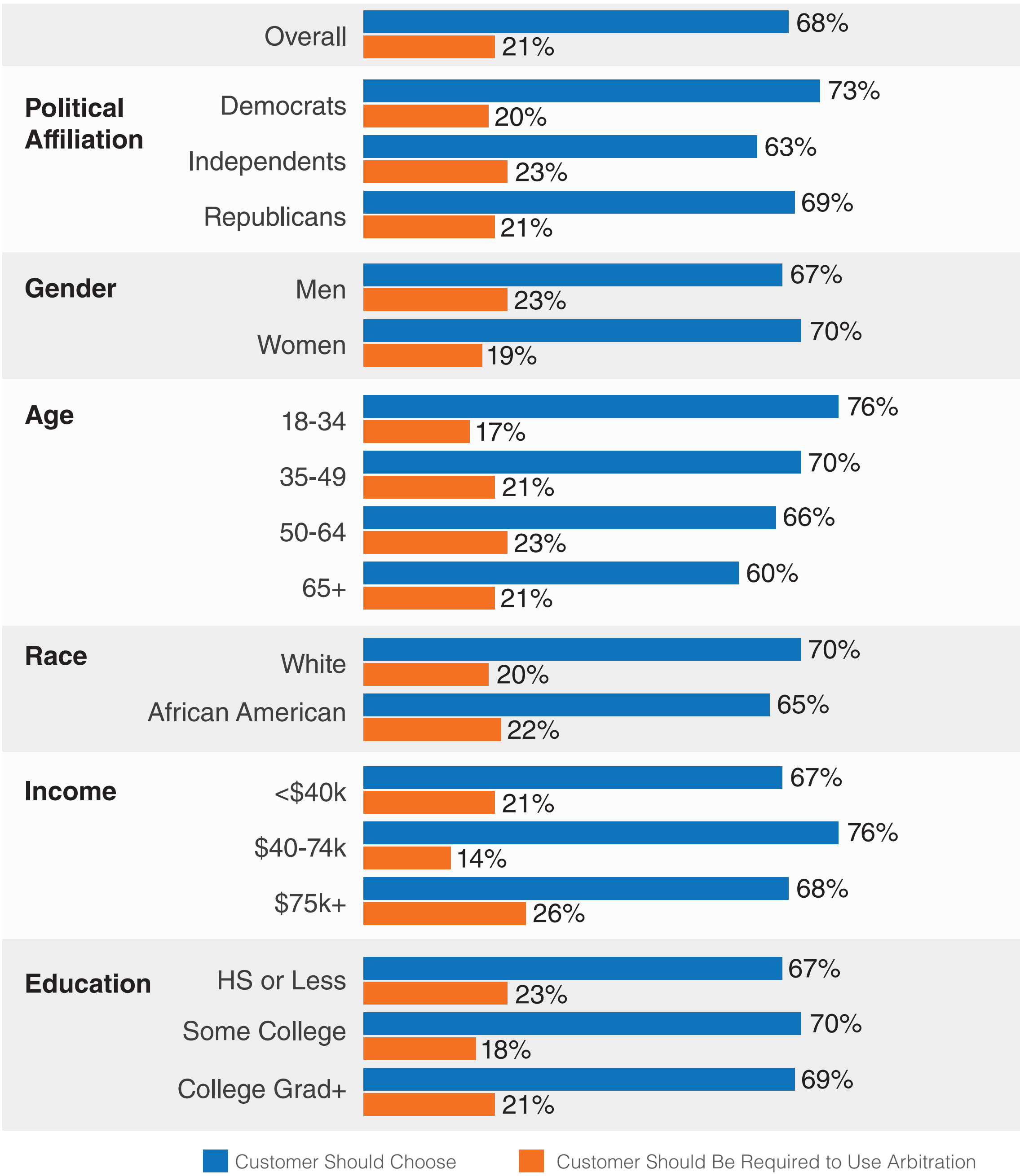
The survey provided a list of items banks commonly include in account agreements and asked respondents if they found each item unacceptable or acceptable.[14] (See Appendix C for survey question.)

