EMPLOYMENT ARBITRATION IN THE 21ST CENTURY: A LOOK AT JAMS

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ABSTRACT

This thesis begins with reviews of the legal history, the academic debate and the empirical studies of employment arbitration. These overviews are followed by a new study of employment arbitrations administered by JAMS, the largest private alternative dispute resolution provider in the world. This study looks at employee win rates, award amounts, case durations, representation effects, repeat player and pairing effects and arbitrator background effects. This study is the first empirical study to consider and find repeat player and pairing effects of participant law firms in employment arbitration. The results of the study are followed by a consideration of its limitations and contributions. The objective is to inform and improve the debate over the desirability of our current system of employment arbitration.

BIOGRAPHICAL SKETCH

Jesse Klinger grew up in Great Neck, New York and attended Great Neck South High School. Jesse received his B.S. from Cornell University's School of Industrial and Labor Relations in 2012. Currently, he is pursuing his J.D. at New York University School of Law.

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CHAPTER 1: INTRODUCTION

INDUSTRIAL RELATIONS AND EMPLOYMENT ARBITRATION

The future of American industrial relations is uncertain. While there is a growing consensus that the old-model of industrial relations is fading and a new-model emerging, the exact nature of the new-model, including the extent of its development and durability, is unknown. The old-model was roughly the New Deal model of industrial relations, which assumed union influence at the bargaining table and in the political system.[1] The new-model presents a shift away from collective representation through unionization and towards an individualized system of employment relations comprised of human resource management and statutory protections.[2] Employers, generally speaking, have gained greater control over the

[1] See Colvin explaining the old industrial relations system: "The old collective bargaining-based industrial relations system was based on three pillars. Employment relations in the workplace were governed by detailed labor contracts regulating all aspects of employment decision-making in the workplace. These rules governing the workplace were negotiated based on the bargaining power of the

[2] See Colvin explaining that, "[o]ver recent decades, American industrial relations has been transformed through two different, though related, processes. First, the institutional structures of industrial relations have been transformed by the declining coverage of union representation and the coincident rise of individual employment rights laws. This shift away from direct union representation and towards individualized employment relations has increased the importance for employment relations of the processes of governance of the nonunion workplace and raises the issue of a potential employee voice gap due to the lack of institutional structures for employee representation and dispute resolution in the nonunion workplace (Freeman and Rogers 1999). Second, traditional forms of work organization and related human resource practices have been transformed by the advent of new forms of work organization, following models such as high involvement work systems, lean production, and self-managed work teams" (2003: 1); "The new individual rights-based employment relations system partly replicates these three pillars. First, employment relations in the workplace are governed by a new set of primarily statute-based individual employment rights. However, these rights only cover a limited set of employment decisions in the workplace, particularly those implicating issues of discrimination in employment, and leave most of the decisions to the unilateral discretion of management. Second, litigation provides employees with a new source of bargaining power in the workplace, akin to the strike power in traditional industrial relations. However, although the potential for sizable damage awards creates a substantial threat for management, the actual number of employment law disputes that reach trial and result in verdicts is relatively small, weakening the ability of any particular group of employees to utilize this weapon. Finally, the expansion of employment arbitration and other employment dispute resolution mechanisms, such as peer review and mediation, have established a new system of workplace dispute resolution. However, the incidence, structure, and due process protections of these procedures

terms of employment and the practices of the workplace. However, employers have shown concern for the potential liability posed by violations of new statutory protections especially when claims of wrongdoing are resolved publicly in front of juries "armed" with the ability to award punitive damages.

As the old system dissipated, the Supreme Court considered numerous cases regarding the proper interpretation of the Federal Arbitration Act (FAA). Over time, the Supreme Court interpreted the scope of the FAA broadly and created its own common law "national policy favoring arbitration." In the area of employment law, the Court in its *Gilmer* (1991)[3] and *Circuit City* (2001)[4] decisions made clear that employment disputes that arise from contracts containing

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varies widely, creating much greater inequality in access to workplace dispute resolution than under the old labor arbitration system. The result is that the new individual rights-based employment relations system is one in which the three pillars only support a more limited set of equity protections and employee's voice in the governance of employment relations than the old collective bargaining-based system that they are supplanting." (2012: 472-73); See also Piore and Safford writing that, "[t]he rules in contemporary U.S. workplaces are as explicit as those under the old regime, yet they grow not out of collective bargaining but rather out of substantive regulation embodied in statutes, administrative rulings, and court decisions and are given coherence by the human resource practices of large corporations and their personnel handbooks and procedures. The main impetus behind the new regulatory framework has been equal employment opportunity legislation. Such regulation has a long history in the United States, but the effort was reinvigorated, and for the first time became serious and effective, when Title VII of the Civil Rights Act of 1964 was passed under pressure from the Black civil rights movement. This law created a new administrative agency that over the course of the next three decades defined what exactly constituted discriminatory practices and how they should be remedied. Through this and subsequent legislation, similar protections were extended to other socially stigmatized and disadvantaged groups, including women, other racial and ethnic minorities, the physically disabled, the aged, and, on local levels, to gays, lesbians, and transsexuals (Skrentny 2002; Wakefield and Uggen 2004). In the 1980s, legislation mandating family leave and advance notice of layoffs was passed. State courts in this period began to impose limits on the doctrine of employment-at-will that has historically governed individual contracts of employment in the United States (Morriss 1995; Autor, Donohue, and Schwab 2002; Edelman, Abraham, and Erlanger 1992). In the 1990s, there has been a proliferation of employment legislation at the state and local level, most notably mandating living wages for contractors of local government activities and, in 2004 in California, paid family leave (Kruse and Hale 2003)" (2006: 301-02).

[3] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[4] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

arbitration clauses, including disputes implicating federal statutory claims, are properly arbitrable and governed by the FAA.[5]

The employment environment produced by the decrease in size of the unionized workforce, the increase in individual statutory employment protections and the expansion of the scope of the FAA, incentivized employers to adopt employment arbitration as an alternative to litigation.[6] In these circumstances, employees, often as a condition of employment, are asked to

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[5] Excluding employment contracts of certain transportation workers. (See *Circuit City*).

"The Trailblazer, of course was the *Gilmer* case in 1991. There the Courts, seemingly departing from then-current law regarding collective bargaining agreements, held that an individual employee could be required as a condition of employment to agree that all workplace disputes would be subject to arbitration rather than court suit. A 7-2 decision found this mandatory arbitration requirement enforceable under the Federal Arbitration Act (FAA) even as it applied to a statutory civil rights claim. This was only a waiver of a judicial forum, said the majority, not a wavier of substantive rights.

Gilmer created a storm of controversy. But 10 years later a 5-to-4 Court in effect reaffirmed *Gilmer* in *Circuit City Stores, Inc. v. Adams.* Placing the emphasis on the text rather than the legislative history of the FAA and stressing the federal policy favoring arbitration, the majority held that the Act exempts only arbitration agreements of transportation workers from judicial enforcement." (St. Antoine 2012b: 244-45).

[6] "Changes in the law of arbitration have created a powerful incentive for employers to introduce nonunion arbitration procedures to avoid litigation. Employers can require employees to agree to arbitration of all employment disputes as a mandatory term and condition of employment. The employer can determine the rules of the arbitration procedure with as yet only limited scrutiny form the courts. Even if the arbitrator's award does not correspond to the remedies that the employee would have obtained in the courts, review of this award will be limited to whether the awards is in 'manifest disregard of the law'. By developing nonunion arbitration procedures, employers can effectively opt out of the dangers of employment litigation and the possibility of substantial punitive damage awards from juries." (Colvin 1999: 88); "The combination of rising levels of litigation in the employment area and the Supreme Court's 1980 reversal of its earlier rejection of the use of arbitration to resolve statutory claims produced a perfect storm of incentives for employer to adopt arbitration agreements as mandatory terms and conditions of employment." (Colvin 2011: 2);

"Over a thirty-year period, from 1963 to 1993, Congress passed at least two dozen major statutes regulating employment conditions, including the Civil Rights Act of 1964, the Occupational Safety and Health Act in 1970, the Employee Retirement Income Security Act in 1974, the Americans with Disabilities Act in 1900, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993. These statutes gave rise to new areas of litigation, ranging from sexual harassment and accommodation of the disabled to age discrimination and wrongful termination. More and more dimensions of the employment relationship were brought under scrutiny of the court system and a multitude of regulatory agencies.

Over time, litigants (especially employers) expressed increasing frustration with the legal system

waive their rights to handle employment disputes through the public justice system and, instead, agree to resolve all claims in a private arbitral forum.

Heated debates have occurred (in the media and Congress, but mostly amongst academics) regarding the desirability of employment arbitration agreements. While these debates are often extensive and passionate, conspicuously absent, until recently, was empirical evidence of the realities of employment arbitration as practiced in the United States. Critics of arbitration highlight the injustice of allowing employers to compel employees to waive their rights to pursue claims in the public justice system and instead be subject to a private system of dubious neutrality. Advocates cite the value of contractual freedom and the efficiency benefits that arbitration offers to the parties and to society. Some portion of the employment arbitration debate undoubtedly involves competing value judgments requiring the prioritization of various societal interests in the resolution of employment disputes. These conflicts are unlikely to be resolved by increased knowledge of employee and employer outcomes in arbitration. However,

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because of the long delays in resolving disputes, the expenses associated with the delays, and the often unsatisfactory outcomes. Increasingly, they turned to ADR as a means of avoiding these costs and delays. As critical actors in this changing milieu, corporations have recently been promoting the use of ADR in a wide range of conflicts with business, clients, customers, and their own employees. The time and cost associated with traditional litigation in each of these areas have been important factors pushing corporations toward the growing use of ADR processes." (Lipsky, Seeber and Fincher 2003: 76);

"Finally, beginning in the 1990s, employers developed a new strategy centered on private arbitration procedures for dealing with the growing burden of employment regulation. Employees were required as a condition of hire to sign an agreement to take disputes that might otherwise have been pursued through the courts or administrative agencies to these arbitration procedures instead." (Piore and Safford 2006: 302-03); "Employers were doubly vexed by employment-law developments in the 1980s. First, a series of court decisions, which would eventually embrace all but a couple of states, imposed significant qualifications on the traditional American common-law doctrine of "employment at will"… The second blow to employers during this period was the award by judges and juries of substantial damages to employees who were found to be victims of wrongful discharge… One widespread employer reaction to these dual developments of new causes of action and costly litigation was to impose so-called "mandatory arbitration." To get or keep a job, employees must agree to arbitrate all legal disputes with their employer rather than take them to court. This would apply even to claims arising under federal or state civil rights legislation prohibiting discrimination against employees because of race, sex, religion, ethnicity, age, disability, and so on." (St. Antoine 2008: 783-85).

key components of the debate raise empirical questions that would benefit from empirical answers.

This thesis begins with reviews of the legal history, the academic debate and the empirical studies relevant to employment arbitration.[7] These overviews are followed by a new study of employment arbitrations administered by JAMS, the largest private alternative dispute resolution provider in the world.[8] This study looks at employee win rates, award amounts, case durations, representation effects, repeat player effects and arbitrator background effects.[9] The results of the study are followed by a consideration of its limitations and contributions. The objective is to inform and improve the debate over the desirability of our current system of employment arbitration.

[7] In the section on the Supreme Court's FAA jurisprudence I rely heavily on the work of Ian MacNeil, Jean Sternlight, Stephen Ware and Alex Colvin. In the section that covers the academic debate surrounding employment arbitration I benefit greatly from the extensive writings of Marc Galanter, Samuel Estreicher and David Schwartz. In the section covering empirical studies of employment arbitration, I depend primarily on research produced by Lisa Bingham, Alex Colvin, Mark Gough and David Lipsky.

[8] "JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial." (http://www.jamsadr.com/aboutus_overview/).

[9] For analyses involving binary independent and dependent variables Pearson's chi-squared tests of independence were used. For analyses involving binary independent variables and continuous dependent variables independent samples t-tests were employed. Logistic regressions were used to determine the independent effects of certain independent variables on employee wins.

CHAPTER 2: THE LAW

THE SUPREME COURT AND THE FAA

Prior to 1925, little judicial respect was accorded to pre-dispute arbitration agreements. In 1925, Congress enacted the FAA, reversing this long-standing judicial hostility. Historical analyses of the FAA often refer to the period between 1925-1967 as the period of "original intent" where the Supreme Court's assessment in cases involving the FAA was functionally consistent with Congress's original intentions in passing the act (Sternlight 1996).[10] However, after the Court established the *Erie* doctrine[11] and expanded the reach of Congress's power to regulate interstate commerce,[12] many disputes likely unanticipated by the Congress of 1925

[10] See also Macneil: "The story of the USAA is two stories, not one. The first story is that of the essence of its first three or four decades. During this first incarnation the USAA was a procedural statute applicable only in federal courts. In this period, what might be called USAA-1 was a part of a truly federal-state system of arbitration law.

The second story, the second life, of the USAA is that of the past three decades. In this, the life of USAA-2, the act has become a national regulatory statute, superseding state law under the Supremacy Clause of the federal Constitution. It thus governs not only federal courts, including where state law would otherwise govern under Erie RR. V. Tompkins (U.S. 1938), but also state courts.

Like all second lives, the story of USAA-2 lies deep in its first life, most obviously (with the benefit of hindsight) in cases like *Erie* and Bernhardt v. Polygraphic Co. of America (U.S. 1956), but even more importantly, in the events of the birth of USAA-1" (1992: 83).

[11] See Macneil: "Nonetheless, *Erie* let loose forces that were to transform the USAA from the procedural statute Congress had enacted thirteen years before into a substantive statute greatly reducing the powers of the states.

One of these forces was a revised notion of what differentiated substance from procedure – the outcome determination test of Guaranty Trust Co. V. York (U.S. 1945). This notion was later to cause the transfer of the USAA from the procedural side of the law, where Congress had put it in 1925, to the substantive side where Congress had most decidedly not put it. The consequences for the USAA went far beyond anything to do with diversity cases" (1992: 135).

[12] "The New Deal expansion of the commerce power began in 1937 with NLRB v. Jones & Laughlin Steel Corp., which adopted a much broader interpretation of Congress's power to regulate interstate commerce. Not until 1941 did Congress overrule *Hammer v. Dagenhart.* In 1942, the Court decided *Wickard v. Filburn*, with its broad extension of the commerce power to a wholly in-state transaction that, when "taken together with that of many others similarly situated," had a sufficient effect on interstate commerce. … Thus, at the time it was enacted, the FAA did not dramatically alter the federal-state balance when it made certain arbitration agreements enforceable in state court, at least not to the degree it does now under modern conceptions of the commerce power. Subsequent events have changed that: in Allied-Bruce Terminix Cos. v. Dobson the Supreme Court held that the current broad conception of the

came before the courts regarding the relationship between the FAA and conflicting state and federal statutes. From 1967-1983, the Court set the jurisprudential groundwork for a dramatic expansion in the scope of the FAA. Specifically, it established the foundations for lines of cases expanding FAA preemption over competing state concerns, approving the determination of statutory claims in the arbitral forum and cutting back at, and eventually reversing, the public policy exception. From 1983-1991, the Court gave more pronounced deference to arbitrators distinct from, but informed by the great deference given to labor arbitrators. Notably, the Court thrust the FAA into state courts, treated arbitration as merely a change in forum and declared a liberal policy favoring arbitration. From 1991 to 2016, the Court has continued to favor the purposes of the FAA over competing statutory objectives (both state and federal). While the transformation of the FAA was already evident, the Court continued to wrestle with issues of FAA preemption, the arbitrability of statutory disputes, the FAA employment exception, the effective vindication doctrine, class arbitration and severability. On a few occasions, federal courts have attempted to restrict the FAA,[13] however, on balance, the Supreme Court's decisions in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011)[14] and *American Express Co v. Italian*

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commerce power, not the narrow conception prevailing at the time of enactment, governs under the FAA. Subsequently, the Court in Circuit City Stores, Inc. v. Adams construed the employment exception to the FAA narrowly, as limited essentially to transportation workers. Thus, the reason for the transformation of the FAA is not, as usually argued, the decision in Erie, but the expansion in Congress's commerce power since its enactment" (Drahozal 2002: 128-29).

[13] See, e.g., *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989).

[14] See Miller: "Concepcion demonstrates the judiciary's willingness to allow boilerplate arbitration clauses to trump access to the court system in the name of the FAA, a statute enacted in 1925 with the seemingly limited purpose of overcoming the then-existing "judicial hostility" to the arbitration of contract disputes between businesses, which was most commonly manifested in diversity cases. That hostility has dissipated. Nonetheless, over the years the Act has been transformed by the Supreme Court through constant expansion into an expression of a "federal policy" favoring arbitration, whether it involves a bilateral business dispute or not. Indeed, the Court has said that the Act "reflects an emphatic federal policy in favor of arbitral dispute resolution." Concepcion strikingly exemplifies the extraordinary

Colors Restaurant, 133 S.Ct. 2304 (2013)[15] are representative of the expansive manner in which the current Court, and thus courts, envisions the FAA.[16]

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judicial extension of the Act's application to a vast array of consumer contracts that are characterized by their adhesive nature and by the individual's complete lack of bargaining power (as well as a probable lack of understanding of the arbitration clause's significance). Federal courts apply the Act even when the judicial forum's law would render an arbitration clause unenforceable, or when the claims are worth much less than the cost of litigating (or arbitrating) them on an individual basis. This occurs despite the passage in the 1925 Act authorizing an arbitration clause to be overridden "upon such grounds as exist at law or in equity for the revocation of any contract"" (2013: 323-325).

