

Mandatory Employment Arbitration: Dispelling the Myths

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Introduction

Using mandatory arbitration to resolve employment disputes has been a major source of controversy since the practice emerged about twenty-five years ago. On one side of the debate have been proponents of the practice, who contend that mandatory pre-dispute arbitration provides a faster and cheaper means of resolving employment disputes than relying on conventional litigation.

Proponents also claim that, when properly designed, mandatory arbitration provisions can entail due process protections sufficient to safeguard the rights of both sides. By contrast, opponents of mandatory arbitration contend that the practice is inherently unfair and especially fails to protect the rights of employee claimants. Opponents argue that mandatory arbitration does not provide a level playing field for the disputants, in part because of the “repeat player effect,” according to which, employers, by virtue of having previous experience in arbitration, have an advantage in the process over employees, who are likely to lack any arbitration experience—that is, they are likely to be “one-shotters.” Moreover, opponents maintain that employer-promulgated procedures, which are designed by employers usually without input from employees, can be slanted to favor employers.

Arbitration Fairness

The public and scholarly debate over mandatory arbitration has spilled over into the political arena. In 2009, Congress considered proposals to amend the Federal Arbitration Act, amendments that were collectively known as the Arbitration Fairness Act (AFA) (H.R.1020; bit.ly/1uAMUYw, with a companion bill, S.931, introduced in the Senate). These amendments would have rendered void and unenforceable any mandatory pre-dispute agreement that would require parties to a consumer, employment, franchise, or civil rights dispute to submit it to arbitration.

In the Findings section of the proposed legislation, the drafters of the bill asserted that “[m]ost consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them” (quoted in Association for Conflict Resolution, Task Force Report: An Examination of the Arbitration Fairness Act of 2009, p. 17). The AFA was strongly supported by many Democrats in Congress but opposed by most Republicans. When the House passed into the control of the Republicans after the 2010 elections, the possibility that the AFA might be passed into law was virtually eliminated. Nevertheless, the bill continues to receive strong support from employee, consumer, and civil rights groups, and a shift in the control of Congress could easily revive its prospects. A new version of the AFA was submitted in 2013 as H.R.1844 and S.878; see bit.ly/1m2gINI.

Popular Myths

Regarding employment arbitration, however, some of the premises on which the AFA is based are simply not correct. There is no evidence, for example, that “entire industries” have adopted mandatory employment arbitration. The purpose of this article is to clear up some of the misperceptions held by both proponents and opponents of mandatory employment arbitration. In fact, both sides in the debate often rely on certain beliefs that are at best dubious and, as data and evidence suggest, may simply be untrue. In other words, there are myths about mandatory employment arbitration that affect the views of both proponents and opponents of the practice and dispelling those myths should lead toward a firmer foundation for the debate.

This article will focus primarily on three particular myths: (1) that mandatory pre-dispute arbitration is the ADR technique of choice for many if not most employers, (2) that the proportion of employees covered by mandatory employment arbitration procedures is substantial and growing and may now exceed the proportion of employees covered by collective bargaining agreements, and (3) that the number of employment arbitration claims and awards has grown steadily, and now (or in the foreseeable future) may exceed the number of employment cases heard in the federal courts. None of these assertions can be substantiated by means of the best evidence and research now available.

Sources of Evidence and Data

Before dispelling these myths, we need to identify the sources of evidence and data we will use in this article, and have used in others. First, we rely on data that researchers have culled from the files of the major arbitration providers, such as the American Arbitration Association (AAA), JAMS, CPR [publisher of Alternatives], and the Financial Industry Regulatory Authority (FINRA). Several researchers (e.g., Lisa Bingham, 1998, and Lew Maltby, 2003, as well as several researchers associated with Cornell, including Alex Colvin, Mark Gough, Kelly Pike, and the authors of this article) have collected data on the arbitrations administered under the auspices of these providers, and will draw on this work.