An overwhelming majority of respondents found many of the components of mandatory arbitration unacceptable:

- Eighty-five percent of respondents believe arbitrators should be required to have a legal degree or legal training.
- Eighty-four percent find arbitration unacceptable if the bank and the arbitration company have an existing financial relationship as a result of the bank providing repeat business to the arbitration company.[15]
- Eighty-nine percent dislike that there is very limited judicial review of an arbitrator's decision, even in instances in which the arbitrator misapplied the law.[16]

EXHIBIT 4:

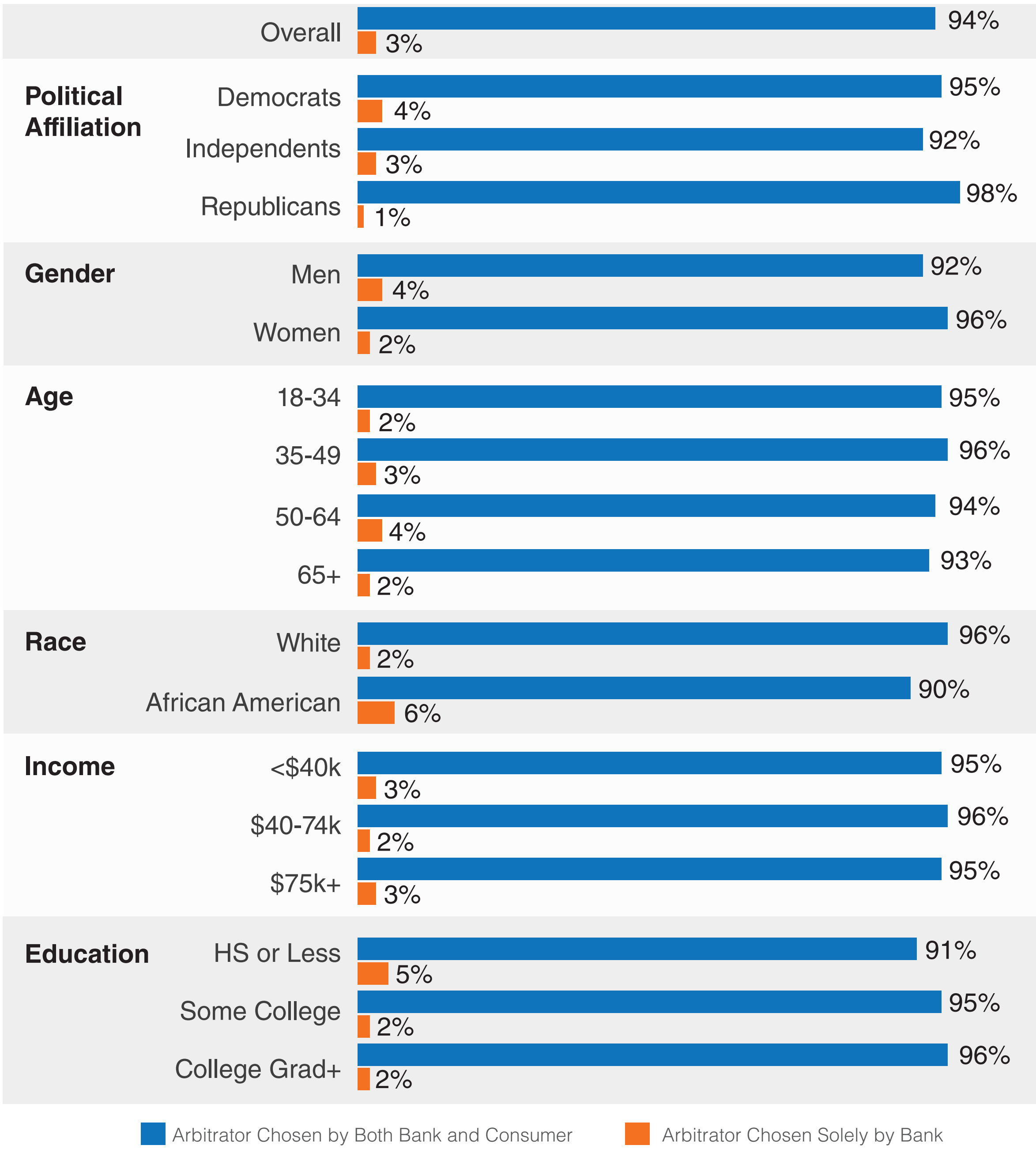
CONSUMERS OVERWHELMINGLY WANT A CHOICE BETWEEN COURT AND ARBITRATION



Due to rounding of numbers and accounting for “not sure” responses, the percentages in this chart do not add up to 100.
SOURCE: The Pew Charitable Trusts, 2012.

EXHIBIT 5:

CONSUMERS OVERWHELMINGLY AGREE THEY SHOULD HAVE A SAY IN THE SELECTION OF THE ARBITRATOR



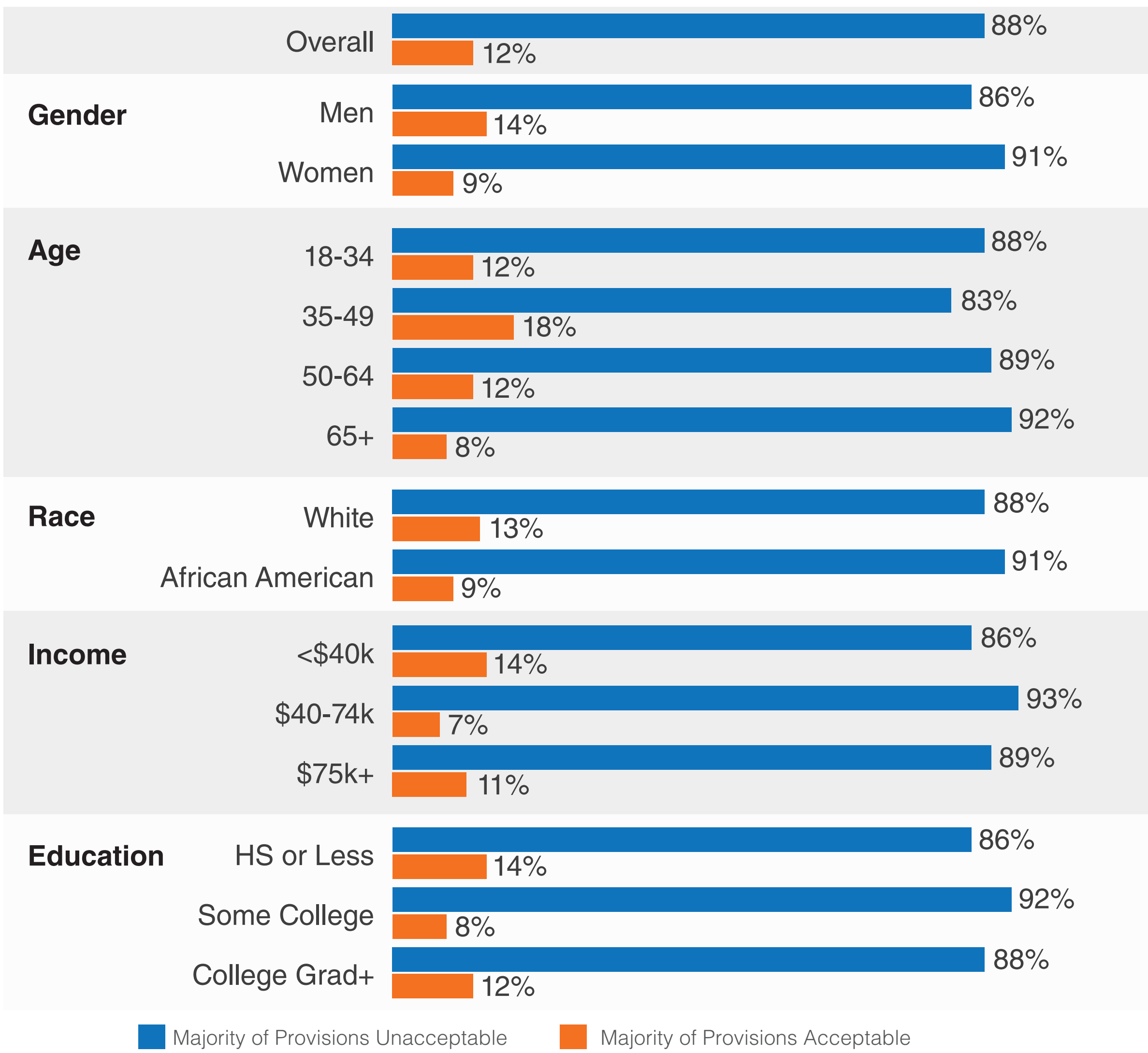
Due to rounding of numbers and accounting for "not sure" responses, the percentages in this chart do not add up to 100.
SOURCE: The Pew Charitable Trusts, 2012.