[15] See Paul Bland (2013): "The decision is catastrophic for the antitrust laws, as well as for civil rights, consumer rights, and many other statutory rights. The decision is an unmitigated disaster, replacing adhesive contracts for an idea of actual law. The drafters of the FAA would not recognize what it has turned into.

Justice Kagan went on to state: "As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. … In the hands of today's majority, arbitration threatens to become … a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability." Justice Kagan gets this one completely right. The *entire point* of the majority opinion is to use arbitration to insulate companies from any possibility of class action liability.

We used to have something called "The Federal Arbitration Act." The Court today might as well have amended its real title to "The Federal Corporate Immunity Act."

[16] See Tribe and Matz: "Though procedural doctrines may seem obscure, they provide an essential means of balancing values like fairness, efficiency, and justice. By tinkering with procedure, the Court can discourage people from filing suits, make it both more essential and more difficult to afford a lawyer, and stack the deck in favor of defendants by constructing obstacles to the discovery of relevant evidence. Indeed, a singe, well-aimed procedural bullet can knock down dozens of legal claims when all those claims turn on the same procedural rule. Because American relies heavily on private plaintiffs to enforce many of its economic regulations, the practical result of pro-defendant procedures is often a form of deregulation – a result congenial to many business interests.

The Roberts Court has displayed a keen interest in procedural rules, issuing a string of opinions that make it harder to bring and maintain many kinds of claims. Several of its most significant lines of cases have focused on limiting suits by consumers and employees. The result has been a substantial diminution in the role of courts as places in which to enforce statutory limits on corporate behavior. The underlying rights remain standing, but they have been deprived of most of the legal force they once accrued through the threat of litigation" (2014: 292).

Prior to the FAA (1925)

Prior to the 1920's, American courts, following English precedents,[17] would allow parties to submit a dispute to arbitration but generally would refuse to enforce a pre-dispute arbitration agreement (Sternlight 1996: 644).[18] While courts were inclined to enforce an arbitrator's award, the non-enforceability of the contractual clause, often referred to as the revocability doctrine, allowed either party to opt out of arbitration before a final decision was issued (Sternlight 1996: 645). Pre-dispute arbitration agreements were typically enforceable only by remedy of nominal damages, not by the remedy of specific enforcement. Consequently, while individuals could be compensated for violations of an arbitration agreement, courts would not compel their adversaries to arbitrate (Sternlight 1996: 645). In the United States, this convention began to erode in the 1920's when there became legislative efforts to reverse the traditional common law hostility to arbitration. New York adopted the New York Arbitration Act in 1920, becoming the first state in the country to enact a statute reversing the revocability doctrine.[19] This action was

[17] See Horton: "Most notably, in 1746, Kill v. Hollister (1746) 95 Eng. Rep. 532 (K.B.)—an eleven-sentence King's Bench opinion that cites no authority—articulated the ouster doctrine, holding that parties cannot agree to override the court's jurisdiction.…Courts in the young American Republic inherited these rules....the Supreme Court invoked the ouster doctrine, calling arbitration clauses "valueless" and opining that agreements "to oust the courts of the jurisdiction conferred by law are illegal and void"" (2010: 612).

[18] See also Stone: "In practice, the "revocability doctrine" meant that if one party to an arbitration agreement refused to arbitrate, the other party was powerless to compel arbitration or to obtain a stay of litigation if the other side brought suit in court. In most states, the party seeking arbitration could go to court for damages for breach of the promise to arbitrate, but the courts awarded only nominal amounts—at most the cost of preparing for the arbitration that never occurred. Thus a party seeking to arbitrate had no effective remedy against a party who refused to abide by an arbitration agreement" (Stone 1999a: 37).

[19] See Stone: "The New York Chamber of Commerce was a central player in the movement to reverse the revocability doctrine. It commissioned, a well-known commercial lawyer, Julius Henry Cohen, to represent the chamber as amicus curiae in a pending litigation in which the plaintiff was challenging the revocability doctrine and seeking to enforce an arbitration agreement. Cohen expanded his 1916 brief into a book-length treatise called *Commercial Arbitration and the Law,* that advocated the repeal of the revocability doctrine… In the following years, the New York Chamber of Commerce joined with the New York Bar Association to propose a statute to the New York legislature to change the common-law rule.

replicated on the federal level with the passage of the United States Arbitration Act (USAA) in 1925 (later renamed the FAA).[20] Section 2 of the USAA established,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract (9 USC § 2).

Period of Original Intent (1925-1967)

The period 1925-1967 is sometimes referred to as the "period of original intent" because of the manner in which later Courts made decisions supposedly at odds with Congress's original intentions. Those who support this perspective usually emphasize the manner in which the Court treated three elements of the FAA. First, some suggest that the FAA was designed to govern only disputes over arbitration agreements brought in federal court:

The same was true of federal and state arbitration law prior to the FAA's 1925 enactment. Federal arbitration law governed only in federal court and state arbitration law governed only in state court. The FAA was apparently enacted with this understanding. Those who enacted the FAA apparently thought they were enacting a *procedural* law governing only in federal courts, unlike *substantive* federal law which governs in both federal and state courts.
The original understanding of the FAA as governing only in federal court prevailed in the case law for many decades after 1925. But the Supreme Court gradually changed the FAA from procedural law (governing only in federal courts) to substantive law (governing in both federal and state courts) (Ware 2001a: 27-28).[21]

The statute, which Cohen drafted, was patterned on the English arbitration law of 1889, with one significant difference: the proposed New York law, unlike its English counterpart, did not contain a provision for de novo judicial review of questions of law… In 1920, Cohen's bill passed the New York legislature and became the New York Arbitration Act… The New York statute served as a template for the Federal Arbitration Act, enacted five years later" (Stone 1999a: 38).

[20] When Congress passed the Act in 1925, it was known as the United States Arbitration Act; it did not become the Federal Arbitration Act until 1947.

[21] See also Horton: "First, the vast majority of scholars believe that Congress understood the statute to be a federal procedural rule that neither applied in state court nor preempted state law. Indeed, the FAA does not contain an express preemption clause, and its enforcement provisions (such as section 4) govern

Second, some commentators submit that the Congress of 1925 would support the Court's original conclusion that whether a dispute is handled in the court system or an arbitral forum has a substantial impact on the rights of claimants, as well as the public interest. This interpretation is inconsistent with the arbitration functions merely as a change in forum interpretation adopted by the Court in later years. In both *Wilko v. Swan,* 346 U.S. 427 (1953) and *Bernhardt v. Polygraphic Co. of America, Inc.* 350 U.S. 198 (1956)*,* the Court explicitly highlighted important differences between the two fora (Sternlight 1996, 652). In *Wilko,* the Court reasoned that arbitration provides a less favorable forum for a plaintiff alleging securities fraud by a brokerage firm. The Court stated: "Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings" (*Wilko v. Swan*, 346 U.S. 427, 434 (1953)). The Court further reasoned: "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 to apply to waiver of judicial trial and review" (*Wilko* at 437). In *Bernhardt*, Justice Douglas expressed similar sentiments:

For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the

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federal courts exclusively. Likewise, the statute's legislative history indicates that it "relate[s] solely to procedure of the [f]ederal courts" and "is no infringement upon the right of each [s]tate"" (2011: 445-446); Colvin: "When originally passed in 1925, the FAA had been enacted under the federal Article III power to regulate procedure in federal courts" (99: 42); Stone: "In the early years, it was applied to commercial arbitrations, but only in a limited set of cases. Due to the then-current interpretation of the act's jurisdictional basis, it only applied to cases involving commerce that were brought in a federal court" (Stone 1999a: 43); Sternlight: "While the U.S. Supreme Court ultimately reached a contrary conclusion, many who have studied the formation of the Act have concluded that the FAA was viewed at the time as a procedural and remedial statute governing federal courts**"** (1996).

Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko* v. *Swan,* 346 U. S. 427, 435-438 (*Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956)).

Third, it is argued that Congress enacted the FAA to target transactions between merchants of equal bargaining power.[22] Although the text of the act does not explicitly contemplate bargaining power, references to the legislative history are often used to support the contention that the act was intended to apply to commercial entities.[23] In 1925, few agreements, especially between parties located in the same state, between large businesses and individual consumers or employees would have been considered by Congress to involve interstate commerce (Sternlight 1996: 647). Today, due to an expansion in Congress's power to regulate interstate commerce and changes in the structure of the economy, many more disputes are considered under the jurisdiction of Congress via the Commerce Clause. Regarding employees

[22] Some support for this position is found in *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403 n.9 (1967): "The Court of Appeals has been careful to honor evidence that the parties intended to withhold such issues from the arbitrators and to reserve them for judicial resolution. See *El Hoss Engineer, & Transport Co.* v. *American Ind. Oil Co.* We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1."

[23] See Schwartz: "Moreover, the legislative history of the FAA makes clear that the statute was meant to enforce pre-dispute arbitration clauses only between commercial entities, whose relatively equal bargaining position and knowledge of the kinds of disputes that might be arbitrated make such causes far less onerous than they are to the average person" (1997: 132); see also Stone: "In the 1920s most supporters of the FAA and the state arbitration laws intended the new statutes to apply to disputes between members of the same trade association or between participants in a common line of business. Even Julius Cohen, the champion of arbitration within trade associations and drafter of the Federal Arbitration Act of 1925, cautioned about the limits of arbitration in other contexts. In 1926 he wrote:

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned" (Stone 1999a: 42).

and consumers specifically, in a response to a Senator who inquired as to whether arbitration contracts would be offered on a take-it-or-leave-it basis to consumers or employees, advocates of the FAA made clear that they did not intend to cover such transactions (Sternlight 1996: 647). [24] The head of the Seamen's Union raised concerns that the FAA would be used to apply to employment contracts:

Piatt also responded to a complaint from the head of the Seamen's Union, which was concerned that it would lead to compelling of arbitration between the stevedores and their employers. He said:

> Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make and industrial arbitration in any sense; and so I suggest that in as far as the [A.B.A] committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes at all (Macneil 1992: 80-90).[25]

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[24] See *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 414 (1967) (Black, J. Dissenting) (citations omitted): "Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts "are really not voluntarily [*sic*] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court . . . ." He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases."

[25] See also Moses: "Cohen, Bernheimer, and their colleagues took great pains to impress upon Congress the limited scope of the proposed legislation. In response to a concern that the legislation would apply to seamen, W.H.H. Piatt explained that the statute was not intended to cover workers. Although the bill did not specifically exclude all employment contracts, the constitutional jurisprudence at the time viewed most employment contracts as involving intrastate and not interstate commerce. Seamen, on the other hand, could be viewed as having contracts that were in foreign or interstate commerce. Piatt and the other proponents had no objection to specifically excluding seamen and sought to make clear that other workers who might be perceived as working in interstate commerce would also be excluded, since the FAA was not intended to cover employment contracts at all. Piatt thus suggested adding the following language: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce," noting that "[i]t is not intended that this shall be an act referring to labor disputes, at all."

Emphasizing that the legislation should not apply to workers, Herbert Hoover, then Secretary of Commerce, sent a letter to Congress on this point that was incorporated in the records of both the 1923 Hearings and the 1924 Joint Hearings. Hoover characterized the objection that had been raised as an objection "to the inclusion of workers' contracts in the law's scheme." He suggested clarification by using virtually the same language as that recommended by Piatt but with the addition of "railroad employees" to the list. The language in the Hoover letter was nearly the exact language added to the statute: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."

Thus, the supporters of the legislation did not believe that it would apply to any workers at all.

The Transition Begins (1967-1983)

Although the immense impact was not felt until years later, the Court's decisions in cases from 1967-1983 provided the foundational reasoning that resulted in the current interpretation of the FAA. First, the Court made decisions premised on the interpretation of the FAA as an exercise of Congress's power to regulate interstate commerce and not the power to regulate federal courts. Second, the Court used public policy grounds to give greater deference to arbitration. Third, the Court expressed its acceptance of vindicating statutory rights in the arbitral forum.

Scope of the FAA preemption

Prior to 1967, commentators and courts had widely maintained that the FAA was an exercise of Congress's Article III power to create and establish procedures for the federal courts (Stone 1999, 945).[26] The Court disagreed with this interpretation in its ruling in *Prima Paint Corp v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967). In arriving at its decision *there,* the Court reasoned that the FAA was unquestionably based on Congress' power to regulate interstate commerce, and not upon an assertion of general federal common law or upon federal procedural

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Under the view of the Commerce Clause at that time, the Act did not apply to contracts of most workers. It only applied to contracts of workers actually engaged in interstate or foreign commerce, such as seamen or railroad employees, and those workers were specifically excluded. Piatt explained that the Act was "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." This was the central concept behind the Act: to provide for enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength—who needed a way to resolve their disputes expeditiously and inexpensively" (2006: 105-106).

[26] The Supreme Court had already indicate a shift to the Commerce Clause power in *Wilko and Bernhardt* "And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of "control over interstate commerce and over admiralty." (Quoting from H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)) (*Wilko* at 405).

powers. The Court conceded that because the FAA was passed 13 years before Erie, at the time of enactment, "Congress had reason to believe that it still had power to create federal rules to govern questions of 'general law' arising in simple diversity cases – at least, absent any state statute to the contrary" (*Prima Paint* at 405 n.13). However, the Court concluded that "[i]f Congress relied on this 'oft-challenged' power" to regulate federal court procedure, "it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation" (*Prima Paint* at 405 n.13). Once the Court established the FAA as an extension of Congress's power under the Commerce Clause, there would inevitably arise disputes that tested the extent to which the FAA preempted state concerns.[27] In 1984, the Supreme Court would go a long way towards resolving these questions by giving the FAA a broad preemptive scope (Stone 1999: 945).

Judicial Policy Favoring Arbitration (Dismantling Public Policy Exception)

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court found that public policy favored the use of arbitration in the international commercial context and approved of arbitrating a claim under section 10(b) of the Securities and Exchange Act of 1934. The Court reasoned:

> A contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction. Such a provision obviates the danger that a contract dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved (*Scherk* at 516).

Besides stressing predictability, the Court expressed concerns of parochialism:

[27] See MacNeil: "In adopting the foregoing course of action, the Court in *Prima Paint* eliminated any doubt that the USAA governs diversity cases in the federal courts where the arbitration agreement is a transaction in interstate commerce. The Court's basis of decision made it logically inescapable that the USAA governs in state courts as well, and the Court all but said so. It refrained, however, from any dictum to this effect" (1992: 138).

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of suit, but also the procedure to be used in resolving the dispute, and the invalidation of the arbitration clause in this case would not only allow respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts" (*Scherk* at 519).

Previously, in *Wilko,* the Court had held that a section 12(2) claim of the Securities Act of 1933 was not arbitrable. Contrary to the reasoning in *Wilko,* the Court in *Scherk* based its decision on the international nature of the dispute and the social policies of avoiding "choice of law chaos" and American parochialism at the expense of judicial direction to ensure the effectiveness of the securities statute (Sternlight 1996: 656).[28] This signaled the Court's willingness to reconsider its prior evaluation of the public interests in the enforcement of arbitration agreements.

Arbitral Forum Appropriate for the Vindication of Statutory Rights

In the prior period, the Court emphasized the differences between protections in litigation and arbitration, but, in its decision in *Prima Paint,* the Court began to question the significance

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[28] See also Schwartz: "One error was the dismantling of what had become known as the "public policy exception" to the FAA. Two Supreme Court decisions, *Wilko v. Swan* and *Alexander v. Gardner Denver*, and an influential Second Circuit decision, *American Safety Equipment Co. v. J.P. Maguire & Co.*, had developed the doctrine that statutory claims "of great public interest" – such as the Securities Act of 1933, the Civil Rights Act of 1964 and the Sherman Antitrust Act – could not be subject to compelled arbitration to prevent plaintiffs from taking these claims to court. Despite references in these cases to the rights of individual claimants, the gist of these holdings was the notion that arbitrators were narrow industry-or-trade specialists, often non-lawyers, and thus not sufficiently judicial in their craft and outlook to render decisions on complex and socially-important statutory claims. The "public policy exception" cases did not stress, and indeed barely mentioned, the concept that these statutes all arose to regulate the overreaching party in a one-sided transaction; and that it was therefore perverse to allow that regulated party to choose dispute resolution rules that it deemed advantageous, under the very nose of regulation" (2012: 14); Ware: "For about 50 years (1925–75) after the enactment of the FAA, significant remnants of the judiciary's refusal to enforce arbitration agreements remained unchallenged. Most significant, courts often refused to enforce agreements to arbitrate claims created by "public interest" statutes in such areas as employment discrimination, antitrust, and securities. Courts did that on the ground that it would violate "public policy" to enforce such agreements" (2002: 4).

of the differences between the two fora. The Court rejected the dissent's argument that arbitrators, with no requirement of legal training, were not capable of adjudicating contractual legal claims.[29] Similarly, in *Scherk,* the Court found that arbitrators should be allowed to rule on securities fraud claims under the Securities Exchange Act of 1934, a federal law. Although the holding in *Scherk* was specifically limited to international transactions, it foreshadowed a more general re-evaluation of the arbitration of statutory rights (Colvin 1999: 45).