In addition, we rely on three surveys of Fortune 1000 corporations conducted over the past seventeen years by Cornell and various co-sponsors. In 1997, Cornell conducted the first comprehensive survey of the use of ADR by Fortune 1000 firms. The respondents in that survey were the general counsels (GCs) or their deputies in each firm, and the researchers managed to obtain responses from 606 corporations. The 1997 survey confirmed the growing use of ADR (at that time, especially arbitration and mediation) to resolve workplace disputes. It also uncovered the emergence of a new

phenomenon, namely, integrated conflict management systems. Briefly, an integrated conflict management system (ICMS) entails a strategic, proactive approach to handling organizational conflict, and incorporates the availability of both rights-based and interest-based options for handling employee complaints.

In 2011, Cornell's Scheinman Institute on Conflict Resolution, in partnership with CPR and the Straus Institute for Dispute Resolution Employment Arbitration at Pepperdine University, conducted a second survey of the use of ADR practices by Fortune 1000 firms. Once again, the survey targeted the GCs or their deputies. The administrators of the 2011 survey succeeded in interviewing top attorneys in 368 of the Fortune 1000 companies. The results of the 2011 survey provide a basis for comparing the ADR policies and practices pursued by major corporations in 2011 with those pursued by major corporations in 1997.

In 2013, with the assistance of CPR, the Scheinman Institute conducted a survey of corporations we identified as using especially innovative—or “cutting edge”—ADR policies. The 2013 survey found approximately 100 corporations that met the definition of “cutting edge” and completed interviews with 57 respondents in those corporations, compiling the results in CPR's 2014 Master Guide Cutting Edge Advances in Resolving Workplace Disputes (see box). In contrast to the earlier Fortune 1000 surveys, the 2013 survey sought interviews with the attorneys or managers in the sample of corporations who had principal responsibility for overseeing the organization's ADR policies and practices. The three surveys conducted by Cornell, CPR, and other cosponsors provide a rich tapestry of data on the use of ADR by America's major corporations.

Employment Arbitration: Separating Truth from Fiction

We now turn to some widely held beliefs about ADR generally and employment arbitration specifically that the best evidence suggests is either of doubtful validity or is simply untrue.

The belief that mandatory employment arbitration is the ADR technique of choice for most employers is not true; most employers prefer mediation and other interest-based processes over mandatory arbitration and other rights-based processes. The best evidence on employer preferences for either rights-based or interest-based options can be found in the three corporate surveys described above.

Preference for Mediation over Arbitration

For example, the 1997 survey clearly documented a corporate preference for mediation over arbitration. Respondents in the 1997 survey told us that they used mediation much more frequently than arbitration to resolve workplace disputes. They explained why they preferred mediation over arbitration, with several respondents noting that the arbitration process was beginning to match litigation in cost and complexity (see Lipsky and Seeber, p. 25). According to the GC of a large energy company, “[a]rbitration is proving to be just as burdensome as litigation. The opposition can use arbitration to elongate the process. It can take over six months simply to agree on an arbitration panel. You can be constantly running back to arbitrators for decisions on discovery. It is a process fraught with potential abuse” (Id.).

The view that corporate employers prefer interest-based options over rights-based options was reinforced by the 2011 survey of the Fortune 1000. In the 2011 survey, respondents were asked how frequently they used voluntary mediation, non-binding arbitration, or binding arbitration to resolve an employment dispute. Nearly seventy percent of the respondents reported that they “rarely” or “never”

used binding arbitration to resolve such a dispute; about eighty-five percent also reported that they “rarely” or “never” used non-binding arbitration to resolve a workplace dispute. By comparison, only 14.3% reported that they “rarely” or “never” used voluntary mediation. As Stipanowich and Lamare point out in a discussion of the 2011 survey results, “[t]he reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints. Indications are that the great majority of disputes are resolved informally in the early stages and rarely in arbitration or litigation. Furthermore, many employers may be eschewing arbitration altogether” (Stipanowich and Lamare, p. 48).

Expanding ADR Portfolio

The 2011 survey also documented the expansion over time of the portfolio of ADR processes used by major corporations. Rather than moving toward the use of arbitration and other rights-based options, the 2011 survey revealed that corporations were moving away from arbitration and toward the use of a variety of interest-based options, including fact-finding, med-arb, conflict coaching, early neutral evaluation, early case assessment, and the use of an ombudsman. Some of these ADR processes were not even on the corporate radar screen in 1997, but by 2011 had clearly gained prominence. Most importantly, the 2011 survey revealed that an increasing proportion of Fortune 1000 corporations had established an ICMS; we estimate that the use of an ICMS grew from seventeen percent to about thirty-three percent of Fortune 1000 employers between 1997 and 2011. An important rationale for the corporate use of an ICMS is that it promotes the use of internal procedures to resolve workplace conflicts at an early stage and helps the organization avoid entirely the use of external procedures (both mediation and arbitration).