- Ninety-two percent rate arbitration as unacceptable if consumers are required to pay the bank's legal fees even when the consumer wins the dispute.

In all, 88 percent of consumers find a majority of the procedural components of arbitration unacceptable, and more than half (56 percent) of respondents find all, or all but one, of those components unacceptable. These results are true across demographics (Exhibit 6).

EXHIBIT 6:

CONSUMERS OVERWHELMINGLY FIND THE MAJORITY OF COMPONENTS OF ARBITRATION UNACCEPTABLE



Due to rounding of numbers, may not add up to 100 percent.
SOURCE: The Pew Charitable Trusts, 2012.

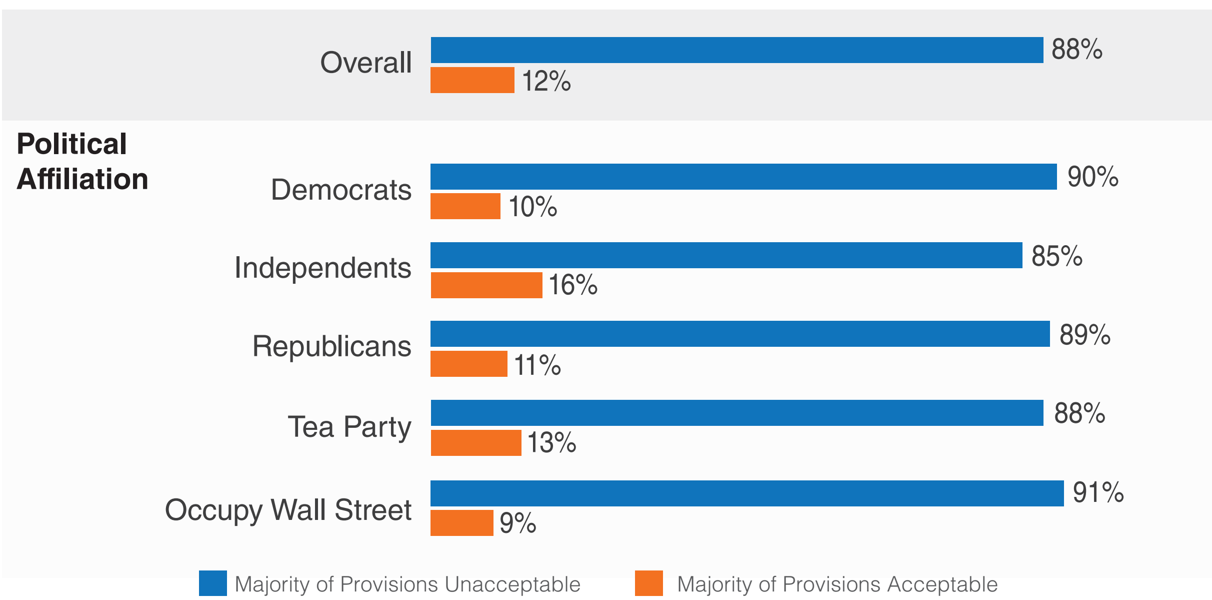
For instance, as illustrated in Exhibit 7, even with arbitration being a politically polarizing issue in Congress, consumers of every major political affiliation find a majority of the arbitration process unacceptable.