Arbitration's Acceptance and Promotion (1983-1991)

The effect of the Court's jurisprudence became clear in the period between 1983-1991. The Court established that the FAA would govern in state courts, that there is a national liberal policy favoring arbitration and that arbitration functions as a change in forum (not threatening the effective vindication of statutory rights).

Scope of FAA: Broadened to Cover Almost All State Court Claims

Southland Corp. v. Keating, 465 U.S. 1 (1984), is an often-cited FAA case since it was the first to apply the FAA to state courts.[30] The Court considered whether the California

[29] *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 407 (1967) (Black, J. Dissenting): "The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and, even if qualified to apply the law, not bound to do so."

[30] See Schwartz: "The other error was the decision in *Southland Corp. v. Keating* and its progeny to federalize arbitration law by holding that the FAA preempts state law. The manifold implications of this decision include: making a needlessly complex hash of arbitration law by interpenetrating federal and state judge-made contract doctrine; creating a jurisdictional anomaly by holding the FAA to be the only "substantive" federal law that creates no federal question jurisdiction; inhibiting the states "efforts to prevent misuse of arbitration clauses as loopholes in consumer protection law; and, of course, flouting the basic federalism principle, unanimously accepted by the court in other contexts, that Congress cannot constitutionally make procedural rules for state courts" (2012: 252-53); Macneil: "It more than justifies

Franchise Investment Law, which invalidated certain arbitration agreements covered by the Federal Arbitration Act, violated the Supremacy Clause. The Supreme Court reiterated its position in *Prima Paint* that the FAA is based on the Commerce Clause. Since the FAA is not a procedural statute and applies in state as well as federal courts, the majority declared that the FAA supersedes state law that conflicts with its purposes. The Court had signaled this as the likely result in *Moses H. Cone Memorial v. Mercury Construction Corp.*, 460 U.S. 1 (1983), where, in dicta, the Court had suggested that the FAA applied in both federal and state courts (Colvin 1999: 42).[31] The decision in *Southland* to limit the ability of state legislatures to prohibit the waiver of the judicial forum for the enforcement of statutory rights signified a much wider expansion of the reach of the FAA (Colvin 1999: 44). The Court's decision in *Southland* has been widely criticized:

The current judicial treatment of the Federal Arbitration Act (FAA) is an embarrassment to a Court whose majority is supposed to be leading a federalism revival, if not a federalism revolution. In 1984, in Southland Corp. v. Keating, the Court held that the FAA is substantive federal law that preempts state laws regulating arbitration agreements. The Court thereby transformed a quaint, sixty-year-old procedural statute into "a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes," as well as an eviction of state lawmaking power over the traditional state domain of contract law. Even worse, Southland preempts this area of traditional state regulation without the justification of any strong federal

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the statement of Justice O'Connor in Southland Corp. v. Keating (U.S. 1984) "one rarely finds a legislative history as unambiguous as the FAA's" There is no serious ambiguity here. In Chapter 11, I shall turn to a remarkably different version of the USAA's legislative history in the opinion of Chief Justice Burger in *Southland*" (1992: 121).

[31] See also Macneil: "The climb starting in 1938 with Erie RR. V. Tompkins (U.S. 1938) and ascending through Guaranty Trust Co. v. York (U.S. 1945), Bernhardt v. Polygraphic Co. of America, Inc. (U.S. 1956), and Prima Paint Corp. v. Flood & Conklin Mfg. Co. (U.S. 1967) reached its summit in 1984 in Southland Corp. v. Keating (U.S. 1984). (The year before the Court had telegraphed its punch in Moses H. Cone Memorial Hospital v. Mercury Constr. Corp. (U.S. 1983) where it said, "Federal law in the terms of the Arbitration Act governs th[e] issue [of arbitrability] in either state or federal court." *Southland* finalized the bizarre transformation of American arbitration law made almost certain along the way by *Prima Paint.* It established beyond cavil that the USAA is a regulatory federal statute superseding state law and, hence, govern in state courts" (1992: 139): Schwartz: "The FAA's Newfound character as national policy favoring arbitration cast state law regulation of arbitration clauses into doubt, an issue which came before the Court the next year in *Southland Corp. v. Keating."* (1997: 86).

interest. Despite its constant, talismanic repetition, the "national policy favoring arbitration" is illusory and is highly dubious federalism (Schwartz 2004: 5).[32]

Judicial Policy Favoring Arbitration

The public policy concerns regarding the FAA were reversed in *Moses H. Cone Memorial* where the Court announced its interpretation of Section 2 of the FAA. In his majority opinion, Justice Brennan described section 2 in broad terms as constituting:

[A] congressional declaration of a liberal policy favoring arbitration agreements notwithstanding any state substantive procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act (*Moses H. Cone Memorial* at 24).

Later in his opinion, Justice Brennan expressed that Congress, in passing the FAA, enacted a strong national policy favoring arbitration; therefore, doubts about its applicability are to be resolved in favor of arbitration:

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability (*Moses H. Cone Memorial* at 24-25).[33]

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[32] See also Macneil: "The Supreme Court's decision in Southland Corp. v. Keating (U.S. 1984) is the law of the land, but the Court lacks jurisdiction to rule history. The majority used the artifacts of the history of the USAA in building their arguments just as a mason uses stone in building a stone wall – picking ones that are useful, ignoring ones that are not, discarding troublesome ones, chipping away offensive spurs on otherwise useful pieces, twisting and turning each stone until it best fits, and above all, covering up the chinks and defects with a mortar of words. In short, the legislative history in *Southland* is typical judicial legal "history" it is advocacy, not history. The result is pathological history" (1992: 170); Schwartz: "At the same time, it is difficult to imagine, as of this writing, that the Supreme Court will reverse its direction after twenty years of advancing a "national pro-arbitration policy" and admit that it has made a terrible mistake. Even though five Justices on the present Court have at one time or another dissented from Southland or a case applying it, there seems to be a settled resignation among the dissenters; perhaps they have come to see it as a good idea" (2004: 627).

[33] See also Sternlight 1996: 637.

The Court's subsequent arbitration decisions virtually all reiterate this supposed policy and imply that it has existed since 1925.[34] The decision in *Moses H. Cone* has had a large impact on the Court's FAA jurisprudence:

Despite the relatively narrow issue presented in *Moses H. Cone* itself, this conceptualization of a broad scope for the FAA would in subsequent decisions be used by the Court to carve out an increasingly expansive role for arbitration as a system for resolution of disputes alternative to and independent of the courts (Colvin 1999: 41).

Arbitration is Appropriate for the Vindication of Statutory Rights

In *Mitsubishi Motors,* the Supreme Court relied on the presumption of arbitrability to hold that an arbitration clause will be interpreted to apply not merely to contractual disputes, but also to statutory claims.[35] In analyzing the effect of section 2 of the FAA, Justice Blackmun, writing for the majority, reasoned that:

The 'liberal federal policy favoring arbitration agreements' … manifested by this provision and the Act as a whole is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate'… Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability. There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights (*Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).[36]

Reiterating its conclusion in *Scherk* that international transactions should be treated differently, the Court held that even if antitrust claims could not be arbitrated domestically they should be

[34] See Sternlight 1996: 641 fn.19: "When the Court first announced the preferential policy in *Moses H. Cone* it stated: "Courts of Appeals have since [Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)] consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree." Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983)."

[35] See Colvin (1999): "From its passage until the mid-1980's, the interpretation applied to the FAA was that it did not compel arbitration of statutory rights… The key analysis setting out the change in the Supreme Court's view of arbitration of statutory rights came in 1985 in another case involving an international transaction, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc."*

[36] See also Colvin 1999: 46.

arbitrable in the context of international transactions. The Court's decision in *Mitsubishi* embodied the Court's newfound faith that arbitration would not obstruct statutory objectives.[37]

In *Mitsubishi,* as in *Scherk,* the transaction involved was still international in nature; however, if international arbitration was an adequate forum for the enforcement of national statutory rights, then, arguably, domestic arbitration should provide an equal if not more reliable means of enforcement (Colvin 1999: 49). In the years following *Mitsubishi,* the Court further expanded the application of the FAA to statutory rights in the domestic context. Around two years after *Mitsubishi,* in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court required the arbitration of disputes arising under provisions of the RICO Act and the Securities Exchange Act of 1934. Justice O'Connor wrote for the majority:

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes. To defeat application of the Arbitration Act in this case, therefore, the McMahons must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute (482 U.S. 220, 226-27 (1987)) (internal citations omitted).

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[37] "In the end, beyond the *Scherk* derived notions of international reciprocity, the core of the reasoning in *Mitsubishi* is an affirmation of faith in the adequacy of arbitration as a dispute resolution system for enforcing statutory rights. As, Justice Blackmun writes for the majority that:

> "… we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. … By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 472 U.S. 614, 628" (Colvin 1999: 48-49).

The majority found that where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, arbitration does not constitute a waiver of compliance with any provision of the Exchange Act. The majority further found no basis for the conclusion that Congress intended to prevent enforcement of agreements to arbitrate RICO claims.

Soon after, in *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), the majority extended this reasoning leading the Court formally to overrule its own *Wilko* precedent. The Court expressed that although its decision to overrule *Wilko* established a new principle of law for arbitration agreements under the Securities Act, this ruling furthered the purpose of the FAA without undermining the purpose of the Securities Act.[38]

However, in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989), the Court placed some limit on its FAA expansion. The case presented the question of whether the application of the provision of the California

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[38] "The Court's characterization of the arbitration process in Wilko is pervaded by what Judge Jerome Frank called "the old judicial hostility to arbitration." Kulukundis Shipping Co. v. Amtorg Tradin Corp., 126 F.2d 978, 985 (CA2 1942). That view has been steadily eroded over the years, beginning in the lower courts. See Scherk, supra, at 616 (Stevens, J., dissenting) (citing cases). The erosion intensified in our most recent decisions upholding agreements to arbitrate federal claims raised under the Securities Exchange Act of 1934, see Shear- son/American Express Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), under the Racketeer Influenced and Corrupt Organizations (RICO) statutes, see ibid., and under the antitrust laws, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). See also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985) (federal arbitration statute "requires that we rigorously enforce agreements to arbitrate"); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983) ("Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). The shift in the Court's views on arbitration away from those adopted in Wilko is shown by the flat statement in Mitsubishi: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S., at 628, 105 S.Ct., at 3354. To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." (*Rodriguez de Quijas* at 480).

Arbitration Act that allows a court to stay arbitration pending resolution of litigation was preempted by the FAA. There, the contract in question contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located" (*Volt* at 470). The Court held that the interpretation of that clause is a matter of state law and rejected the argument that the liberal federal policy favoring arbitration was offended by this application of the California Arbitration Act. The Court acted to preserve some space for state legislatures and state courts by declaring the FAA does not occupy the entire field of arbitration:

> The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. See *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA). But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law — that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). The question before us, therefore, is whether application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not (*Volt* at 477-78).

Arbitration Today (1991- 2016)

The 1990's provided some support for the belief that the tides were turning and that the judiciary would begin to rein in the scope of the FAA: "In a recent turnaround, an increasing number of courts are evidencing a heightened awareness of the potential pitfalls in nonunion arbitration. These decisions have focused on establishing more specific criteria for the review of arbitration agreements, procedures, and decisions" (Colvin 1999: 62).[39] However, the majority of

[39] See also Bingham & Chachere: **"**There is a rapidly evolving body of cases regarding the grounds upon which a court may overturn an employment arbitration award (Jacob 1997). These include unconscionability (Jacob 1997); manifest disregard of the law (Davis 1997; Poser 1998); and the lack of meaningful, knowing or voluntary consent in very limited circumstances (Axenson 1998; Lewin 1997; Ware 1996)" (1999: 111 in E&K).

these decisions were in district and appellate courts and concerned notice, unconscionability, and excessive fees.[40] It would be tough to argue persuasively that those opposing the FAA's expansion have garnered many significant victories since Professor MacNeil provided the following account of the realities under the Court's interpretation of the FAA:

The foundation change has been the shift of the constitutional underpinnings of the USAA from congressional power to control federal courts to congressional power to regulate commerce. The USAA therefore supersedes state law by reason of the Supremacy Clause of the United States Constitution. This carried with it applicability of the USAA in state courts and removed any doubt of its applicability in diversity cases so long as interstate commerce is involved, as it virtually always will be in diversity cases. The impact of all this is greatly expanded by a revised view of sections 2's "transaction involving commerce" whereby the phrase goes to the limits of congressional power under the commerce clause. This impact is also greatly enhanced by the Court's replacing the prior "intention of the parties" approach, its bias, if any, being against arbitration, with a strong pro-arbitration stance, paralleling that flowering collective bargaining law under the Labor Trilogy. This pro-arbitration stance is manifested in rules such as the following: Fraud in the inducement of the overall contract, and possibly other formation issues, is for the arbitrator. Arbitration clauses are to be read broadly to bring disputes within their coverage. Where some issues in dispute are nonarbitrable, arbitration must go ahead with the arbitrable issues, even though the result is two separate proceedings, arbitration and litigation, with all the problems that entails. The clause in section 2 providing for nonenforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" is read narrowly. All state law excluding issues arising under *state* law as unsuitable for arbitration – the public policy exclusion – is invalid. The public policy exclusion is virtually eliminated from federal law, subject only to congressional power explicitly to exclude. International trade arbitration is favored at the expense of national policy… (Macneil 1992: 149).

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[40] Many of these decisions are susceptible to what Horton calls a "feedback loop" where contract drafters adjust to court rulings by slight changes in language that deal with the Court's specific concern while maintaining significant competitive advantages and restrictions on employee due process. See Horton (2010: 667):

> The debate over contract procedure has not accounted for the fact that corporations unilaterally amend their dispute resolution clauses again and again. These modifications debunk the leading … rationales for privatizing procedure. The fact that drafters repeatedly amend procedural clauses means that contract procedure will neither lead to lower prices nor alleviate the burden on the judicial system. However, striking down procedural clauses for eroding procedural rights or jurisdictional and constitutional values… creates a nasty feedback loop. Drafters respond to adverse judicial rulings by amending their terms to try to convince courts that the new terms no longer diminish important interests and therefore are valid.

For instance, discussing a First Circuit decision, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 163 F.3d 53 (1st Cir. 1998), Colvin writes, "The limited nature of this requirement was recognized by the majority itself in its concluding comment that, "had Merrill Lynch taken the modest effort required to make relevant information regarding the arbitrability of employment disputes available to Rosenberg, it would have been able to compel Rosenberg to arbitration."" (Colvin 1999: 64).

Notwithstanding MacNeil's account, the Supreme Court has since made many important decisions for the future of employment arbitration. Specifically, the Court has made decisions regarding the extent of FAA preemption, the arbitratibility of statutory rights, the FAA's employment exemption, the effective vindication doctrine, the class action waiver and the seperability doctrine.

Preemption

The Court applied its *Southland* conception of FAA preemption in *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, the Court considered whether the FAA preempted a requirement of the California Labor Code which provided that actions for the collection of wages remain regardless of the existence of any private agreement to arbitrate. The Court held that the presence of an arbitration agreement under the FAA preempted the employees' right to sue for unpaid wages in court. Justice Marshall wrote for the majority:

> As we stated in *Keating,* "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.,* at 10. "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.,* at 16 (footnote omitted). Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. "We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Keating, supra,* at 11 (*Perry* at 489-90).

This led the Supreme Court in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), to hold that the FAA preempted a Montana law that required arbitration clauses to be prominently displayed on the first page of the contract. The reasoning advanced to support this result was that the requirement conflicted with the FAA's assurance that arbitration agreements be placed upon

the same footing as other contracts. Thus, the Montana law was preempted since it improperly treated arbitration agreements differently than other contracts.

The Supreme Court had a rare opportunity to overturn *Southland* in *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995). The Court was faced with the question of whether the FAA preempted an Alabama state statute making predispute arbitration agreements invalid and unenforceable. In a 7-2 ruling, the Court determined that the language used in the FAA made the power of the act coterminous with Congress's full power under the Commerce Clause (*Allied-Bruce* at 275).[41] Justice O'Connor wrote, notably, in concurrence:

I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass. See *Southland Corp.* v. *Keating,* 465 U. S. 1,21-36 (1984) (O'CONNOR, J., dissenting); see also *Perry* v. *Thomas,* 482 U. S. 483, 494-495 (1987) (O'CONNOR, J., dissenting); *York International* v. *Alabama Oxygen Co.,* 465 U. S. 1016 (1984) (O'CONNOR, J., dissenting from remand). We have often said that the pre-emptive effect of a federal statute is fundamentally a question of congressional intent. See, *e.g., Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 516 (1992); *English* v. *General Elec. Co.,* 496 U. S. 72, 78-79 (1990); *Schneidewind* v. *ANR Pipeline Co.,* 485 U. S. 293, 299 (1988); *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). Indeed, we have held that [w]here ... the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be 'clear and manifest'. *English, supra,* at 79, quoting *Jones* v. *Rath Packing Co., 430* U. S. 519, 525 (1977). Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation. See *Perry* v. *Thomas, supra,* at 493 (STEVENS, J., dissenting) ("It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend"). I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute (*Allied Bruce* at 283).

[41] "We recognize arguments to the contrary: The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively-as, for the reasons set forth above, we do here. See, *e. g., McLain* v. *Real Estate Bd. of New Orleans, Inc.,* 444 U. S. 232, 241 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U. S. 738, 743, n. 2 (1976)" (*Allied-Bruce* at 275).