Extent of Arbitration Coverage

The coverage of employment arbitration provisions has probably been exaggerated. Claims that a higher proportion of private sector employees are covered by mandatory arbitration provisions than are covered by collective bargaining agreements have not been substantiated. It is not difficult in the literature that deals with employment arbitration to find assertions of the type made by Katherine Stone: “As a result of the 1980s developments in arbitration law, arbitration agreements have become ubiquitous. Employers now routinely put arbitration clauses in employment manuals, lenders put them in credit card agreements, hospitals put them in medical consent forms, and businesses of all types insert them in purchase agreements and service contracts Estimates suggest that, as of 2003, nearly one quarter of private sector non-union workers were subject to arbitration systems that their employer designed and imposed as a condition of employment” (Stone, 2013, pp. 167-168).

Stone continues, “Since 1991, when the Supreme Court first enforced a mandatory arbitration clause in employment case, arbitration has become so frequent that more employees are covered by arbitration clauses than by collective bargaining agreements. Thus, arbitration has largely displaced the civil justice system for most disputes involving ordinary people” (Stone, 2013, p. 168).

In similar fashion, Carmen Comsti asserts that, “[f]orced arbitration was transformed from a rarely used form of dispute resolution into a juggernaut that has changed the nature of statutory enforcement of worker protection laws in the United States. Surveys and studies conducted over the last two decades indicate that a fast-growing number of employers have adopted the practice of forced arbitration of workplace claims” (Comsti, 2014, p. 6). According to David Schwartz, “[t]he Supreme Court has created a monster. With the Court’s enthusiastic approval, pre-dispute arbitration clauses—agreements to submit future disputes to binding arbitration—have increasingly found their way into standard form contracts of adhesion” (Schwartz, 1997, p. 36). The view that mandatory employment

arbitration clauses are “ubiquitous” is shared by Margaret Moses, Jean Sternlight, and other scholars (Moses, 2014; Sternlight, 2005).

The best evidence demonstrates, however, that the scholars who have made these claims have probably exaggerated both the growth in and the extent to which private sector employees are covered by mandatory arbitration policies. In an early study, the GAO reported that, of 1,448 establishments subject to EEOC reporting requirements, only 7.6% maintained a mandatory employment arbitration policy (GAO, 1995). In the 1990s, the growth of ADR practices, including mediation and arbitration, was proceeding at a steady pace, so it would not be surprising if the coverage of private sector employees by mandatory arbitration policies grew for several years (prompted in part by the Supreme Court’s 2001 decision in the Circuit City case). In 2006, the senior author of this article and his co-author Ron Seeber surmised that the proportion of private sector employees covered by employment arbitration provisions had been growing (Seeber and Lipsky 2006, p. 250). But recent research suggests that the growth of mandatory employment arbitration provisions has slowed or even possibly stopped over the last few years.

It turns out that most scholars who have estimated the extent of coverage of mandatory arbitration procedures relied heavily on research conducted by Alex Colvin. In fact, to our knowledge, he is the only researcher who has developed estimates of coverage that are based on solid empirical evidence. In a 2007 article, Colvin suggested that according to the best empirical research “a current estimate in the range of fifteen to twenty-five percent of employers having adopted employment arbitration seems reasonable” (Colvin, 2007, p. 411). Colvin based his estimate on two surveys he conducted in the telecommunications industry. According to Colvin, “[a] 1998 survey of ‘establishments’ in the telecommunications industry indicated that 16.3% of these organizations had adopted mandatory arbitration. A subsequent 2003 survey of establishments indicated that 14.1% had adopted mandatory

arbitration Major restructuring in the telecommunications industries during this time period meant that many establishments closed and new ones opened, which may account for part of the difference” (Colvin, 2004, pp. 586-587). Adjusting for the size of the workforce, Colvin concluded that 22.7% of non-union employees in the telecommunications industry were subject to employment arbitration agreements (Colvin, 2007, p. 410). However, as Colvin notes, his calculation of the percentage of employees covered by mandatory arbitration clauses in the telecommunications industry is actually the percentage of *non-union* employees.