Half of the consumers surveyed support the overall goals of arbitration.

Pew provided consumers with contrasting statements about mandatory binding arbitration.[17] One is supportive of arbitration, stating that it is a simpler and cheaper alternative to court and that it protects against frivolous lawsuits. The other characterization is more unsupportive of the process, stating that arbitration is a biased system that is set up by the bank and that favors the repeat business of the bank. Fifty-six percent of consumers find the assertion that arbitration "streamlined the justice system" compelling, while 51 percent believe that arbitration is a "simpler, less costly way for banks and individuals to settle a dispute."

EXHIBIT 7:

CONSUMERS ACROSS THE POLITICAL SPECTRUM OVERWHELMINGLY FIND COMPONENTS OF ARBITRATION UNACCEPTABLE



SOURCE: The Pew Charitable Trusts, 2012.

Consumers are conflicted on what mandatory binding arbitration means for them.

While the goal of using arbitration as a means of protecting against frivolous lawsuits resonates with consumers, the components that may constitute the process do not. In fact, 85 percent of those who favor arbitration because it protects against frivolous lawsuits also find a majority of the components of arbitration unacceptable (Exhibit 8).

This same feeling is true for 80 percent of consumers who favor arbitration as a simpler and less costly mechanism for resolving disputes—those same consumers also find the majority of the arbitration process unacceptable (Exhibit 9).

CONSUMERS ARE CONFLICTED ABOUT THE PROVISIONS OF ARBITRATION AND ITS GOALS

EXHIBIT 8:

GOAL: PROTECTING AGAINST FRIVOLOUS LAWSUITS

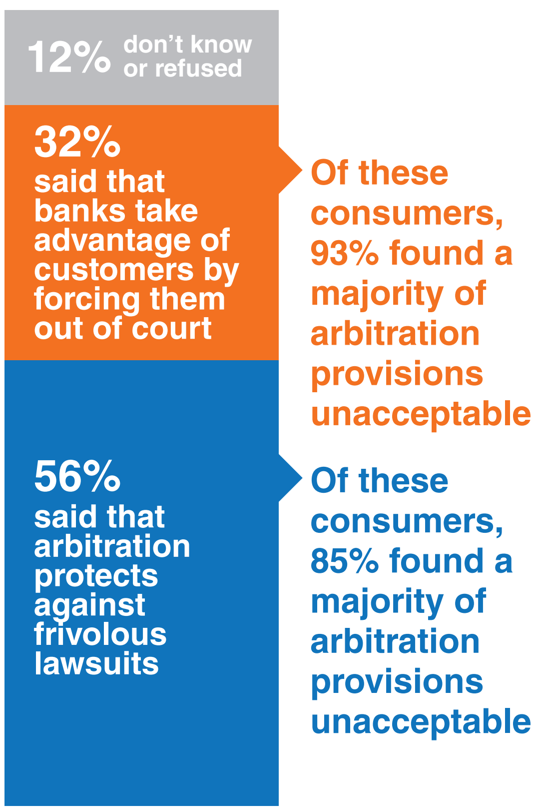
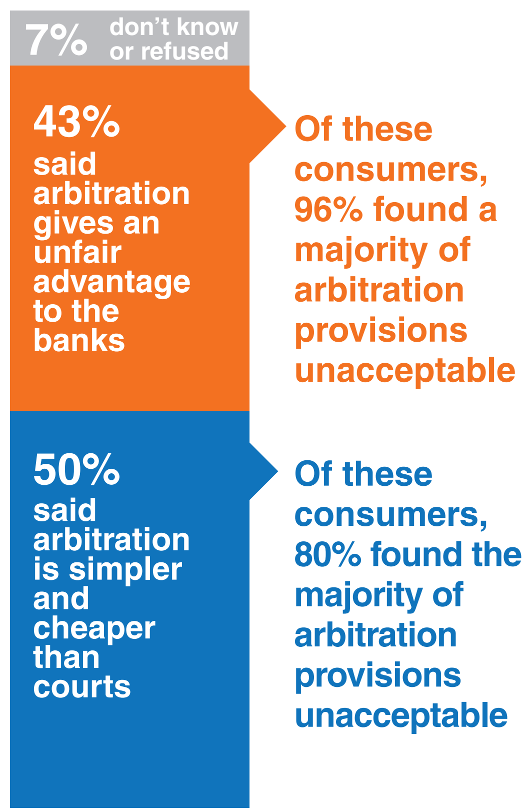