However, Justice O'Connor voted with the majority after being persuaded by considerations of *stare decisis* and left it to Congress to correct the Court's interpretation. Justice Scalia, while dissenting from the Court's judgment, announced that he would not in the future dissent from judgments that rest on *Southland* though he remained willing to join four other Justices prepared to overrule it.

The next major development came in 2011 in *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011). The Court *there* reversed the judgment of the Ninth Circuit and held that the FAA preempted a California state contract law that prohibited class action waivers in certain forms of agreements. The majority opinion largely rested on established Court doctrine.[42] However, the decision broke new ground as it was the first time the Court preempted a state law that did not specifically regulate arbitration agreements.[43] The Court rested its analysis on the principle of obstacle preemption, stating that while facially neutral, the effect of the California *Discover Bank Rule* ran contrary to the purposes of the FAA. Writing for the majority, Justice Scalia asserted, "Requiring the availability of class wide arbitration interferes with fundamental

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[42] "It is well known that the Supreme Court construes the FAA as reflecting a strong federal policy favoring arbitration, and, as a result, courts must enforce arbitration agreements according to their terms. In the past twenty-five years, the Court's FAA jurisprudence has imbued the FAA with super-status: it governs virtually every arbitration clause arising out of a commercial transaction, its substantive provisions apply in both state and federal court, and section 2 "" which declares that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" "" preempts state laws that place an arbitration agreement on unequal footing from other contracts. Thus, the Court has held that the FAA preempts state statutes that prohibit the arbitration of a particular type of claim (*Preston v. Ferrer* (2008); *Perry v. Thomas* (1987); *Southland v. Keating* (1984)), state statutes that invalidate arbitration agreements on grounds different than those that invalidate other contracts (*Doctor's Associates v. Cassarotto* (1996); *Allied-Bruce Terminix v. Dobson* (1995)), and state judicial rules that display vestiges of the ancient judicial hostility to arbitration. (*Mastrobuono v. Shearson Lehman Hutton* (1995)). In contrast, the FAA does not preempt a state arbitration statute that merely dictates the order of proceedings with respect to an arbitration and related third-party litigation, but does not regulate the viability or scope of the arbitration agreement itself. (*Volt Information Sciences v. Stanford University* (1989))." (http://www.scotusblog.com/2011/09/att-mobility-faa-preemption-and-class-arbitration/).

[43] (http://www.scotusblog.com/2011/09/att-mobility-faa-preemption-and-class-arbitration/).

attributes of arbitration and thus creates a scheme inconsistent with the FAA" (*Concepcion* at 1748).

The impact of *Concepcion* was evident in *DIRECTTV, Inc. v. Imburgia*, 135 S. Ct. 463 (2015). In *Imburgia,* the Court considered the California Court of Appeal's interpretation of a contract provision that voided the arbitration agreement if the "law of your state" would find the class-arbitration wavier unenforceable. Finding that this specific provision trumped a general provision stating that the FAA governed the arbitration provision and that ambiguous language should be construed against the drafter (DIRECTTV), the court of appeals denied DIRECTTV's motion to enforce the arbitration provision on the ground that California's Consumers Legal Remedies Act rendered invalid class action waivers. Since class arbitration waivers were unenforceable in California, the Court reasoned, the invalidation provision was triggered. Justice Breyer, writing for the Court's majority, found that California's interpretation of the phrase "law of your state," by not accounting for *Concepcion*, did not place arbitration contracts on equal footing with all other contracts as required by the Court's precedents. Consequently, the Court found that the FAA preempted the lower court's interpretation of the contract.[44]

Mandatory Arbitration of Statutory Disputes

By 1991, the Court had already reversed its nonarbitrability doctrine of statutory claims in the international sphere in *Scherck* and *Mitsubishi,* and domestically in *McMahon* and the *Rodriguez de Quijas*.[45] While these decisions served as clear signals of the Court's acceptance of

[44] This decision also calls into question the continued viability of *Volt*, but does not reject *Volt's* basic conclusion that the FAA does not reflect a congressional intent to occupy the entire field of arbitration. (*See Volt* at 477).

the arbitral forum, questions remained regarding its resonance in the context of the arbitration of employment claims. The Court first addressed this question in *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). Robert Gilmer, a manager of financial services, filed an age discrimination claim under the ADEA. His employer moved to compel arbitration, but Gilmer argued that he should not be compelled to arbitrate such a claim. The question before the Court was whether Gilmer's ADEA claims were arbitrable, and if so, whether a pre-dispute arbitration clause that compelled arbitration constituted an invalid prospective waiver of Gilmer's legal rights (Reuben 2012: 892).

Gilmer advanced the argument that private arbitration is inconsistent with the important social policies embodied in the ADEA. The Court rejected this argument citing its prior decisions that subjected other important statutory claims to arbitration. Resting on the Court's prior decision in *Mitsubishi,* the majority asserted that as long as the prospective litigant can effectively vindicate his or her statutory claim in arbitration, the ADEA would continue to serve both its remedial and deterrent function. Another argument that several *amici* advanced on behalf of Gilmer was that Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1). They proposed that since Gilmer's claim was a result of his employment, the FAA should not

[45] Accordingly, the jurisprudential work done by *Gilmer* should not be exaggerated: "[I]n 1991 when the Supreme Court decided the *Gilmer* case, most of the important questions concerning arbitration of statutory claims had already been decided. The proposition that parties could be compelled to arbitrate statutory rights, even important statutory rights such as those in the nondiscrimination laws, was well-established. The possibility that an arbitral procedure might differ from a court in important ways or that arbitration may offer different remedies than the statute provided had already been considered and dismissed. And the Court had already decided that once parties an agreement to arbitrate, a party resisting arbitration had a very high burden to show that Congress did not intend the particular statutory rights in dispute to be decided in arbitration. Thus, the *Gilmer* decision was unremarkable from the point of view of the Federal Arbitration Act" (Stone 1999a: 50-51); "With respect to the case pending in the Supreme Court, Gilmer v. Interstate/Johnson Lane Corp., a straightforward application of the approach taken in McMahon and Rodriguez suggests that-but for section 1-the FAA will be held to require arbitration of claims under the ADEA and, by implication, other federal employment laws" (Estreicher 1990: 786).

govern. The Court, however, declined to consider the issue since Gilmer's arbitration agreement was contained in his securities exchange registration application, not in his employment contract with Interstate. Ten years later, the Court would confront this issue in *Circuit City*.

In 2012, the Court considered whether the Credit Repair Organizations Act's (CROA) anti-waiver provision combined with the phrase "right to sue" in the disclosure provision precluded enforcement of an arbitration agreement. Justice Scalia, writing for the majority in *CompuCredit Corp v. Greenwood,* 132 S.Ct. 665 (2012), found the CROA silent on whether claims under the Act can proceed in an arbitrable forum and determined that in such circumstances the FAA requires that arbitration agreements be enforced according to their terms. This decision functionally continued to expand the scope of the FAA by requiring statutes to contain a fairly explicit contrary congressional command to override the FAA's mandate.

Employment Exemption

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), Saint Clair Adams had signed an employment application with Circuit City that required all employment disputes to be settled exclusively by final and binding arbitration. The Ninth Circuit found that contracts of employment were exempt under section 1 of the FAA. Circuit City appealed and the Court granted *certiorari*. Saint Clair Adams and *amici* in support argued that the term "involving commerce," which the Court had previously construed broadly, was coextensive with the "engaged in foreign or interstate commerce" term used to establish the employment exception. To substantiate this argument, they argued that at the time of the enactment it would have been illogical for Congress to exclude transportation workers but include employment contracts that they then would not have considered under the jurisdiction of the Commerce Clause:

Consideration of the relationship between the States and Congress at the time of the enactment of the FAA in 1925 demonstrates just how odd it would have been for Congress to have excluded all (and only) transportation workers from the FAA. Transportation workers were perhaps the only class of workers over whom Congress had reasonably secure Commerce Clause jurisdiction in 1925. To construe the statute as petitioner suggests would be to assume that Congress wanted to exclude from federal jurisdiction (and thus leave to the States) employment contracts of workers over whom it clearly had substantial regulatory authority, while bringing within the scope of federal law (and thus depriving the States of jurisdiction over) employment contracts of workers over whom it likely had no authority. This Court has applied ejusdem generis to avoid a perverse result; it has never applied that or other maxims to put in place a scheme as unusual as that suggested by petitioner (Seth P. Waxman, Solicitor General – *amicus curiae* – Brief for the United States).

The Supreme Court rejected these arguments and reversed the decision of the Ninth Circuit. Justice Kennedy, writing for majority, held that the Section 1 exemption applied only to transportation workers. The decision was largely based on the doctrine of *ejusdem generis* which limits the scope of general words that follow enumerations of particular classes or things to apply only to classes or things of a similar nature. Thus, in Section 1, where it states "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," the nature of the employment of seamen and railroad workers serves to modify the meaning of "any other class of workers." The Court extinguished any remaining doubts that employment disputes were arbitrable by stating: "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context" (*Circuit City* at 123).[46]

Effective Vindication

In *Wilko* and *Bernhardt,* the Court had expressed skepticism regarding the use of the

[46] "Fourteen years after Gilmer, the applicable law is relatively stable and clear: employers outside of the transportation industry may require employees to agree to arbitrate all employment disputes as a condition of employment so long as certain due process requirements are met." (Sherwyn, Estreicher, Heise 2005, 1559).

arbitral forum for the resolution of statutory claims. The *Mitsubishi* decision was crucial in reversing the Court's cynicism and served to establish the effective vindication doctrine. In *Mitsubishi,* the Court held that a party does not forgo the substantive rights afforded by statutes when compelled to pursue them in an arbitral forum. The Court nonetheless established what came to be a limiting principle when it stated in *dicta*, "And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" (*Mitsubishi* at 637).

The Court perpetuated the vindication of rights doctrine in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). The issue the Court confronted was whether an arbitration agreement was unenforceable because it failed to protect a claimant asserting a violation of the Truth in Lending Act from excessive costs. The Court rejected the claim due to the claimant's insufficient showing that the costs would prove prohibitive. However, Chief Justice Rehnquist, writing for the majority, stated:

> Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point (*Randolph* at 92).

By suggesting there could be sufficient showing that arbitration proved too costly for the vindication of statutory rights and would, in that instance, compel invalidation, the Court helped preserve the effective vindication doctrine.

The next major consideration of the effective vindication doctrine came in *American Express v. Italian Colors Restaurant*. The question the Court considered was whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the

plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Italian Colors Restaurant claimed that to prove its antitrust claim against American Express would necessitate the hiring of an expensive economic expert. It asserted that the combination of the class action waiver and other contractual limits on cost sharing prevented it from being able to effectively vindicate its rights in arbitration.

Justice Scalia, writing for the majority, rejected this claim and held that the arbitration agreement should be enforced according to its terms. Justice Scalia explained the effective vindication doctrine in the following manner:

> The "effective vindication" exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies." 473 U. S.*,* at 637, n. 19 (emphasis added). Dismissing concerns that the arbitral forum was inadequate, we said that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.,* at 637. Subsequent cases have similarly asserted the existence of an "effective vindication" exception, see, *e.g., 14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 273–274 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 28 (1991),but have similarly declined to apply it to invalidate the arbitration agreement at issue.
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> And we do so again here. As we have described, the exception finds its origin in the desire to prevent "prospective waiver of a party's right to pursue statutory remedies," Mitsubishi Motors, supra, at 637, n. 19 (emphasis added). That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. See Green Tree Financial Corp.-Ala. v. Randolph, 531 U. S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights"). But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy (570 U.S.__ (2013) (Slip Op_6-7).

Justice Kagan dissented from the Court's opinion describing it as a betrayal of the Court's precedent and federal statutes like the antitrust law. She maintained:

> Our decisions have developed a mechanism—called the effective vindication rule—to prevent arbitration clauses form choking off a plaintiff's ability to enforce congressionally created rights. The doctrine bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims. In so doing, the rule reconciles the Federal Arbitration Act (FAA) with all the rest of federal law—and indeed, promotes the most fundamental purposes of the FAA itself. As applied here, the rule would ensure that Amex's

arbitration clause does not foreclose Italian Colors from vindicating its right to redress antitrust harm… In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action (Kagan dissenting, Slip op. 1-2, 14).

Some have argued that *Italian Colors* severely limits the effective vindication doctrine. Justice Scalia's unwillingness to concede that an express waiver of economic testimony would be sufficient to trigger the doctrine likely contributes to these concerns.[47] While the showing of prohibitive costs or explicit waivers of statutory protections would be sufficient, it is unclear what other types of restrictions, if any, would be invalidated by the Court's current interpretation of the effective vindication doctrine.[48]

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[47] 570 U.S. __n.3 (2013) "The dissent contends that a class-action waiver may deny a party's right to pursue statutory remedies in the same way as a clause that bars a party from presenting economic testimony. See post, at 3, 9. That is a false comparison for several reasons: To begin with, it is not a given that such a clause would constitute an impermissible waiver; we have never considered the point. But more importantly, such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim."

[48] Two lower Court decisions help paint a picture of the current state of the effective vindication doctrine. In *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013), the Second Circuit considered whether a class-action waiver provision in an arbitration agreement that removed the financial incentive to pursue a claim under the Fair Labor Standards Act of 1938 was ground to invalidate the agreement. Relying on *Italian Colors*, the Court determined that the effective vindication doctrine did not invalidate the arbitration agreement. However, in *Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016), the Tenth Circuit invalidated an arbitration agreement that included class action and consolidation waivers and a provision establishing that each party would bear its own legal fees and, potentially, arbitrator fees. Un-persuaded by arguments invoking the contractual opt-out provision and the AAA's fee waiving capabilities for parties in financial need, the Court declined to order the parties to arbitration holding that the fee splitting provisions violated the effective vindication doctrine.

Class Arbitrations & Class Action Waivers

The intersection of class actions and the FAA became prominent when the Supreme Court considered the case of *Green Tree v. Bazzle*, 539 U.S. 444 (2003). The Court granted *certiorari* to determine whether the Supreme Court of South Carolina's determinations that the arbitration clause was silent as to whether arbitration might take the form of class arbitration and, that in that circumstance, South Carolina law considers the contract to permit class arbitration were consistent with the FAA. The controlling opinion in the case, issued by Justice Breyer, held that the determination of whether the arbitration agreement permitted class actions was for the arbitrator to decide. Accordingly, the Court vacated the judgment of the South Carolina court and remanded the case to the arbitrator. The dissent argued that since arbitration is a matter of consent and not coercion, arbitration agreements must be enforced in accordance with their terms. Chief Justice Rehnquist expressed his view that the provisions of the arbitration agreement "make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer" (*Bazzle* at 459). He concluded that the imposition of class-wide arbitration conflicted with the parties' selection provision and, thus, he would reverse the decision of the South Carolina Supreme Court. Rehnquist's opinion presaged the Court's view in later decisions.

In 2010, the Court revisited the relationship between class actions and arbitration in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010). The case was distinguishable from *Bazzle* since, in this instance, the parties had stipulated that the parties had not reached agreement on the question of whether the arbitration provision authorized class arbitration. Supposedly consistent with the Court's precedent emphasizing the consensual basis of arbitration, but noticeably inconsistent with the substantial procedural deference often given to

arbitrators, the Court refused to allow arbitrators to infer availability of class-arbitration solely from a "bi-lateral" agreement to arbitrate. Writing for the majority, Justice Alito reasoned, "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator" (*Stolt-Nielsen* at 1775).

The next step was *Concepcion* where Justice Scalia interpreted the FAA to preempt California's *Discover Bank Rule* since it stood as an obstacle to the objectives of the FAA.[49] It is worth remembering that, while he stated that he was no longer going to dissent from cases relying on *Southland,* Justice Scalia originally concluded that the FAA was not intended to govern in state courts. This decision, made up by a conservative 5-4 majority, is arguably at odds with their general judicial philosophy. In the decision, Justice Scalia discusses at length why he believes that class arbitration would be risky for defendants and is poorly suited for high stakes litigation.[50] He concludes that it is hard to believe that defendants would bet the company with

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[49] "The Discover Bank rule was simply the application of a general rule of state contract law to the specific context of arbitration. Ordinarily, a state supreme court's interpretation of its own state statutes is entitled to enormous deference by the Court. The Scalia majority, however-in the Court's first construction of the savings clause-found that "nothing in [the clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Applying this principle to hold the California Supreme Court's Discover Bank rule preempted by the FAA demonstrates its remarkable encroachment on state contract police powers. Under Concepcion, a state supreme court's interpretation of a state contract law of general applicability will be preempted if it results in the invalidation of an arbitration clause.

The problem with this analysis, of course, is that the very purpose of the savings clause is to invalidate arbitration clauses when they are unenforceable as a matter of general state contract law. If taken seriously then, Concepcion renders the savings clause essentially meaningless, effectively ending state police authority over contracts with arbitration provisions. It is difficult to imagine an outcome more at odds with conservative notions of federalism." (Reuben 2012: 919-20).

[50] "In its undisguised hostility to class procedures and with its emphatic vote of confidence for private arbitration, *Concepcion* was a pro-business opinion. It is big business, after all, that stands to benefit most substantially from a decline of class litigation and that firmly favors arbitration agreements. As Harvard Law Professor Mark Tushnet writes, rulings like *Concepcion* "don't actually deny that the plaintiffs were screwed by big business. They simply make it impossible for plaintiffs to bring cases that would impose

no effective means of review and that the drafters of the FAA assuredly did not envision class arbitration. Justice Scalia writes,

The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *Rent-A-Center*, *West*, 561 U. S., at __(slip op., at 3). But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law (563 U.S.__(2011) (slip op., at 17)).