The usual way of calculating the percent of workers covered by collective bargaining agreements is either to calculate the percent of wage and salary workers who are members of unions or the percent of wage and salary workers who are represented by a union. The term “union density” is frequently used to refer to these estimates. The US Bureau of Labor Statistics (BLS) reported that in 2013 14.5 million wage and salary workers were members of unions, that is, 11.3% of the total. The BLS also reported that an additional 1.5 million workers were covered by a union contract but had no union affiliation; this suggests that 12.5% of wage and salary workers were covered by a union contract (BLS, 2014). If we knew the proportion of wage and salary workers that was covered by mandatory arbitration provisions, then we would have an estimate that might be compared to union density estimates. However, we lack estimates of the coverage of mandatory employment arbitration provisions that are directly comparable to union density estimates. Colvin’s estimates for the telecommunications industry remain the best empirical estimates that we have of the coverage of mandatory arbitration provisions. He buttressed his findings by examining the dates establishments in the telecommunications industry adopted mandatory arbitration from the period preceding 1995 through 2002 (Colvin, 2004, pp. 587-588).

Based on his studies, Colvin concluded, “Taken together though, the results suggest that, after rapid expansion in the 1990s, the growth of mandatory arbitration may have slowed. This suggestion is supported by the adoption dates of mandatory arbitration procedures found in the 2003 survey from the telecommunications industry” (Colvin, 2004, p. 587).

Integrated Conflict Management Systems: The Cutting Edge

In the 2013 survey of fifty-seven “cutting edge” companies, the senior author of this article discovered that a high proportion of these companies did indeed rely on arbitration to resolve employment disputes. However, only nineteen percent of the companies surveyed used mandatory ADR procedures, while seventy-four percent used either entirely voluntary or some mixture of voluntary and mandatory procedures. There are various types of “mixed procedures.” A few survey respondents noted that they used voluntary post-dispute arbitration to resolve disputes between their companies and their senior managers and executives but mandatory pre-dispute arbitration to resolve disputes involving some of their blue collar employees; some companies view a procedure that is voluntary for employee claimants as a mandatory procedure for supervisor respondents; other companies use a mandatory procedure for statutory claims but a voluntary procedure for other types of claims. “A few companies (Xerox is a good example) use voluntary arbitration for employees, but if the employee elects to use arbitration, the process becomes mandatory for the employer” (Lipsky, 2014, p. 13).

In the securities industry, under FINRA rules, the arbitration of employment discrimination complaints was mandatory from the inception of the program through 1999, but was made voluntary after 1999 (Lamare and Lipsky, 2014, p. 124). It might be noted that some corporate attorneys have used the term “opt out” to refer to an arbitration procedure that allows employee claimants to decline to participate in the procedure and take their claim to the courts. Maltby has written that the “unofficial coercion” associated with mandatory arbitration could be avoided by giving employees an opportunity

to opt out of the procedure: “Employers could also adopt a default policy of arbitrating disputes but allowing the employee to opt out before the dispute arises” (Maltby, 2003, p. 315). Employers who have arbitration provisions with an “opt out” option obviously should not be considered as employers who use mandatory arbitration, although some researchers have apparently missed this important point. Lipsky noted that his findings on voluntary arbitration “suggest that cutting edge companies prefer voluntary post-dispute rather than mandatory pre-dispute arbitration. *This is a finding that contradicts conventional wisdom...*” [italics added] (Lipsky, 2014, p. 14).