EXHIBIT 9:

GOAL: BEING FASTER AND CHEAPER THAN COURT



SOURCE: The Pew Charitable Trusts, 2012.

Conclusion

The personal checking account is one of the most widely used financial products in the United States. Although large numbers of these accounts contain mandatory arbitration clauses, many consumers are unaware of what it means to be bound by such dispute resolution constraints. Pew's research shows that when the limitations are explained, consumers are concerned about the process of arbitration and find many of its features unacceptable. Yet, at the same time, consumers like arbitration's goals of being cheaper and faster than going to court. While consumers are conflicted, they often do not have the choice of bringing their complaints to court; more than half of the 50 largest financial institutions' checking account agreements contain mandatory binding arbitration clauses.

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (CFPB) is required to study the arbitration clauses attached to the agreements for financial products.[18] Pew urges the CFPB to conduct its mandated study of arbitration agreements in a timely and thorough fashion. In the study, the CFPB should examine mandatory binding arbitration clauses and other constraints on dispute resolution to determine whether such provisions prevent consumers from obtaining relief.

Appendix A: List of 100 Largest Financial Institutions by Deposit Volume

Institution	Ranking
JP Morgan Chase	1
Bank of America	2
Wells Fargo	3
Citibank	4
U.S. Bank	5
PNC Bank	6
TD Bank	7
HSBC Bank	8
SunTrust	9
BB&T	10
Regions Bank	11
Capital One Bank	12
Fifth Third Bank	13
RBS Citizens	14
BMO Harris Bank*	15
Union Bank	16
KeyBank	17
Charles Schwab	18
M&T Bank	19
Comerica	20
Sovereign Bank*	21
USAA	22
Compass Bank	23
Huntington Bank	24
Bank of the West	25
Ally Bank	26
Navy Federal Credit Union	27
E*Trade	28
Hudson City Savings Bank	29
First Republic Bank	30
Synovus	31
Banco Popular de Puerto Rico	32
North Carolina State Employees' Credit Union	33
People's United	34
New York Community Bank	35
National Bank	36
First Niagara Bank	37
BOK Financial Corporation	38
First-Citizens Bank & Trust Co.	39
East West Bank	40
The Frost National Bank	41
Commerce Bank	42
First Tennessee Bank	43
OneWest Bank	44
Associated Bank	45
Zions First National Bank	46
Webster Bank	47
TCF Bank	48
Pentagon Federal Credit Union	49
Signature Bank	50
Whitney Bank	51
FirstMerit Bank	52
Astoria Federal Savings and Loan*	53
BancorpSouth	54
First National Bank of Omaha	55
Bank of Hawaii	56
The PrivateBank and Trust Co.	57
FirstBank	58
Arvest Bank	59
Susquehanna Bank	60
EverBank	61
Firstbank of Puerto Rico*	62
Valley National Bank	63
State Farm Bank	64
Iberiabank	65
Umpqua Bank	66
Boeing Federal Credit Union	67
Third Federal Savings and Loan	68
Washington Federal	69
UMB Bank	70
Rabobank	71
Prosperity Bank	72
Flagstar Bank	73
MB Financial Bank	74
Schools First Credit Union	75
BankUnited	76
First National Bank of Pennsylvania	77
Citizens Bank*	78
Investors Bank*	79
Trustmark National Bank	80
Cathay Bank	81
First Citizens Bank and Trust*	82
Alliant Federal Credit Union	83
Israel Discount Bank	84
Fulton Bank	85
Apple Bank for Savings*	86
Old National Bank	87
The Golden 1 Credit Union	88
International Bank of Commerce	89
First Midwest Bank	90
Sterling Savings Bank	91
Great Western Bank	92
MidFirst Bank	93
Eastern Bank	94
United Community Bank	95
Northwest Savings Bank	96
National Penn Bank	97
First Interstate Bank	98
FirstBank	99
First Financial Bank	100