Atypically for the Court's four liberal justices, Justice Breyer wrote the dissent in defense of federalism:

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U. S. C. §2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. See, *e.g., Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"). But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach (563 U.S.__ (2011) (Breyer Dissenting) (slip op., at 11-12)).

A year later, the Court considered *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013). The question presented was whether the arbitrator exceeded his power under the FAA when he found that the parties' contract allowed for class arbitration. At oral argument, some of members of the Court were not compelled by the arbitrator's reasoning regarding whether the contract provided for class actions. However, since the parties had agreed to submit the question

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liability on businesses for their violations of the law." Nor can it be said that *Concepcion* was compelled by precedent. At best, it was a difficult case; in the view of many scholars, it reflected a policy-driven desire to deregulate by reshaping the ground rules of civil litigation." (Tribe & Matz 2014: 295-96).

of whether class actions were arbitrable to the arbitrator, the Court had to weigh the great deference it gives to arbitrator decisions against its distaste for class arbitrations. A unanimous Court, in a decision written by Justice Kagan, decided that the arbitrator's decision survives the limited judicial review provided in section 10(a)(4) of the FAA:

> In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretations went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under §10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants (569 U.S.__ (2013) (slip op., 8-9)).

American Express v. Italian Colors Restaurant, 570 U.S.___(2013) is the Court's most recent case regarding class action waivers and arbitration. As noted above, the majority opinion, written by Justice Scalia, held that the FAA does not permit Courts to invalidate a class action waiver on the grounds that it makes the claim prohibitively expensive to pursue. The majority rejected the idea that the effective vindication doctrine is violated because a particular theory of the case is not economically feasible to pursue:

> Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law condition enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U.S., at__(slip op., at 9). "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.,* at ___(slip op., at 14). We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." *Id.,* at ___(slip op., at 17).
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> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure (570 U.S.___(2013) (slip op., 8-9)).

Justice Kagan adamantly disagreed with the Court's characterization. She contended that the effective vindication doctrine clearly applied and was necessary to protect both the objectives of the FAA and competing statutes:

> The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that Amex's agreement bars not just class actions, but "other forms of cost-sharing . . . that could provide effective vindication." Ante, at 7, n. 4. In short, the Court does not consider—and does not decide— Italian Colors's (and similarly situated litigants') actual argument about why the effective vindication rule precludes this agreement's enforcement.
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> As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome (570 U.S.___(2013) (Kagan Dissenting) (slip op., 14-15)).[51]

[51] "Like *Concepcion, Italian Colors* safeguarded big businesses from private suits that could enforce economic regulations designed to protect consumers and small businesses. Although Scalia insisted that the FAA required this result, Kagan made a powerful point in response "What the FAA prefers to litigation is arbitration, not *de facto* immunity." *Italian Colors* laid bare a profound difference of opinion concerning the role of litigation – and thus the role of courts – in affording a means by which to hold big businesses to account when they may have acted illegally" (Tribe & Matz 2014: 397).

Conversely, the National Labor Relations Board has held that D.R. Horton, Inc. violated Sections 7 and 8(a)(1) of the National Labor Relations Act by requiring its employees to sign an arbitration agreement that prohibited the filing of joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum. The 5th Circuit rejected the NLRB's conclusion and in so doing noted that:

> "Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable. See Richards v. Ernst & Young, LLP, – F.3d — , No. 11-17530, 2013 WL 4437601, at *2 (9th Cir. Aug. 21, 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013)" (*D.R. Horton v. NLRB*, No. 12-60031, *25 (5th Cir. 2013).

Seperability[52]

In *Prima Paint,* the Court was presented with the question of whether under the FAA the federal court or an arbitrator is to resolve a claim of "fraud in the inducement." The majority, relying on section 4 of the FAA, held that a federal court may only consider issues relating to the making and performance of an agreement to arbitrate and that it is for the arbitrator to decide a claim of fraud in the inducement.[53] This holding places arbitrators in the puzzling position of deciding the validity of a contract, where the provision contained therein is the sole source of authority the arbitrator has to decide disputes related to these parties. The impact of the seperability doctrine is that it is for the arbitrator to decide if the validity of the entire contract is at issue; however, it is for the Courts to decide challenges directed exclusively at the validity of the arbitration provision.[54]

A seemingly related issue came before the Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options,* a component of the Court's decision rested on a limited question of arbitrability. Justice Breyer, writing for the Court, explained the narrow question as whether the court or an arbitrator has the primary authority to decide whether a party

[52] Also referred to as severability.

[53]"We hold, therefore, that, in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy, and not subject to delay and obstruction in the courts" (*Prima Paint* at 404).

[54] "This holding is known as the "separability" doctrine because it treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the "container contract." The Prima Paint Court held that,

> arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." (Ware 2007: 109).

has agreed to decide the question of arbitrability.[55] While the Court agreed with *First Options* that a court must defer to an arbitratror's arbitrability decision when the parties submitted that matter to the arbitrator, that determination only begs the question of who is to determine if there was agreement that an arbitrator would determine arbitrability. In this case, the Court adopted reasoning distinct from its *Prima Paint* decision, concluding, "because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts" (*First Options* at 947). Professor Ware details the Court's departure from its seperability doctrine:

> [T]he Supreme Court effectively decided that courts, rather than arbitrators, rule on assent and agency arguments denying that any container contract between the alleged obligor and obligee was ever formed. In other words, First Options effectively decided that the separability doctrine does not apply to such arguments because courts must rule on them even though they challenge the container contract as a whole, rather than the arbitration clause specifically. This reading of First Options is supported by dicta in a 2002 Supreme Court case, Howsam v. Dean Witter Reynolds, Inc (Ware 2007: 112).

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[55] "The first question-the standard of review applied to an arbitrator's decision about arbitrability-is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter.* Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question. Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, *e. g.,* 9 U. S. C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan, 346* U. S. 427, 436-437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas* v.*Shearson/American Express, Inc.,* 490 U. S. 477 (1989). Hence, who-court or arbitrator-has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration" (*First Options* at 942).

The Court's second application of the separability doctrine came in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. __ (2006). The parties' dispute arose from Deferred Deposit and Disclosure Agreements that contained arbitration provisions. The question presented was whether an arbitrator or a court should consider the claim that a contract containing an arbitration provision is void for illegality. Justice Scalia, writing for the majority, relied on the Court's precedent in *Prima Paint* and *Southland* to invoke the seperability doctrine and determine that the issue was for the arbitrator to decide:

> *Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court (546 U.S. ___(2006) (slip op., 5)).

The majority opinion affirmed that regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the entirety of the contract is for the arbitrator to decide.[56] The *Buckeye* decision also served to engrain the distinction between how the Court treats questions relating to the formation of a contract and defenses to contract enforcement (Ware 2007: 111).[57]

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[56] "In addition, Buckeye also resolves doubt about whether the FAA requires state, as well as federal, courts to apply the separability doctrine. The pre- Buckeye belief that states were free to depart from the separability doctrine followed from the fact that Prima Paint's reasoning rested on FAA sections 3 and 4, which by their terms appear to apply only to proceedings in federal court. Nevertheless, Buckeye held that the separability doctrine applies in state court and preempts any inconsistent state law because it rests on FAA section 2, which applies to proceedings in state, as well as federal, court" (Ware 2007: 111).

[57] "As noted above, Buckeye ruled that courts must send to arbitrators any "challenge to the validity of the contract as a whole," (the container contract), while courts themselves must resolve any challenge directed "specifically to the arbitration clause." While arbitrators hear any challenge to the container

Soon after, the Court faced seperability considerations in *Rent-A-Center, West, Inc. v. Antonio Jackson*, 130 S.Ct. 2772 (2010).[58] This case involved a dispute that arose from an employment arbitration agreement. To resolve this case the Court considered whether the claim

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contract's validity, Buckeye cautioned:

> The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (CA11 1992), whether the signor lacked authority to commit the alleged principal, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (CA3 2000); Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587 (CA7 2001), and whether the signor lacked the mental capacity to assent, Spahr v. Secco, 330 F.3d 1266 (CA10 2003).

Thus, Buckeye did not decide whether courts or arbitrators rule on arguments denying that any container contract between the alleged obligor and oblige was ever formed ("concluded"). And Buckeye recognized that parties have raised such arguments based on lack of (1) assent, (2) agency, and (3) capacity. While Buckeye did not decide whether courts or arbitrators rule on these three arguments, with respect to two of them—assent and agency—the Supreme Court had already spoken. In the 1995 (pre-Buckeye) case of First Options of Chicago, Inc. v. Kaplan,37 the Supreme Court effectively decided that courts, rather than arbitrators, rule on assent and agency arguments denying that any container contract between the alleged obligor and obligee was ever formed. In other words, First Options effectively decided that the separability doctrine does not apply to such arguments because courts must rule on them even though they challenge the container contract as a whole, rather than the arbitration clause specifically. This reading of First Options is supported by dicta in a 2002 Supreme Court case, Howsam v. Dean Witter Reynolds, Inc. Curiously, however, neither First Options nor Howsam ever mentions the separability doctrine (or Prima Paint), and Buckeye never mentions First Options or Howsam. These two lines of cases (Prima Paint and Buckeye on the one hand, and First Options and Howsam on the other) have yet to converge into a coherent whole." (Ware 2007: 111-112).

[58] The Court had considered seperability again in *Preston v. Ferrer (2008) (*128 S.Ct. 978 (2008) where an attorney sued Ferrer (aka Judge Alex) for unpaid fees. The parties' contract included an arbitration provision, which Preston invoked. Ferrer countered that the contract was invalid and unenforceable since it violated the California Talent Agencies Act. The question presented was whether the FAA overrides state statutes that refer certain disputes initially to an administrative agency. The Court determined that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA. Justice Ginsburg, writing for the majority, reasoned:

> *"Buckeye* largely, if not entirely, resolves the dispute before us. The contract between Preston and Ferrer clearly "evidenc[ed] a transaction involving commerce," 9 U.S.C. § 2, and Ferrer has never disputed that the written arbitration provision in the contract falls within the purview of § 2. Moreover, Ferrer sought invalidation of the contract as a whole. In the proceedings below, he made no discrete challenge to the validity of the arbitration clause. See 145 Cal.App.4th, at 449, 51 Cal.Rptr.3d, at 635 (Vogel, J., dissenting).[3] Ferrer thus urged the Labor Commissioner and California courts to override the contract's arbitration clause on a ground that *Buckeye* requires the arbitrator to decide in the first instance." (128 S.Ct. 978, 984 (2008)).

that an arbitration agreement was unconscionable was for the district court or the arbitrator to decide. The arbitration agreement at issue included a clause that gave the arbitrator exclusive authority over claims relating to the enforceability of the agreement, including any claim that all or any part of the agreement was void or voidable. Justice Scalia, writing for the majority, reaffirmed the Court's prior seperability decisions:

> Here, the "written provision ... to settle by arbitration a controversy," 9 U.S.C. § 2, that Rent-A-Center asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement," App. 34. The "remainder of the contract," *Buckeye, supra,* at 445, 126 S.Ct. 1204, is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center. To be sure this case differs from *Prima Paint, Buckeye,* and *Preston,* in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration—contracts for consulting services, see *Prima Paint, supra,* at 397, 87 S.Ct. 1801, check-cashing services, see *Buckeye, supra,* at 442, 126 S.Ct. 1204, and "personal management" or "talent agent" services, see *Preston, supra,* at 352, 128 S.Ct. 978. In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific "written provision" to "settle by arbitration a controversy" that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator (*Rent-A-Center* at 2779).

The dissent lambasted the majority's reasoning with Justice Stevens writing:

> Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called "delegation clause."… While I may have to accept the "fantastic" holding in *Prima Paint, id.,* at 407, 87 S.Ct. 1801 (Black, J., dissenting), I most certainly do not accept the Court's even more fantastic reasoning today. I would affirm the judgment of the Court of Appeals, and therefore respectfully dissent (*Rent-A-Center* at 2781-88) (Stevens, J. Dissenting).

Recently, the Court considered whether it should review *de novo* or with deference an arbitrator's award made under an investment treaty between the United Kingdom and Argentina. *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014). The majority, spoken for by Justice Breyer, interpreted a local court litigation provision in the contract that preceded access

to arbitration as a procedural precondition and, consequently, believed that it was for the arbitrator to determine whether that procedural precondition had been satisfied. Alternatively, the dissenters, spoken for by Justice Roberts, viewed the litigation provision as a condition to the formation of an agreement, similar to a unilateral offer to arbitrate. Accordingly, they viewed the question as one of assent, which is for the Court to decide. Although this case is unlikely to have a large impact on FAA jurisprudence, it reflects the Court's continued struggles with the seperability doctrine.

Summary

This section covers the legal history of the Supreme Court's interpretation of the Federal Arbitration Act. The Court's FAA jurisprudence is undoubtedly controversial and, in my view, has transformed the FAA so much so that the Act's current function far exceeds what Congress originally envisioned. Reviewing the legislative history of the Act, most commentators are struck by the long journey the FAA has travelled, propelled predominantly by active Courts and apathetic Congresses. Whether a proper interpretation of the FAA would subject most employees' statutory claims to arbitration with state regulations subject to an obstacle preemption standard is debatable. It bears mention, however, that the fidelity of the current Court's interpretation to the original intentions of the Act's drafters says little about whether the current interpretation bolsters or harms societal welfare.[59] The policy debate is covered in the following section.

[59] The obvious exception being the societal interest in having the Court interpret statutes in accordance with their original meaning/Congress's original intentions.

CHAPTER 3: THE DEBATE

THE DESIRABILITY OF EMPLOYMENT ARBITRATION

Preliminary Observations

Before analyzing the debate over the efficacy of arbitration as a means to resolve employment disputes, it is useful to clarify important terms, identify relevant assumptions and set necessary parameters for the endeavor. While interesting discussions take place over the desirability of ADR generally, and arbitration specifically, the following discourse focuses on employment arbitration as currently practiced in the United States.[60] Employment arbitration is distinct from arbitration in the collective bargaining context and grievance arbitration, both common forms of dispute resolution in the unionized workplace.[61] Employment arbitration is predominantly a private and confidential process that is the product of a contractual agreement between two actors, an employer and an employee. While superficially similar to court-annexed ADR, the distinct nature of how arbitration arises in the context of a private employment agreement raises substantially different issues from that of arbitrations in the court-annexed context.[62]

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[60] For consideration of ADR Generally, See Owen M. Fiss, Against Settlement, The Yale Law Journal Volume 93 Number 6 May, 1984.

[61] See Seeber & Lipksy (2006: 737): "The key differences between labour and employment arbitration stem from the fact that employment arbitration systems are created and controlled by employers. Employer control raises fundamental concerns about whether or not employment arbitration provides a level playing field for employers and employees, a topic discussed earlier. Employment arbitration is even more proprietary than labour arbitration. The private and confidential nature of the proceedings and the lack of published awards raise fears that at least some employees are being subjected to kangaroo courts. The lack of transparency makes it difficult for employment arbitrators to develop a set of standardized norms for conducting hearings and writing awards." See also Estreicher writing, "Arbitration in nonunion settings does not warrant an aggressive pro-arbitration policy akin to the Steelworkers Trilogy" (1990: 797).

[62] See Seeber & Lipsky (2006: 724) "It is important to recognize the distinction between the so-called 'court-annexed' or 'court-based' ADR, on the one hand, and employer-promulgated ADR, on the other. Beginning in the 1970s, federal and state courts began experimenting with the use of a variety of ADR

A further distinction lies between employer-promulgated and individually-negotiated arbitration agreements. Individually-negotiated employment arbitration agreements are typically agreements between "sophisticated" employees (executives, managers or other high-salaried professionals) represented by private legal counsel who have input in the drafting of their employment contract including, potentially, the arbitration clause. Employer-promulgated arbitration agreements, on the other hand, are unilaterally drafted and typically considered contracts of adhesion since they most often are required as a condition of employment on a "take it or leave it" basis.[63] The analysis that follows will at times group these two circumstances together, as they are both properly called employment arbitration, but it is important to recognize that the significance of some of the advantages and disadvantages of arbitration vary considerably based on the nature of the underlying employment relationship.[64] Moreover, while

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techniques, including arbitration, mediation, early neutral evaluation, case valuation and summary jury trials. In 1989, Congress encouraged the further development of court-based ADR by authorizing 10 federal district courts 'to implement mandatory arbitration programmes and an additional ten to establish voluntary arbitration programmes' (Plapinger and Stienstra 1996: 3). A year later, Congress passed the Civil Justice Reform Act, which mandated all federal district courts to establish programmes 'to reduce cost and delay in civil litigation' (28 USC §§ 471–482). Virtually, every district court has now established an ADR programme and a large majority of them use either arbitration or mediation to resolve civil cases. It should be noted, however, that only non-binding arbitration is offered by US district courts (Kakalik *et al* . 1996; Plapinger and Stienstra 1996: 4–6)."