Companies that have established an ICMS have the choice of making the options available to their employees voluntary or mandatory. Prudential, for example, established its “Roads to Resolution” conflict management system in the late 1990s, and from the start Prudential’s system was entirely voluntary. The system had an elaborate set of internal options, but if internal mechanisms failed to resolve a dispute an employee could take his or her complaint to either external mediation or arbitration. An employee who exhausted Prudential’s internal mechanisms could then use mediation, or could pursue the claim in arbitration, using the arbitration procedures offered by Prudential, or could pursue the claim in the arbitration program maintained by FINRA.¹ In the first decade of the Roads to Resolution system, several hundred claims were submitted to mediation, and several dozen were submitted to FINRA’s arbitration program, but not a single claim was submitted to Prudential’s self-administered arbitration procedures (Lipsky, Seeber, and Fincher, 2003, pp. 149-150).²

Apples and Oranges

Two important points need to be made about the coverage of employment arbitration provisions. First, scholars who have not conducted their own empirical research on this question have apparently simply extrapolated Colvin’s findings for the telecommunications industry to the entire workforce and this exercise may not be a valid one. Second, almost all estimates of the coverage of

mandatory employment arbitration provisions have been based on the percentage of companies or establishments that have mandatory arbitration policies. But, as we have noted, “union density” is measured either by the percentage of employees that are covered by collective bargaining agreements or the percent of employees that belong to a union. Therefore, researchers who compare employees covered by mandatory employment arbitration provisions with employees covered by collective bargaining agreements are comparing apples and oranges.

Regarding these two points, the proportion of firms covered by ADR procedures, including arbitration, varies greatly across industries. Some industries have a higher proportion of employees covered by ADR procedures than (for example) the telecommunications industry, but other industries have a much lower proportion. More importantly, the proportion of employees covered by ADR procedures (including arbitration) varies greatly across firms. There is not much empirical evidence on the proportion of employees in a firm that are covered by ADR policies and procedures. Although Colvin developed precise estimates based on data he had about establishments in the telecommunications industry, other researchers apparently based their estimates of the extent of coverage of employment arbitration procedures on the false assumption that if a company has a mandatory employment arbitration procedure it can be correctly assumed that the procedure covers all of the firm’s employees. Evidence suggests that this assumption is almost never true (see, for example, Colvin, 2004; Eisenberg, Miller, and Sherwin, 2008, p. 887).

In the 2011 Fortune 1000 survey the respondent attorneys were asked, “What proportion of your employees are covered by ADR?” Table 1 shows the breakdown of responses.

What is probably most surprising is that over forty-three percent of the respondents in this survey reported that none of their employees were covered by ADR. About one-fifth of the respondents reported that more than seventy-five percent of their employees were covered by ADR. But the median

response on the extent of coverage (not counting the respondents in the “don’t know” category) was under ten percent. The respondents in the 2011 survey—top attorneys in the corporation— may not have had reliable information about the extent to which their employees were covered by ADR, so there may be response errors in these results.³ But if the top attorneys do not know the proportion of their employees covered by ADR, who would? If the results in Table 1 are taken at face value, they suggest that the vast majority of employees in Fortune 1000 corporations are not covered by ADR policies. Unless an appropriate adjustment is made, on a firm-by-firm basis, for the extent of employee coverage by ADR policies and procedures, estimates of the extent of coverage of employment arbitration provisions would be highly exaggerated.

To our knowledge, Colvin is the only researcher who has developed a coverage estimate correctly, but of course his estimates are limited to the telecommunications industry. In our view, the jury is still out on the claim that the proportion of employees covered by mandatory employment arbitration exceeds the proportion of employees covered by collective bargaining agreements. In the public sector the BLS reports that the union membership rate was 35.3% in 2013, whereas in the private sector it was 6.7% (BLS, 2014). The use of ADR, including employment arbitration, in the public sector is limited, so it is highly unlikely that the proportion of workers in the public sector covered by mandatory arbitration exceeds the proportion covered by collective bargaining contracts. No one has yet developed precise estimates, but we think it is highly unlikely that the proportion of the entire workforce (both public sector and private sector employees) that is covered by mandatory employment arbitration procedures exceeds the proportion of the entire workforce covered by collective bargaining agreements.