*Pew was unable to collect account agreements for these banks.

Appendix B: Methodology

To study the prevalence of mandatory binding arbitration in checking accounts, from June to August 2012, Pew was able to collect account agreements from 92 of the 100 largest financial institutions in the United States that had at least one personal checking account option available to consumers. The size of each institution was determined using deposit volume data from the Federal Deposit Insurance Corporation or National Credit Union Administration. When possible, Pew collected the agreement for the most basic account offered that was not an online-only account. If accounts varied by state, the state in which the institution had the largest presence, either by deposit volume or number of branches, was used. Pew attempted to acquire these agreements first by accessing them online, then by calling a branch, and finally by visiting a location if that was feasible. Pew was unable to obtain account agreements for eight institutions using these methods.[19]

To assess consumer attitudes toward mandatory binding arbitration, Pew commissioned Hart Research and McLaughlin & Associates to collaboratively conduct a survey of checking account holders. Interviews were conducted from July 9–11, 2012, among 603 respondents age 18 and older. The margin of error for total qualified respondents is +/- 4 percent at the 95 percent confidence level.

Appendix C: Survey Question

Now I'd like to read you several items that most banks commonly include in their account agreements, which customers are required to follow if there's a dispute with the bank. For each one, please tell me whether you think that item is acceptable or unacceptable.

- Banks often use the same company to provide the third-party decision maker. This means that the bank often already has a financial relationship with the third-party decision maker, who is chosen by the bank and who has decided multiple cases for the same bank over the years.
- The judgment made by the third-party decision maker is final. Even in instances where the decision maker misapplied the law, the customer may not be able to have the decision reviewed by a court.
- The checking account's terms and conditions contain a confidentiality clause, meaning customers cannot tell others about the subject of their dispute with the bank, the third-party decision maker's handling of the dispute, or the final judgment.
- Even if the bank loses a dispute to a customer, the customer may still be required to pay the bank's legal fees.
- Even if the customer does NOT sign the account agreement when they open their checking account, by using their checking account they are still required to take their dispute into a private system that is not a court.
- This private dispute resolution process occurs with no judge or jury present.
- The third-party decision maker hearing the evidence and issuing a judgment does not need to have a legal degree or legal training.

Endnotes

1 The arbitration companies' rules and procedures may expand on what is disclosed in the checking account agreements by setting forth additional requirements for the arbitrator and/or the arbitration process. Pew did not look at individual arbitration company rules and procedures, but instead acted in place of a consumer and read what was disclosed in checking account agreements.

2 Testimony of Victor E. Schwartz, partner, Shook Hardy & Bacon, L.L.P. on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, U.S. Senate Committee on the Judiciary, Hearing on "Arbitration: Is It Fair When Forced?" (October 13, 2011), http://www.judiciary.senate.gov/pdf/11-10-13SchwartzTestimony.pdf.

3 Testimony of Lori Swanson, Minnesota Attorney General, U.S. Senate Committee on the Judiciary, Hearing on "Arbitration: Is It Fair When Forced?" (October 13, 2011), http://www.judiciary.senate.gov/pdf/11-10-13SwansonTestimony.pdf. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

4 While the other 33 institutions (36 percent) did not include any of these limitations, they may restrict dispute resolution in ways that are not included in Pew's report.