[63] See Seeber & Lipsky (2006: 724): "Regarding arbitration policies established by employers, another important distinction is between employees who agree to use arbitration as part of individually negotiated employment contracts and employees who are subject to the use of arbitration under policies and procedures promulgated by the employer that are intended to cover groups or classes of employees." See also Colvin & Pike (2012: 18-19): "All these factors reinforce the advantages of employees under individually-negotiated agreements compared to their compatriots under employer-promulgated procedures. They also indicate the importance of separating these categories in any analysis of employment arbitration."

[64] See e.g., Zack: "Our concern should not be over the Gilmers of the workforce. They are educated and sophisticated and may indeed have the leverage to negotiate arbitration agreements with a realistic anticipation of what they are getting into. Our real concern should be for the tens of millions who are forced into signing such agreements under threat of not securing or retaining employment. They are powerless to avoid mandatory arbitration and should be assured legal protection." (Eaton & Keefe 1999: Zack 89); Maltby: "These problems would be severe enough even if employees were theoretically free to accept or reject their employer's arbitration system. But where the employer's system is a condition of

the availability of post-dispute arbitration agreements should not be ignored, the heart of the debate is over pre-dispute arbitration agreements-- arbitration agreements that cover potential disputes, not agreements to arbitrate a particular dispute after it has arisen.[65]

Determining the desirability of employment arbitration is a normative endeavor.[66] One may craft compelling arguments by elaborating on the value of constitutional rights or the value of contractual freedom, but it is insufficient to limit the scope of the inquiry to just one, or both, of these criteria. Professor Estreicher is on the right track when he sets up the debate in the following fashion:

> In several areas our laws do stipulate minimum conditions that are nonwaivable features of the employment bargain. Employees have rights to organize independent unions, to be paid statutorily declared minimum wages, to be free of discrimination on account of race, sex, national origin, age, and disability, and so forth. But in many other areas of vital importance to employees-such as the basic economic terms of the relationship, whether it be compensation,

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employment, and employees must "agree" to use it or lose their jobs, the potential for abuse is multiplied. Unfortunately, this is the approach most employers have elected to take" (1998: 34); Edwards: "Nonetheless, if parties voluntarily elect to use private fora for the resolution of public disputes, we may not care. Parties are not required to bring such cases to court; indeed, they can and do settle such cases all the time. When ADR is voluntarily chosen, the parties simply agree to give up some of the protections of a public forum in exchange for informality and expedition. The real problem comes when parties who are otherwise protected by an important public law are compelled to use an ADR procedure in lieu of coming to court and then have no meaningful review in court" (1999: 295-96).

[65] "The vast majority of employer-promulgated arbitration programs require an employee, usually at the time of hire, to sign an agreement that requires the individual to waive his or her right to sue the employer, and instead, to agree to submit any future dispute to arbitration. Because such agreements are signed before a dispute arises, they are frequently called mandatory predispute arbitration agreements (Dunlop and Zack 1997; Sternlight 2001; Stone 1996; Zack 1999). Some scholars and practitioners also use the term compulsory arbitration to refer to the same practice (Bales 1997)." (Seeber & Lipsky 2006: 724-725).

[66] "[O]nce we appreciate that an encounter or injury may be crystallized into very different kinds of disputes and may be handled in very different kinds of institutions, we recognize that sorting disputes by their suitability to particular dispute processes is not a technical exercise but a political choice of which kinds of disputes deserve which kinds of response, which in turn reflects our commitments about the good society and the good life." (Galanter 1989: xiv); "Nonetheless, constructing a system of dispute resolution, especially when the parties have unequal bargaining power as is usually true of employers and employees, implicates moral values profoundly. The dignity and worth of the weaker party, the employee, must be recognized and respected. Due process requires a "level playing field" that will place both parties on an equal footing in seeking a fair and equitable outcome in their dispute." (St. Antoine 2012a: 402).

benefits, or job security-the law allows the parties to negotiate a contract that meets their joint objectives.
The pertinent question is whether, in the overall mix, the nature of the forum for future disputes is a subject that may be determined by contract or whether this term belongs to the nonwaivable, nonmodifiable category and, hence, is outside of the realm of contract. The answer cannot be supplied simply by speaking in terms of a nonwaivable "right" to go to court, for that in a sense begs the question. Rights are created by statute or decision and are the result of policy judgments. A judgment has to be made on the merits whether the benefits of allowing the parties to shape their own dispute resolution mechanism outweigh the attendant costs to the parties and to the public policy objectives of the statutes in question (Estreicher 1997: 1354-55).

Whether the forum for resolving future disputes is included or excluded from the realm of contract would only be the start of the inquiry. Determining what types of disputes should be subject to private fora and what types of private fora are appropriate for the resolution of particular disputes are necessary follow-up considerations. For instance, rarely is it argued that an employer promulgated pre-dispute agreement to attend mediation is objectionable; however, one can imagine inappropriate or corrupt fora that would be unsuitable for the resolution of certain disputes. The general question considered here is whether it is desirable to allow parties to agree to pre-dispute binding employment arbitration agreements.[67]

[67] There are differences between a theoretical debate over the potential of employment arbitration as a system for resolving workplace disputes and a policy debate over the desirability of employment arbitration as currently practiced. While this analysis will touch on both as they are inevitably intertwined; the primary purpose is to evaluate employment arbitration as currently practiced. Assumed for the purposes of debate over the desirability of an existing policy are the existing institutional structures, legal precedent and allocation of resources (within the justice system, government agencies and participants in the employment relationship). This is consistent with how others have approached this debate:

> "In considering the design question, we assume that all involved actors (employees, employers, unions, etc.) retain whatever endowments they currently possess in terms of intelligence, energy, income, occupational status, access to resources, union representation, and statutory and contractual rights. Holding these endowments constant, we ask what institutional arrangements for adjudicating rights disputes would do the best job of resolving those disputes in a fair, efficient manner for workers, managers and the public generally." (Estreicher & Eigen 2010: 409)

At times the debate over employment arbitration seems entirely consumed with comparisons between arbitration and litigation, but it is important to recognize that this frame, while often a sensible one to adopt, is not the only evaluative perspective one should employ. For instance, if an arbitration provider required a $50,000 filing fee for any claim irrespective of its nature, one need not compare this filing fee to the filing fee at the local court to determine if this arbitral forum is acceptably accessible to the average claimant. Similarly, if evidence existed that bribes were pervasive in cases administered by a particular arbitration provider, this tainted system would not become just if the best available evidence

This review attempts to incorporate the most discussed and contentious facets of the debate regarding employment arbitration (though it is by no means exhaustive).[68] The debate is broken into four sections: access, process, outcomes, and the public interest. These considerations are interrelated,[69] but this organizational structure enables consideration of the major issues from the perspectives of the major stakeholders (employees, employers and the public at large).[70] The access section covers questions regarding the types of claims and claimants that are facilitated by arbitration agreements. The process section addresses certain procedural aspects of the arbitration process. The outcome section briefly sets-up the debate over employee outcomes that will be explored in greater depth accompanied by empirical studies in the chapter that follows. The public interest section covers the broader societal impact of employment arbitration.

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suggested that a similarly situated judge or jury could be as easily or more easily bribed. Direct comparisons between employment arbitration and judicial resolution of employment litigation are most appropriate when the discussion is limited to a determination of which forum would be preferable to a particular employee or employer if confronted with a choice between these two fora in their current forms. It proves problematic, however, when fixation on the comparison functions as justification for complacency when it comes to investigating needed improvements unique to one's preferred forum or in rectifying flaws that permeate both fora.

[68] "Perhaps no issue in employment relations has generated more intense debate in the last decade or so than the debate about employment arbitration, especially mandatory predispute arbitration. In part, this debate pits pro-business and conservative groups against pro-labour and liberal groups — groups that believe they have a vital stake in the success or failure of employment arbitration. In part, the debate involves both scholars and practitioners, regardless of their ideology, who differ on the wisdom of relying so heavily on private parties to resolve public claims. The intensity of the debate alone suggests the significance of the phenomenon. There is disagreement on almost every facet of employment arbitration…" (Seeber & Lipsky 2006: 729).

[69] For example, the types of claimants that have access to a particular forum and the types of procedural mechanisms available will affect the resultant outcomes.

[70] Although the public at large does include the international community the analysis here primarily pertains to the effect on the American public, but undoubtedly there are direct and indirect effects of U.S. policy on the international community.

Access

Average Claim(ant)s

The debate over the accessibility of employment arbitration was made prominent in Samuel Estreicher's influential article *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements.* In this piece, Prof. Estreicher argued that the judicial system was failing the overwhelming majority of workers and that an employment arbitration system would be an improvement for employees. His central claim was that the existing structure of the judicial system allowed too many claims to be neglected due to claimants' inability to retain competent counsel.[71] More recently, he reaffirmed these views:

The fundamental problem of the current system is that the overwhelming majority of U.S. workers lack access to a fair, efficient forum for adjudicating their disputes with their employers. They have, in a theoretical sense, a right of access to a court system that is, properly viewed as, the envy of the world, but the costs of access to the system – not so much filing fees, but access to competent counsel – are prohibitive. Workers with viable claims are often left with the unpalatable choice of filing a complaint with an administrative agency poorly resourced to

[71] "The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources… The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by component counsel; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this 'litigation lottery'." (Estreicher 2001). See also Pincus: "The policy attack on arbitration relies on unjustified stereotypes - an imaginary court system that is efficient and accessible and an imaginary arbitration system in which businesses pick biased decision makers and set whatever rules they want. In fact, ordinary people cannot access the courts, with their byzantine rules and time-consuming delays, and most legal injuries are too individualized and too small to attract a lawyer's assistance. Arbitration provides a needed alternative in which the fairness of the process is protected through judicial oversight mandated by existing law…Lawyers are taught that the judicial system, as it exists in theory, is the best way to resolve disputes. But the reality of our courts today does not square with the theory. We need the actual increase in access to justice that arbitration provides" (Pincus NYT 05/24/2012); Maltby: "Paradoxically, the trend toward private justice may have potential benefits for employees. The cost of public civil justice has grown dramatically in recent years. Many people with legitimate claims against their employers never receive justice because they are unable to afford lawyers. Private dispute resolution, which relies on mediation and arbitration, is generally much less expensive than litigation, and may bring justice within the reach of many to whom it is currently denied" (Maltby 1998: 29-30).

handle a large volume of claims, representing themselves in court, or simply giving up (Estreicher & Eigen 2010).

Prof. Estreicher has characterized the judicial system as offering a "Cadillac" caliber system for resolving the claims of the select few who win the "litigation lottery,"[72] while the claims of non-lottery winners are relegated to a "Rickshaw" caliber system. In his view, employment arbitration is preferable since its relative speed and lower process costs would provide the average claimant a "Saturn" caliber system for resolving their disputes. Many of the out-spoken advocates of employment arbitration propose that plaintiffs' lawyers are the major beneficiaries of the current system since it allows them to leverage the settlement value of the high process costs of litigation in any case that makes it beyond summary judgment. They contend that this system creates economic incentivizes for plaintiffs' lawyers to pursue many claims, including those lacking in merit, in the hopes of extorting settlements.[73] Professor Estreicher argues that one reason average claimants will benefit is that, "lower costs of the forum also mean lower costs for their representatives" (Estreicher 2001: 564).

There are reasons, however, that arbitration agreements might serve to diminish employees likelihood of retaining competent counsel:

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[72] The use of the term litigation lottery is unfortunate since it suggests that the chances of a large award are associated with luck; however, in reality, those select few who win the litigation lottery are most likely the victim of an injustice that society has expressed through statute or jury award should be met with harsh treatment. These determinations are often made based on the maliciousness of the wrongdoing and its actual or potential impact on the victim(s) and/or society.

[73] "Most plaintiff lawyers understandably value this system because it enables them to be highly selective about the cases they take on. Moreover, the sheer costs of defending a litigation and the risks of a jury trial create considerable settlement value irrespective of the substantive merits of the underlying claim. Thus, most cases where claimants obtain competent counsel will settle, and at sufficiently high values to give plaintiff lawyers ample economic rewards without actually having to try many law suits. Thus, the system works well for high-end claimants and most plaintiff lawyers, and not very well for average claimants." (Estreicher 2001: 563).

The economic incentives for attorneys to take employment cases to arbitration are mixed. Arbitration typically consumes less time than litigation. Consequently, arbitration may lower the economic threshold for lawyers to take employment cases. On the other hand, the low costs needed to defend a case reduce employers' incentive to settle for some amount below defense costs. This settlement aspect of arbitration may make a case less attractive to a plaintiff's lawyer. In addition, arbitrators do not have the reputation for high verdicts that juries, fairly or unfairly, have. Thus, there would appear again, to be less incentive for plaintiffs' lawyers to take an arbitration case (Sherwyn et al. 2005: 1575).

While lower process costs and the absence of the potential for large jury awards may serve to deter plaintiffs' lawyers considering representing an employee subject to arbitration, critics of arbitration present many additional elements that could influence plaintiffs' lawyers' calculations. Professor Sternlight explores some of these potential features in the consumer context:

> [S]ome companies use their arbitration clauses as a means to limit consumers' access to substantive relief. That is, at the same time that they mandate arbitration, such clauses may shorten consumers' statute of limitations, bar recovery of punitive damages, compensatory damages, or attorney fees; or bar recovery of injunctive relief.... To the extent such clauses exist and are enforced they may impact consumers adversely not only by diminishing their recovery, but also by making it more difficult for them to secure legal representation. Presumably when attorneys make a determination as to whether to represent a particular client, particularly on a contingent fee basis, they take into account the extent of the client's likely recovery, if successful. To the extent that a consumer's relief has been substantially limited by an arbitration clause the consumer may find it difficult or impossible to secure legal representation, and this in turn may make it difficult or impossible for the consumer to win their case (ALA 2006: Sternlight 146-47).

There are multitudes of ways that companies can draft arbitration agreements that make it harder for a consumer or an employee to prove their case and/or limit their recovery, which would serve to diminish the likelihood that they are able to retain competent counsel.

However, even if on balance employment arbitration does provide greater incentives for plaintiffs' lawyers to represent employees' with low-value claims, an obvious practical constraint should not be ignored-- the interests of employers. Since the inclusion of an arbitration agreement is often at the unilateral discretion of the employer, it is important to explore the

logical consequence of the "Saturns for Rickshaws" position from the perspective of an employer. As Professor David Schwartz appropriately inquires,

> [W]here does anyone get the idea that claim-suppressing arbitration welcomes or attracts the filing of more claims, large or small? Simple micro-economics tells us that an employer will switch back to a litigation regime the moment it perceives that the cost of arbitrating many smaller "Saturn" claims exceeds the cost of litigating fewer "Cadillac" claims; so the number of Saturns is necessarily capped, and "the many" may not be that many (Schwartz 2012: 11).[74]

This argument should be of particular concern for those advancing the accessibility claim in the employer-promulgated context since these employers, as rational economic agents, would not initially decide to or continue to implement arbitration agreements if they were, all things considered, harmful to their business.[75] For the "Saturns for Rickshaws" argument to remain compelling, in the average employment relationship, the increase in "average claims" needs to be valuable enough to employees not to be outweighed by the drawbacks presented by their loss of access to the public court system. At the same time, the employees' lack of access to the judicial system has to be of great enough value to the employer that the employer is not dissuaded by the expenses associated with the increase in "average claims."[76]

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[74] See also Schwartz: "The thrust of the populist argument is that, all other things being equal, a mandatory arbitration regime will lead to more claims being brought in arbitration than in litigation. This sounds nice from the claimant's point of view; for the defendant, however, it means more cases to defend. Arbitration populists generally fail to acknowledge an important limitation: defendants will drop mandatory arbitration from their contracts if too many of "the many" benefit" (2009: 1325).

[75] "It seems that to many detractors of mandatory arbitration, if this is something employers want, it must be something employees would prefer not to have. Why else would employers want something—certainly not to give away money to employees. The suspicion is that employers self-select into mandatory arbitration programs in large part because they plan to use this system to repress employee rights and to reduce the employers' costs of violating the law. Proponents of arbitration are equally entrenched in the view that these claims are inaccurate…" (Eigen, Menillo, Sherwyn 2011: 4).

[76] "What if mandatory arbitration turns out to favor plaintiffs? Somewhat paradoxically, this is really not a compelling policy argument in favor of mandatory arbitration—not the mandatory arbitration in the form of adhesion contracts imposed by defendants. The problem is that defendants will regard this definitive proof as bad news—and switch back to litigation. At that point, the only way to impose this plaintiff-friendly form of dispute resolution on defendants would be by means of broad legislation requiring arbitration without their consent.

However, too many critics of arbitration focus exclusively on the distributive elements of conflict resolution. There are other benefits that arbitration might provide such as confidentiality, speed or expert decision makers that may be mutually desirable. From an integrative perspective, if arbitration was able to produce equivalent outcomes to litigation, but due to the efficiency of its procedures, lowered process costs for both parties, then there remains potential for mutually beneficial arbitration agreements. In the individually-negotiated context, the employee and employer may be expected to construct an arbitration agreement that strikes an appropriate balance between costs and fairness. Conversely, it may be naive to expect employers with overwhelming bargaining power who unilaterally draft arbitration provisions, presented with opportunities to substantially limit their liability (through limitations on discovery, punitive damages or class actions) to forgo these opportunities and focus exclusively on mutually beneficial procedural matters.[77]

Self-Represented Claimants

It is often suggested that arbitration is a more accessible forum for individuals who are not able to or choose not to retain an attorney. The contention is that the lower cost and informal

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Here, of course, is the contradiction that lies at the heart of the pro-plaintiff policy argument for mandatory arbitration. It only works by fooling defendants. The argument is premised on the idea that defendants are misinformed about the true costs of arbitration and therefore adopt it despite the fact that it increases their disputing costs. It is hard to argue for a policy of systematically fooling one side of the dispute..." (Schwartz 2009: 1337).