Actual Number of Employment Arbitrations is Modest

The number of claims that employees take to arbitration and result in arbitration awards has

been, by almost any standard, relatively modest. Moreover, there is growing evidence that the use of employment arbitration has been declining in recent years. We first need to acknowledge that no institution or individual has ever been able to collect a comprehensive set of data on the total number of employment arbitration claims filed or awards issued in the United States. Part of the difficulty in collecting comprehensive data on employment arbitration cases results from the fact that some employment arbitration programs are self-administered by employers. Another part of the difficulty results from the confidential nature of employment arbitration cases and corresponding lack of information about filings and awards. Employers who administer their own employment arbitration programs not only promulgate their own rules and procedures for conducting employment arbitration but also either maintain their own arbitrator rosters or construct arbitrator panels on a case-by-case basis. These employers have chosen not to rely on a provider such as the AAA, JAMS, FINRA, or CPR. Colvin has noted, that “[a]n employer need not designate any service provider to administer arbitration, nor need they adopt any standard set of rules and procedures for the conduct of arbitration” (Colvin, 2014).

To our knowledge, there is simply no comprehensive information available on the number or extent of employer self-administered employment arbitration procedures. On the basis of the hundreds of interviews we have conducted with corporate attorneys, we do know that several large companies maintain these self-administered procedures (for example, at one time, Prudential and Raytheon), but there is no way to estimate how many employment arbitration claims and awards flow through these procedures. However, Colvin and Gough recently conducted a survey of attorneys that represent plaintiff employees, and their survey revealed, according to the respondents, that “the second most common category of arbitration administration after administration by the AAA was ad hoc cases, i.e., cases in which there was no service provider at all” (Colvin, 2014).

Analyzing the Caseloads

Thanks to the diligent efforts of several of our colleagues, however, we do have very good evidence on the number of employment arbitration cases that have been handled by the major providers. We will now briefly review what we have found out about the employment arbitration caseloads administered by the AAA, JAMS, and FINRA.

In 1997 and 1998 Lisa Bingham published articles in which she analyzed employment arbitration awards found in AAA files. In her 1997 article, Bingham analyzed 270 employment arbitration awards and in her 1998 article she examined 203 awards. Presumably, Bingham was able to capture in her studies all of the employment arbitration awards conducted under the auspices of the AAA during the period 1993-1995. If this is a correct presumption, then there were about eighty employment arbitration awards a year administered by the AAA during those years (Bingham, 1997; Bingham, 1998, especially p. 236). Stipanowich reported that between 1997 and 2002 the number of employees covered by AAA employment arbitration procedures grew from three million to six million. The number of employment arbitration filings grew from 1,342 cases in 1997 to 2,133 cases in 2002 (Stipanowich, 2004, p. 873). Of course, the vast majority of those filings did not result in awards. Given the ratio of awards to claims discovered by other researchers, it is unlikely that the number of arbitration awards issued under AAA auspices during this period exceeded about two hundred a year. In 2003 Lewis Maltby published an article in which he reported on the number of arbitration claims filed with the AAA in 2001 and 2002. "At our request, AAA staff conducted a computerized analysis of their entire 2001 and 2002 caseload to determine the frequency of post-dispute arbitration agreements" (Maltby, 2003, p. 219). The AAA retrieved 2,272 employment arbitration claims. However, since Maltby's analysis dealt only with post-dispute arbitration agreements, it excluded claims arising under pre-dispute mandatory arbitration

provisions. Nevertheless, Maltby's findings make it clear that a high proportion of the AAA's employment arbitration caseload consists of cases arising under voluntary arbitration agreements.

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The common use of voluntary arbitration to resolve executive disputes is further confirmed by research by Schwab and Thomas. They found that about forty-two percent of the CEO employment contracts they examined included a clause requiring that disputes between the parties be arbitrated rather than litigated (Schwab and Thomas, 2006, p. 287). In a related study, however, Eisenberg and Miller found that even among high-level executives there was a "flight from arbitration." The authors examined over 2,800 consumer, commercial, and employment contracts filed with the SEC in 2002 by public firms, and they concluded, "Little evidence was found to support the proposition that these parties routinely regard arbitration clauses as efficient or otherwise desirable contract terms. The vast majority of contracts did not require arbitration; only about 11% of the contracts did" (Eisenberg and Miller, 2007, p. 235).

The AAA granted Alex Colvin direct access to their employment arbitration files.