5 This figure includes three financial institutions that required resolution of disputes by judicial referee. These clauses, all pertaining to accounts in California, were functionally very similar to mandatory arbitration agreements.

6 According to *Blacks Law Dictionary*, 9th ed. (New York: West, 2009), "Lost profits" are defined as "a measure of damages that allows a seller to collect the profit that would have been made on the sale if the buyer had not breached." "Consequential damages" are defined as "losses that do not flow directly or immediately from an injurious act, but that result indirectly from the act." "Punitive damages" are defined as "damages awarded in addition to actual when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others." "Incidental damages" are defined as "losses reasonably associated with or related to actual damages."

7 Eight of the 11 financial institutions that allow consumers to opt out of the arbitration clause require that the consumer do so in writing. Of the other three, one does not disclose the method to opt out, one allows the consumer to opt out online if the consumer opened the account online (otherwise, in writing), and one allows the consumer to opt out over the phone or in person at a branch.

8 Small Claims Court is a forum that allows individuals to bring civil action in which the amount claimed does not exceed a certain amount. For example, in Maryland, the amount claimed must not be more than $5,000. Md. Code Ann., Cts. & Jud. Proc. § 4-405 (2012).

9 It is important to note that irrespective of whether the arbitration clause makes this point clear, a consumer's right to appeal is extremely limited pursuant to established judicial precedent. See *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 510 (2001) ("[E]ven 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority.") citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (following the same standard as the Federal Arbitration Act in upholding an arbitrator's decision).

10 Before a hearing or a trial begins, the process defined as "discovery" requires each party to disclose information that only it possesses and that is deemed essential to the requesting party's preparation of its case.

11 Arbitrators may be required under the arbitration company's rules and procedures to have a law degree or in the alternative a high level of expertise on the subject matter relating to the dispute.

12 See note 6 above.

13 Pew looked only at what was disclosed in checking account agreements. Consumers may have a role in the selection of the arbitrator, depending upon the arbitration companies' rules and procedures.

14 This question is based solely on what is disclosed in a checking account agreement and does not address the possibility that additional rules and procedures exist in the arbitration companies' own requirements.

15 An example of what is termed "the repeat player effect" is illustrated in the testimony of Minnesota Attorney General Lori Swanson. See U.S. Senate Committee on the Judiciary, Hearing on "Arbitration: Is It Fair When Forced?" (October 13, 2011), http://www.judiciary.senate.gov/pdf/11-10-13SwansonTestimony.pdf.

16 For discussion of limited judicial review, see *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 510 (2001) ("[E]ven 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority.") citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (following the same standard as the Federal Arbitration Act in upholding an arbitrator's decision).

17 The questions pertaining to the components of arbitration occurred first in the survey, followed by two questions that presented contrasting statements about arbitration:

> *I'm going to read you two statements, and I would like you to tell me which statement comes closer to your point of view.*
> **Statement A:** Using the third-party decision maker in a private process when disputes arise, instead of taking the dispute to court, streamlines the justice system by protecting against frivolous lawsuits that clog the courts.
> **Statement B:** Using the third-party decision maker in a private process when disputes arise, instead of taking the dispute to court, allows a bank to take advantage of its customers by forcing them into a separate system created by the bank itself.
>
> *And from the following two statements, which statement comes closer to your point of view?*
> **Statement A:** The private process with the third-party decision maker benefits both banks and customers equally by providing a simpler and less costly way for banks and customers to settle a dispute.
> **Statement B:** The private process with the third-party decision maker unfairly benefits banks because the decision makers are chosen by the bank, and the decision makers are relying on the repeat business from the banks.

18 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.S § 5518. http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

19 While certain disclosures, such as a fee schedule, are required to be disclosed to potential and current customers pursuant to the Truth in Savings Act, there is no similar requirement for account agreements.

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