[77] "The results are striking. Over three-quarters of the studied companies' consumer agreements provided for mandatory arbitration of disputes. Yet less than ten percent of their negotiated nonconsumer, non-employment contracts included arbitration clauses. The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. Systematic eschewing of arbitration clauses also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses. Large corporations' assertions that mandatory consumer arbitration is justified because it provides consumers with a superior form of dispute resolution thus appear to be disingenuous." (Eisenberg, Miller, Sherwin 2007: 6).

nature of arbitration in comparison to litigation makes arbitration more appealing to self-represented claimants:

What is clear is that it is easier for a pro se plaintiff to prosecute his or her claim in arbitration than in litigation. First, arbitration's informalities make it easier for unrepresented plaintiffs to pursue their cases. There are no motions to defend and understand, and there is less discovery to which one must respond. Moreover, if a case proceeds to arbitration, the procedure is much less formal, with relaxed rules of evidence, no jury instructions, no motions in limine, etc. Second, in many arbitration policies the employer (including the employer we analyze in this study) is represented by counsel in arbitration only if the employee chooses attorney representation. If the plaintiff does not choose to be represented by counsel, a nonlawyer represents the employer. In the litigation context, however, it would be extraordinarily unusual for an employer to forgo hiring legal counsel because the employee chose to proceed pro se (Sherwyn et al. 2005: 1575).[78]

While rarely is this point contested directly, the discussion regarding self-represented claimants has been focused on access with little consideration of outcomes.[79] The value of such access is amplified or diminished by the chances of and types of remedy.

Continued Employment

The quickness of arbitration and its relatively less adversarial nature are often cited reasons that the continued employment of a worker is more likely post-arbitration than it would be post-litigation.[80] This position is consistent with the general view of alternative dispute

[78] See also Estreicher & Eigen: "The positive side is that arbitral proceedings are a good deal quicker than litigation, employees are more likely to be able to proceed pro se to hearing than they would in trials, and claimants earning lower salaries than plaintiff in employment law trials obtain hearings on the merits" (2010: 415).

[79] "There are also options that, while officially neutral, would greatly disadvantage employee-plaintiffs. For example, the arbitration rules could provide that neither side will be represented by counsel. This would be a great handicap to most employees, who have little familiarity with employment law. But most employers have human resource professionals who, while not attorneys, have knowledge and experience in this area." (Maltby 1998: 33).

[80] "[U]nlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement." (Estreicher 2001: 564); "Lastly, the current system is better suited to terminated relationships, but relatively ill equipped to resolve disputes occurring in ongoing relationships (Eigen, 2008). Essential1y, the

resolution as offering relatively more integrative solutions than litigation. Furthermore, it seems likely that some portion of litigable claims is suppressed due to fear of retaliation or public embarrassment. To the extent that arbitration is less public, formal and divisive, it is reasonable to expect that arbitration agreements may encourage the filing of some claims that would have been suppressed absent an arbitration agreement.

Process

Process Control

Since employment arbitration is a creature of contract between two private entities, control over the content of the agreement is undoubtedly significant. The parties' control over the process is generally seen as ADR's and arbitration's most desirable facet since it allows them to tailor the process to the specific nature of their dispute(s). This control provides the parties the opportunity to determine the location of the proceedings, the authority of the adjudicator, the extent of discovery, the use of witnesses, the schedule of hearings, the roster of neutrals and method of selection. Additionally, the parties have discretion over what aspects of the dispute, if any, are made public.[81]

For individually-negotiated arbitration agreements, which involve the input of both sides, the adversarial balance presented by the participants' bargaining power may be expected to

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individual-rights system is analogous to divorce proceedings, but does very little in the way of counseling couples interested in staying together." (Estreicher & Eigen 2010: 414).

[81] "There are three main reasons we favor arbitration as an organization…The third fact that is very important for us is confidentiality. We like to keep our employee disputes confidential. Arbitration provides us with a great advantage there" (Yechout, Counsel at United Health Group, 2012: 252-53).

facilitate an arbitration agreement that each believes is preferable to litigation.[82] Since employer-promulgated agreements are under the unilateral control of the employer, however, in the employer-promulgated context the drafter's calculus shifts from mutual interests in efficiency and equity to a partisan interest in minimizing liability and maximizing profits. Employers' exclusive control over the drafting of the arbitration agreement serves as the root cause for many of the undesirable consequences emphasized by critics:

> The FAA confers broad power on private parties. It is an empty husk that companies can fill with contracts to arbitrate, which then radiate with the 'liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.' Capitalizing on both the Court's refusal to consider seriously whether arbitration alters substantive rights and the freedom to add and amend arbitration clauses-a power that exceeds the boundaries of contract law itself-businesses have invoked the FAA to create elaborate private procedural regimes (Horton 2011: 468).[83]

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[82] Even in the individually negotiated context, it is possible that the arbitration agreement is agreed to even if it is believed to favor one party, since it could function as a concession that is necessary to receive other contractual benefits and the employee may have limited bargaining power.

[83] See also Horton: "As the Court ratcheted up the presumption that arbitration clauses are valid, companies saw an opportunity. The FAA would drape these lenient doctrines and other vigorous pro-arbitration policies over whatever contract terms drafters embedded in an arbitration clause. The statute thus gave firms broad discretion not only to mandate arbitration but also to shape the path of proceedings and dictate the rules under which they must be conducted…. Companies quickly realized that their ability to shunt claims out of the court system also gave them license to create an alternative procedural universe in arbitration. They laced their arbitration clauses with terms that shortened statutes of limitations, drastically restricted discovery, required confidentiality, specified distant fora, nominated biased arbitrators, made the proceedings prohibitively expensive, cherry-picked which claims must be arbitrated, and waived plaintiffs' right to recover attorney's fees and other substantive remedies. To be sure, many courts found the most blatantly one-sided among these terms to be unconscionable. But perhaps out of respect for the buffer zone that the Court had created around arbitration clauses, other judges upheld even seemingly unfair terms" (2011: 456, 460); Arnold Zack: "In the years following the 1991 decision, employer-created systems multiplied with scant regard to due process and substantive law protections. In virtually all cases the employer paid the arbitrator's full fee and in many cases established the panel from which the employee may or may not have had a right of selection. The employee would have had no way of ascertaining the experience of the arbitrator in prior cases, while the employer certainly would have such records. Many systems proclaiming the procedure was to be kept "within the family" denied employees the right to legal representation and sometimes restricted the options for representation at all. Most restricted or prohibited discovery or depositions. Few, if any, mandated the arbitrator follow the law, and many required a decision without a written opinion. Virtually all prohibited the arbitrator from awarding punitive damages or attorneys' fees or even interest, confining the arbitrator to awarding only compensatory damages and often with a cap thereon. These arbitration schemes did spread, frequently enlisting the services of presumably neutral agencies such as the American Arbitration Association, Jams/Endispute, and CPR (Center for Professional Responsibility)" (Zack 1999: 76); Maltby: "Whatever

These concerns have been acknowledged by arbitration advocates,[84] but have received little direct refutation. On some occasions it has even prompted some advocates to concede the value of and recommend greater due process protections.[85] Other advocates argue that the courts will strike down provisions that are too one-sided. Critics contend that the courts provide insufficient

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the employer's motivation, the potential due process problems arising from private justice are staggering. Unlike collective bargaining arbitration, in which the union must agree to all aspects of the system, non-union employment arbitration is an exercise in which one party to a dispute has the unilateral ability to shape the resolution system. Without the union's institutional strength to provide a proper balance, the employer has enormous temptation to design the system to its own advantage." (1998: 32-33); Seeber & Lipsky: "Last, but certainly not least, many American employers adopted the use of arbitration because they realized that arbitration allowed them to do a much better job of managing and controlling conflict than did litigation. They appreciated the fact that they could determine the conditions governing its use, including the possibility of eliminating or reducing discovery, maintaining confidentiality, avoiding legal precedents, and controlling the selection of the arbitrator. Of course, opponents of employment arbitration object to its use for precisely the same reasons (Lipsky *et al*. 2003: 76–88; Slaikeu and Hasson 1998)" (2006: 729).

[84] In a section titled The Challenge of Employer-Initiated ADR. Estreicher and Eigen outline the some of these concerns: "The related concern is that employers have too much control, under current law, to customize an ADR system, and that ADR in its current incarnation reflects management fiat imposed as a condition of employment on job applicants and employees. For some, management control of program design may reduce the degree of employee trust in the process, the potential for expression of meaningful voice, and may reduce its perceived procedural fairness (Bingham, 1997; Eigen, 2008; Lipsky, Seeber, and Fincher, 2003; Stone, 1996). Existing employees are not likely to invoke the ADR system when they fear reprisal and conflict of interest, especially when the appeal procedure goes through the same decision makers who control employees' advancement in the firm (Rowe, 1997). A related weakness is the fact that employees in the non-union setting are often not represented by anyone, while the employer has the benefit of its human resources and legal departments" (Estreicher & Eigen 2010: 416-417).

[85] See e.g., Estreicher & Eigen: "As it has been fifteen years since its promulgation, the time is ripe for an updating of the Protocol, to capture the issues that have become salient in the interim. Everyone is going to have his or her own favorite list, but provisions rejecting employer-promulgated changes in the otherwise legally applicable limitations period and available statutory or contractual remedies should be featured. Also, employees should not be required to pay forum or arbitrators' fees if the arbitration is pursuant to an employer-promulgated agreement or program; the most an employee should have to pay would be the equivalent of court costs" (2010, 418).

While Estreicher & Eigen see the need for an updated protocol, it should be noted that the adoption of a due process protocol is optional on arbitration providers and the decision to use a provider is optional and typically at the sole discretion of the employer. By suggesting that these provisions should not be included in legislation (the section that follows in their chapter), the authors implicitly advocate for allowing employers the option to limit limitations periods and statutory remedies.

recourse and that often provisions are "facially neutral", but functionally one-sided.[86]

-Class Actions

The class action is a procedural mechanism for resolving disputes that involve numerous similarly situated claimants with common claims against a party. Employee advocates argue that class actions are necessary to aggregate low-value claims that would not be economically feasible to pursue on an individual basis. Large corporations, likely targets of class actions, have been particularly antagonistic to class claims. Many believe that corporations have implemented mandatory pre-dispute arbitration clauses in combination with class action waivers as a means to avoid the liability posed by potential class actions.[87] They view the combination of class action

[86] Discussing discovery specifically, Maltby writes: "Another "neutral" provision is to limit discovery. While this can be presented as a way of simplifying the process that affects both parties equally, the reality is quite different. The employee has the burden of proof and needs discovery to obtain the information necessary to meet this burden. The employer, by contrast, already has the relevant employment records and access to the key witnesses, who are generally other employees" (1998: 33). See also Schlesinger: "On the other hand, though, it's really hard on employees to establish statutory discrimination claims in arbitration. Several of my experiences have shown us that. I think there are two reasons why that is. One, you don't have the discovery you need too frequently. Discovery is important in a statutory employment discrimination claim. You want to be able to get inside the mind of the decision maker. It's hard to do that without depositions or electronic discovery as are traditionally available to you in court. So for that reason, on a discrimination claim, almost every time I'd rather be in court. I think the reason that higher-level employees with employment contracts do better in arbitration is because it's easier to prove those claims without a lot of discovery" (2012: 259).

[87] See, e.g., Sternlight: "It is no secret that banks, insurance companies, and other potential corporate defendants do not like class actions. Today, such potential defendants, in a broad array of industries, hope that they have found a surreptitious way to defeat the feared class action: mandatory binding arbitration. These companies and their attorneys assert that they may use contracts of adhesion to compel consumers, employees, and others to arbitrate rather than litigate their claims, and to require that such arbitration must proceed on an individual rather than class basis. Increasingly, potential defendants are drafting arbitration clauses that explicitly bar class actions, hoping that these will facilitate favorable court rulings" (2000: 5-6); Yechout "There are three main reasons we favor arbitration as an organization. One is the class waiver issue. Certainly class actions have seen a dramatic uptick in recent years. I've been in-house counsel for eight years, and the growth in class actions in that time has been amazing. And you do see class waivers in arbitration agreements successfully enforced. The *Concepcion* decision was, obviously, very helpful in that regard. It will be interesting to see what the courts do with applying that to employment claims. That is a tremendous benefit from an employer perspective." (2012: 252); Summers: ""One employer member of the Federalist Society panel stated that he counseled employers that the primary advantage of

waivers and arbitration agreements as clear evidence of employers' intentions to suppress employee claims:

Indeed, an arbitration agreement's ban on class or aggregate claims arguably suggests an illegitimate purpose on the employer's part. Because aggregation almost only occurs when it is a more cost-efficient way to process certain substantive claims—not only more efficient than individual litigation but usually more efficient than individual arbitration as well—a ban on aggregation suggests that the employer's aim is not to reduce the cost of the adjudication process but to escape some liabilities altogether. Both the effect of negating some nonwaivable employee rights and the apparent purpose of foreclosing some meritorious claims altogether condemn class action waiver clauses (Estlund 2006: 429).[88]

At least some corporations have behaved in a manner consistent with Prof. Schwartz's analysis since they have attempted to promulgate arbitration agreements directly after the filing of a class claim in the hopes of preempting court certification.[89]

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arbitration is not that it is cheaper, quicker, or less burdensome than litigation, but rather that it allows employers to avoid class actions: "[d]espite the potential disadvantages to employers who require arbitration, the primary question asked by companies considering arbitration is: 'Can we cut off class and collective actions by requiring arbitration?'" (2004: 702); Horton: "For companies, however, the most advantageous aspect of their control over arbitral procedures was the chance to prohibit class action lawsuits" (2011: 461).

[88] See also Schwartz: "The motivation of employers and sellers to use arbitration as a claim-suppressing technique is borne out by their positions with regard to class actions. Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational. Two paradigm examples are all too common. In the consumer setting, low-dollar-value rip-offs that generate large revenues because practiced on a wide scale -- unauthorized charges to credit card holders for unsolicited "credit insurance," for example – can go entirely unremedied without a class action. Small, quotidian violations of wage and hour laws by mass employers would likewise go unremedied if relegated to individual suits. Professor Eisenberg has shown that barring class actions has become a primary factor in companies' choice to use pre-dispute arbitration. Defendants have been fighting that battle in the courts for the past decade and are on the very edge of victory" (2012: 4); Malin: "Moreover, there is simply no reason for a class action waiver other than to insulate an employer from liability for breaches of its statutory or common law duties. The incorporation of class action waivers is a clear abuse of employer-imposed pre-dispute arbitration mandates" (Indiana Law Journal 2012: 301); Weidemaier: "By aggregating claims in formal and informal ways, one-shot claimants enhance their ability to compete in litigation with their repeat-player adversaries. In what I have called the individuation critique, skeptics assert that arbitration does not permit such aggregation. While arbitration proponents defend arbitration for independent reasons, such as economic efficiency, they do not suggest that arbitration could or should facilitate aggregate dispute resolution" (2007: 111).

[89] "In the most extreme version of this defense, some companies seek to use arbitration to defeat class actions by issuing a mandatory arbitration provision after the filing of the class action. Subsequent to the filing of the lawsuit that was designated as a class action, but prior to the court's certification of the class,

Those who defend employment arbitration agreements in combination with class action waivers usually make some combination of three arguments. First, few employment claims need to be pursued as a class action. They suggest that class actions are not an appropriate mechanism for fact-intensive day-to-day workplace disputes over adverse personnel decisions (Estreicher & Eigen 2010: 409).[90] Second, that class actions are unnecessary and often unhelpful devices for resolving workplace disputes. [91] Third, proponents argue that critics employ an illogical calculus when it comes to measuring the impact of class action waivers. They argue that from an *ex ante* perspective (prior to the dispute), employees benefit from the inclusion of class action waivers, but critics focus exclusively on an *ex post* (after a dispute has arisen) evaluation of prohibited claims.[92] They claim that even if there were many important and legitimate claims that could only be pursued via the class mechanism, the inclusion of arbitration agreements with class action waivers could still be net beneficial for most employees. The value of increased access for

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defendants in several cases have sought to impose binding arbitration on the putative class members and then challenged the legitimacy of the class suit on that basis." (Sternlight 2000: 11).

[90] See also Estreicher & Eigen (2010): "In fact, there is evidence suggesting that, with the exception of certain wage and hour class actions brought under the Fair Labor Standards Act, or equivalent state statutes, the estimated individual recoveries would warrant the assertion of individual claims in an appropriately designed low-cost forum (Estreicher and Yost, 2009)"; St. Antoine: "In any event, an unfairly discharged employee will usually have a claim worth pursuing in arbitration on an individual basis." (2012: 245).

[91] "Others question whether the class action is really the optimum means of eradicating discrimination or even addressing most of the rights-based problems in the contemporary workplace (Nielsen, Nelson, and Lancaster, 2010). " (Estreicher & Eigen: 2010).