In landmark research, Colvin discovered that over a five-year period (2003-2007) there were 3,945 filings by employees seeking to arbitrate an employment claim; in other words, on average there were about eight hundred employment claims filed per year. The filings resulted in 1,213 awards, for an average of about 240 a year (Colvin, 2011). So, from the mid-1990s, when Bingham discovered the AAA issued about eighty employment awards a year, the number of awards issued under AAA auspices increased to about 240 a year in the period examined by Colvin.

Two Cornell graduate students, Mark Gough and Jesse Klinger, have studied the employment arbitration caseload administered by JAMS. For his master's thesis, Klinger analyzed the complete dataset of JAMS's employment cases for the period April 2003 to January 2013. He discovered that over this period JAMS administered 1,486 employment arbitration cases; in 258 of these cases a hearing was held and an award issued. In other words, over approximately ten years there was an average of about 150 employment arbitration claims per year filed with JAMS resulting in an average of twenty-six awards a year (Klinger, 2014, p. 147).

The last piece of the puzzle we need to put in place is the employment arbitration caseload administered by FINRA. Two of the authors of this article, Lipsky and Lamare, collected all of the FINRA employment arbitration case files (which are available online) from the inception of the employment arbitration program in 1986 through 2008. Over this period of more than twenty years, about 3,200 employment arbitration awards were issued under FINRA auspices; in other words, on average over this period there were about 160 FINRA employment arbitration awards a year (Lipsky, Seeber, and Lamare, 2010, p. 12; Lamare and Lipsky, 2014, pp. 118-119). FINRA virtually exhausts the list of providers that administer employment arbitration cases. CPR provides partial administration of employment arbitration cases, but we lack information on how many claims or awards flow through CPR. The Federal Mediation and Conciliation Service (FMCS) is potentially another provider, but the FMCS caseload consists almost entirely of labor arbitration cases. The agency has told the authors that it has handled employment arbitration cases only under special circumstances and on an ad hoc basis. To the best of our knowledge, state-level agencies that handle labor relations in the public sector (such as New York's Public Employment Relations Board) are not players in the employment arbitration arena.

It therefore appears that in a typical year the most important ADR providers (AAA, JAMS, and FINRA) administer no more than 500 employment arbitration cases that result in an award. As noted, no

one knows how many self-administered awards are issued annually, but calling it an additional 500 cases would be a very generous assumption. Therefore, the best data suggests that at most there are no more than one thousand employment arbitration awards issued annually. This is a very small fraction of the employment claims that are litigated in the federal courts. For example, over the period 1997 to 2013 there were nearly 1.5 million discrimination claims filed with the U.S. Equal Employment Opportunity Commission (EEOC, 2014); this is an average of over 85,000 claims per year. Over the same period, there were over 76,000 claims filed in federal courts under the Fair Labor Standards Act (FLSA) (Bloomberg Law, 2014). Virtually all of these claims might have been arbitrated, but obviously only a small proportion was settled by arbitration. But the EEOC and the FLSA are only two sources of statutory claims that are arguably potential sources of arbitration cases. There are a score of other federal statutes (ERISA, OSHA, ADEA, ADA, FLMA, etc.) that could potentially be a source of arbitration cases. Moreover, there are a multitude of state laws dealing with employment relations. And, in addition, there are an uncountable number of contractual and other non-statutory claims that employees might potentially pursue in arbitration, if those opportunities existed. Arbitration may have considerable potential as a means of resolving workplace disputes, but it is quite obvious that to date it has only scratched the surface of this potential. To claim that employment arbitration “has largely displaced the civil justice system for most disputes involving ordinary people” is, to say the least, clearly unsupported by the facts.

Use of Employment Arbitration Actually Declining

Moreover, there is compelling evidence that the use of employment arbitration has been declining in recent years. In a previous article in this publication, the senior author of this article summarized the corporate use of employment arbitration, as reported by the respondents in the 1997 and 2011 Fortune 1000 surveys. He wrote that, over the period 1997-2011, the survey results revealed

“a noteworthy decline in arbitration use across a variety of disputes . . . [T]he proportion of corporations that reported using employment arbitration at least once in the previous three years declined to 36%, from 62%—in relative terms, about a 40% decline” (Lipsky, 2012, p. 140). The corporate attorneys who participated in the 2011 survey offered numerous reasons for their dissatisfaction with employment arbitration. A few expressed concerns about the availability or competence of arbitrators; a larger number was concerned about the difficulty of appealing arbitrators’ awards. In summarizing the views of these attorneys, Lipsky wrote, “Many of them believe that arbitration has increasingly become similar to litigation, and they suggest that ‘external law’—relevant statutes and court cases—has made arbitration more costly, complex, and time consuming” (Lipsky, 2012, p. 141).

Conclusion

In the research we have conducted over the years on ADR, we have confirmed the view that organizations shape their conflict resolution and conflict management policies to meet their own needs and interests. We have discovered that a growing number of corporations have adopted a strategic approach to their adoption of conflict management policies: They make an explicit linkage between the conflict management policies they adopt and the larger strategic objectives they hope to achieve by using those policies. Initially, many employers adopted ADR because they hoped the use of ADR would help them avoid the cost and time-consuming nature of conventional litigation. Over time, however, they discovered that the use of ADR served other purposes, including the recruitment and retention of talented employees, the improvement of employee performance on the job, and the enhancement of employee satisfaction and morale (Lipsky and Avgar, 2008). The adoption by many employers of a strategic view of conflict management, we discovered, went hand-in-hand with their adoption of high-

performance work systems and other team-based approaches to managing the workforce (Lipsky, Seeber, and Fincher, 2003, pp. 65-67).

In this context, the use of employment arbitration may have seemed appropriate in an earlier era, when many employers viewed the use of ADR merely as a means of avoiding litigation. But when many employers began to take a larger strategic view of conflict resolution and conflict management, they recognized that the adversarial nature of employment arbitration was inconsistent with the values of teamwork and employee engagement they were trying to promote by means of other policies they had adopted. This inconsistency became more glaring when corporate attorneys and managers began to realize that employment arbitration had become nearly as expensive and time consuming as litigation. Other ADR techniques, especially mediation and other interest-based options, increasingly seemed to be better not only at saving time and money but also at promoting teamwork, employee performance, and satisfactory supervisor-employee relationships.

Consequently, the corporate use of employment arbitration seems to have reached an apex about ten or fifteen years ago and now seems to be on the decline. Predictions that employment arbitration would become a “juggernaut” and change the nature of the statutory enforcement of employment law were, at best, exaggerated. Certainly some corporations will continue to prefer employment arbitration over other options (two corporations that do seem to prefer employment arbitration are Halliburton and Darden). But most corporations (and, indeed, other types of organizations) have adopted a more strategic, and perhaps a more nuanced, view of the use of employment arbitration and other ADR options. Moving forward, we believe it will be helpful if all the stakeholders in employment relations adopted a position on employment arbitration based on valid views about its use and not on exaggerations and distortions.

Notes

1. FINRA serves as the independent regulatory body for U.S. securities firms. It provides arbitration and mediation services for claims involving customers and brokers, brokers and brokers, and employees and their firms. The employment arbitration program, managed by FINRA, was launched in 1986 and covers only employees registered with the Securities and Exchange Commission. From 1986 to 2007 the arbitration program was administered by the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE). In 2007 the dispute resolution programs of the NASD and the NYSE were merged under FINRA (see Lamare and Lipsky, 2014).
2. We are grateful to Oliver Quinn, formerly a vice president with Prudential and the head of the Roads to Resolution program, for sharing this information with us.
3. The respondents' views about the proportion of their employees covered by ADR seem to be inconsistent with their views about their companies' use of arbitration, mediation, and other ADR techniques. A large majority reported that they had used arbitration and mediation to resolve a workplace dispute in recent years. Some of the respondents seem to have answered the question on ADR coverage in terms of what proportion of their firms' employees were covered by formal ADR policies, and they distinguished their firms' apparent ad hoc use of ADR techniques from their firms' formal ADR policies.

References and Further Reading

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TABLE 1
THE PROPORTION OF EMPLOYEES COVERED BY ADR POLICIES
IN FORTUNE 1000 COMPANIES (2011 SURVEY RESULTS)

Proportion of Employees	Percentage of Companies
More than 75 percent	19.0%
Between 51 and 75 percent	3.5%
Between 26 and 50 percent	3.5%
Between 1 and 25 percent	19.4%
Zero	43.3%
Don't know	11.3%