[92] "Such agreements are too-often falling due to several courts taking the narrow *ex post* perspective of considering how the arbitration agreement affects the adhering party (usually the plaintiff), *given the existence of the particular dispute* that gave rise to the litigation, rather than the more complete *ex ante* perspective of considering the arbitration agreement as of the time it was formed. If courts took the *ex ante* perspective on the effects of an arbitration agreement that prohibits class adjudication, they would consider, not just the reduction in the value of the claim the plaintiff turned out to have, but also the increase in the value of the other claims the plaintiff could have had and the better price or wage the plaintiff received due to both the arbitration agreement and its prohibition on class adjudication." (Ware 2006: 292-293).

other types of claims (in the vein of "Saturns for Rickshaws") and/or higher wages as a result of reductions in employer liability could outweigh the value of the class action mechanism.

Process Costs

A rarely contested advantage of arbitration is that it limits process costs in comparison to the drawn-out and time-intensive litigation process. Lower process costs in arbitration are assumed to benefit both the employer and employees, while potentially harming lawyers.[93] There are lingering questions regarding the distribution of process savings. While some critics argue that employers are disproportionate beneficiaries of cost reductions, advocates argue that an employer's lower process cost will enable companies to lower prices for their consumers (which often includes their employees) or increase wages and other benefits for their employees.[94] While these are direct process savings that result from arbitration's relative efficiency, the parties may also realize indirect saving as a result of the increased opportunities to engage in productive activities (Galanter & Lande 1992: 396). However, claims that would have settled absent access to arbitration are likely to be of greater cost when governed by arbitration agreements as opposed to the courts.

[93] "The employer's process costs include the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal. If these costs are lower in arbitration than in litigation then arbitration benefits employers even if the results (damages and other remedies) of arbitration are identical to those of litigation." (Ware 2001: 747-48).

[94]"Now consider the effects of the *Gilmer* rule if all arbitration's benefits to the employer come from lower process costs. In other words, assume that comparable cases get the same award or the same result in arbitration as in litigation but the employer's costs of getting to that result are lower. These lower process costs benefit the employer. And some of these benefits may be passed on to consumers or to employees. In other words, the employer's lower process costs benefit some or all parties while harming no one, except those (like lawyers) who sell process." (Ware 2001: 748-49).

Repeat Player Debate

The repeat player debate is more convoluted than most aspects of the employment arbitration debate. Some scholars feel the debate regarding "repeat players" has garnered an undeservingly large amount of attention.[95] The root of the problem with the repeat player debate, on both sides, is that it has been drastically oversimplified. Using as a reference point a seminal 1974 article by Professor Marc Galanter, commentators tend to throw around the term "repeat player" and its associated advantages often with little regard for the depth and nuance present in Prof. Galanter's analysis.

To start, it is important to outline how Prof. Galanter conceptualizes repeat players:

> Because of differences in their size, differences in the state of the law, and differences in their resources, some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; others do so only rarely. We might divide our actors into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time…Obviously this is an oversimplification; there are intermediate cases such as the professional criminal. So we ought to think of OS-RP as a continuum rather than as a dichotomous pair (Galanter 74: 98-99).

The continuous nature of these terms allows there to be a considerable variation between the repeat player status of a local grocery store and a Wal-Mart, although both employers may be properly considered repeat players.[96]

With an understanding of the distinction between repeat players and one-shotters, and the wide spectrum of repeat players that exist, one can consider the potential advantages of being a

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[95]Referencing the repeat player effect Ware has a section titled: "*The Repeat-Player Effect and Those Who Make Too Much of It"* (Ware 2001: 751).

[96] "It is not suggested that RPs are to be equated with "haves" (in terms of power, wealth and status) or OSs with "have-nots." In the American setting most RPs are larger, richer and more powerful than are most OSs, so these categories overlap, but there are obvious exceptions. RPs may be "have-nots" (alcoholic derelicts) or may act as champions of "have-nots" (as government does from time to time); OSs such as criminal defendants may be wealthy." (Galanter 1974: 103).

repeat player. While not exhaustive, Galanter's analysis has withstood the test of time.[97] What follows is slightly shortened version of nine advantages he outlined:

1. RPs, having done it before, have advance intelligence; they are able to structure the next transaction and build a record. It is the RP who writes the form contract, requires the security deposit, and the like.
2. RPs develop expertise and have ready access to specialists. They enjoy economies of scale and have low startup costs for any case.
3. RPs have opportunities to develop facilitative informal relations with institutional incumbents.
4. The RP must establish and maintain credibility as a combatant. His interest in his "bargaining reputation" serves as a resource to establish "commitment", to his bargaining positions. With no bargaining reputation to maintain, the OS has more difficulty in convincingly committing himself in bargaining.
5. RPs can play the odds. The larger the matter at issue looms for OS, the more likely he is to adopt a minimax strategy (minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for RPs, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases.
6. RPs can play for rules as well as immediate gains. First, it pays an RP to expend resources in influencing the making of the relevant rules by such methods as lobbying. (And his accumulated expertise enables him to do this persuasively.)
7. RPs can also play for rules in litigation itself, whereas an OS is unlikely to do so. That is, there is a difference in what they regard as a favorable outcome. Because his stakes in the immediate outcome are high and because by definition OS is unconcerned with the outcome of similar litigation in the future, OS will have little interest in that element-of the outcome which might influence the disposition of the decision-maker next time around. For the RP, on the other hand, anything that will favorably influence the outcomes of future cases is a worthwhile result. The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of the same kind…
8. RPs, by virtue of experience and expertise, are more likely to be able to discern which rules are likely to "penetrate" and which are likely to remain merely symbolic commitments. RPs may be able to concentrate their resources on rule-changes that are likely to make a tangible difference. They can trade off symbolic defeats for tangible gains.
9. Since penetration depends in part on the resources of the parties (knowledge, attentiveness, expert services, money), RPs are more likely to be able to invest the matching resources necessary to secure the penetration of rules favorable to them (Galanter 1974: 98-103).[98]

These advantages can be roughly divided into two groups. The first group consists of experience

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[97] See Lande describing Galanter 74: "This article is also quite relevant to the dispute-resolution field, which has become the focus of my career. Even before the 1976 Pound Conference, which is often identified as the initiation of the modern alternative-dispute-resolution (ADR) movement, Galanter provided a more insightful analysis of alternatives to dispute resolution through court adjudication than that in much of our current scholarship" (2008: 150).

[98] (RP = repeat player; OS = one shotter).

and resource advantages that include additional information, access to specialists and relationships with institutional incumbents. The second group involves the repeat player's interest in and ability to strategize for long-term gains, including the ability to effectively lobby and play for the "rules of the game."

The purpose of specifically outlining these advantages is to illustrate how a repeat player's "position of advantage is one of the ways in which a legal system formally neutral as between "haves" and "have-nots" may perpetuate and augment the advantages of the former" (Galanter 1974: 103-104). Importantly, while the existence of unequal players may seem inevitable given the nature of our society, the manner in which a system of conflict management is structured can accentuate or mitigate the extent to which broader power inequities influence the resolution of particular disputes.

-Are Lawyers the Real Repeat Players?

Arbitration advocates are quick to point out that the real repeat players are lawyers not parties. They contend that this fact eliminates, or at least greatly minimizes, the supposed advantage. They also point to the presence of a sophisticated plaintiffs' bar as a substantial mitigating factor to any repeat player concerns, placing considerable faith in the leveling effects of the repeat player status of employee representatives.[99]

[99] "For one thing, it probably is incorrect to consider the repeat-player phenomenon from the parties' perspective. Rather, the proper level of analysis is probably at the level of the parties' lawyers, who have the superior incentive to remain informed about the reputations of particular arbitrators. Insofar as certain lawyers develop reputational expertise representing claimants or defendants in particular arbitrations (employment arbitration, consumer arbitration, etc.), the repeat player advantage would be less pronounced." (Rutledge 2008: 566); "The assertion is often made, for example, that under arbitration employers enjoy systematic advantages as "repeat players" that would not be available in civil litigation. Although having some force in the context of industry panels, the point is considerably overstated if arbitration is conducted, as is likely, before arbitrators chosen by the parties on an ad hoc basis. An employer may be a repeat player in the sense that it likely will be arbitrating disputes with more than one

Legitimate criticisms of those who express concern over repeat player effects are that they have paid too little attention to the role of lawyers and law firms. However, arbitration proponents' predictions regarding the effects of representation lack empirical support. The influence of representation on the advantages of repeat players will likely differ in direction and significance based on the resource allocation of the participants, the existing institutional arrangements and the economic realities of the legal profession.[100] While there is reason to believe based on the nature of the employment relationship that employers are likely to have more experienced counsel, the formation of a sophisticated plaintiffs' bar, prompting a better sharing of information, could serve to diminish employers' repeat player advantages.

A key component of these advocates' "repeat player" defense is the existence of a sophisticated plaintiffs' bar, which, in their view, adequately serves to counteract any repeat player advantage of the employer and its counsel. This has been consistently repeated, but with little empirical support beyond mentioning the existence of the National Employment Lawyers Association:

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employee (or former employee), but arbitrators chosen on prior occasions are unlikely to be deemed acceptable by claimant representatives." (Estreicher 1997: 1355); "Something is missing from this picture: lawyers. Lawyers are often repeat players, indeed the only ones involved in many cases. In such cases, any repeat player advantage may result from "the repeat play of the large law firm lawyers who represent organizations." Perhaps plaintiffs' lawyers can confer similar benefits on their one-shotter clients. Indeed, as described most thoroughly by Professor Stephen Yeazell, plaintiffs' firms have gradually restructured themselves—becoming larger, more specialized, and better financed —in ways that potentially offer repeat-player benefits to their clients." (Weidmaier 2007: 74).

[100] "What happens when we introduce lawyers? Parties who have lawyers do better. Lawyers are themselves RPs. Does their presence equalize the parties, dispelling the advantage of the RP client? Or does the existence of lawyers amplify the advantage of the RP client? We might assume that RPs (tending to be larger units) who can buy legal services more steadily, in larger quantities, in bulk (by retainer) and at higher rates, would get services of better quality. They would have better information (especially where restrictions on information about legal services are present). Not only would the RP get more talent to begin with, but he would on the whole get greater continuity, better record-keeping, more anticipatory or preventive work, more experience and specialized skill in pertinent areas, and more control over counsel. One might expect that just how much the legal services fact-or would accentuate the RP advantage would be related to the way in which the profession was organized." (Galanter 1974: 114).

The likely absence of a repeat-arbitrator effect is consistent with the view that the real repeat players in arbitration are not the parties themselves but the lawyers involved. Moreover, the emergence of an organized plaintiff's bar, in the form of the National Employment Lawyers Association, should drive down considerably any claimed systematic advantage for employers (Estreicher 2001: 566).[101]

Here, too, Prof. Galanter provides a more nuanced consideration:

What about the specialization of the bar? Might we not expect the existence of specialization to offset RP advantages by providing OS with a specialist who in pursuit of his own career goals would be interested in outcomes that would be advantageous to a whole class of OSs? Does the specialist become the functional equivalent of the RP?... Most specializations cater to the needs of particular kinds of RPs. Those specialists who service OSs have some distinctive features: First, they tend to make up the "lower echelons" of the legal profession. Compared to the lawyers who provide services to RPs, lawyers in these specialties tend to be drawn from lower socio-economic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession… Second, specialists who service OSs tend to have problems of mobilizing a clientele (because of the low state of information among OSs) and encounter "ethical" barriers imposed by the profession which forbids solicitation, advertising, referral fees, advances to clients, and so forth… Third, the episodic and isolated nature of the relationship with particular OS clients tends to elicit a stereotyped and un-creative brand of legal services… Fourth, while they are themselves RPs, these specialists have problems in developing optimizing strategies. What might be good strategy for an insurance company lawyer or prosecutor trading off some cases for gains on others-is branded as unethical when done by a criminal defense or personal injury plaintiff lawyer. It is not permissible for him to play his series of OS as if they constituted a single RP (Galanter 1974: 116-117).[102]

More recently, the claim has been made that the combination of technological and cultural changes with an increase in statutory employment protections spurred a "sizable and specialized"

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[101] "Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area-such as the members of the National Employment Lawyers Association, a plaintiff group who can be counted on to share information within their group about the track records of proposed arbitrators." (Estreicher 1997: 1355); "Whatever reputational and informational benefits employer has are largely mirrored on the claimant side by the organized plaintiff employment bar (Estreicher, 1997; Estreicher, 2001)." (Estericher & Eigen: 2010).

[102] See also Galanter: "The existence of a specialized bar on the OS side should overcome the gap in expertise, allow some economies of scale, provide for bargaining commitment and personal familiarity. But this is short of overcoming the fundamental strategic advantages of RPs-their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy." (1974: 117).

plaintiffs' employment bar.[103] While there are likely some repeat player plaintiffs' counsel and sharing of information between members of the plaintiffs' bar, these findings are insufficient to conclude that the that the plaintiffs' bar would sufficiently counteract the breadth and magnitude of manifestations of employers' and their representatives' repeat player advantages.[104]

-RP vs. OS in Employment Arbitration

The advantages expressed above assume a justice system that roughly resembles the American justice system.[105] Some of them, one might expect to apply in arbitration in a manner

[103] "For my purposes, the most noteworthy aspect of this restructuring is the extent to which modern plaintiffs' firms, like other repeat players, aggregate claims. This happens in formal and informal ways. Formal methods include judicial mechanisms for combining multiple claims in a single judicial proceeding, such as joinder, class actions, intervention, and consolidation. Where feasible, these mechanisms allow lawyers more effectively to coordinate and finance large-scale litigation. Firms that undertake such litigation are of necessity specialized, well-financed repeat players.

Moreover, even where formal judicial mechanisms are unavailable, technological and cultural changes have increased the ability and willingness of plaintiffs' lawyers to pool information and risk, allowing them to match defendants' litigation investments even in the largest cases. For example, plaintiffs' firms may agree to coordinate their efforts in multiple lawsuits, sharing expertise, discovery materials, and strategy, and effectively treating the separate lawsuits as a single litigation…. While the firm may not pass on to its clients the full benefits of its repeat-player status, there are reasons to believe that, on average, "the plaintiffs' bar is able to offer its clients a more valuable product at a lower cost" than was historically possible. Although these developments have been most pronounced in the personal injury and product liability bars, the employment bar has experienced similar changes. Fueled in part by an expansion in the rights and remedies available to aggrieved employees, a sizeable and specialized plaintiffs' employment bar now exists." (Weidmaier 2007: 74-77).

[104] Such cooperation presupposes that plaintiff-side lawyers are not reluctant to share information, which could be used to give them a competitive advantage in the pursuit and maintenance of individual clients.

[105] "Let us also make the following assumptions about the society and the legal system:
It is a society in which actors with different amounts of wealth and power are constantly in competitive or partially cooperative relationships in which they have opposing interests.
This society has a legal system in which a wide range of disputes and conflicts are settled by court-like agencies which purport to apply pre-existing general norms impartially (that is, unaffected by the identity of the parties).
The rules and the procedures of these institutions are complex; wherever possible disputing units employ specialized intermediaries in dealing with them.
The rules applied by the courts are in part worked out in the process of adjudication (courts devise interstitial rules, combine diverse rules, and apply old rules to new situations). There is a living tradition

similar to how they apply in litigation. However, it is important to consider the manner in which these advantages would function in the specific context of employment arbitration.

Employers are inherently more likely to be repeat players than their employees, since they can reasonably be assumed to be party to more employment arbitration agreements than their individual workers. Further, that, employment arbitration exists as a private industry, with arbitrators dependent on the parties for their selection, raises additional concerns about the potential advantages of repeat players:

> The problem with this competitive private industry in dispute resolution services is that the pressure on the professionals to garner more cases inevitably leads to a kind of insidious corruption that undermines the integrity of private dispute resolution as an alternative to public justice. The fact that the employment of every ADR professional depends on a private party's choice to hire that professional or sponsoring organization logically means that every ADR professional is under direct economic pressure to do whatever he or she can to encourage parties to exercise their freedom of choice in his or her favor.
>
> Were all parties to ADR proceedings equal in terms of numbers and kinds of cases referred, one could argue that the result of this kind of economic pressure would be decisions of high quality and impartiality. In fact, however, parties to ADR are not equal in terms of their relationship to the ADR industry. In many, if not most cases, one party is much more likely than the other to be involved in future ADR proceedings and to be choosing future ADR professionals for these future proceedings (Murray 2008: 275).

Arbitrators facing the need to be selected to earn a living have an incentive to make decisions that will encourage their future selection. This is distinct from the experience in the public courts because judges, juries, and court administrators are structurally insulated from direct economic interest in the outcomes of the cases they are assigned.

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of such rule-work and a system of communication such that the outcomes in some of the adjudicated cases affect the outcome in classes of future adjudicated cases.
Resources on the institutional side are insufficient for timely full-dress adjudication in every case, so that parties are permitted or even encouraged to forego bringing cases and to "settle" cases, that is, to bargain to a mutually acceptable outcome.
There are several levels of agencies, with "higher" agencies announcing (making, interpreting) rules and other "lower" agencies assigned the responsibility of enforcing (implementing, applying) these rules. (Galanter 1974: 96).

Arbitration proponents argue that a competitive industry and reputational concerns should alleviate critics' concerns of bias. Professor Drahozal expresses this sentiment:

> Several factors may reduce the likelihood or consequences of repeat-arbitrator or repeat-player bias. First, arbitration providers, as well as individual arbitrators, may seek to maintain a reputation for fair and unbiased decision making. Such reputational constraints may reduce the risk that repeat-arbitrator or repeat-player bias will occur. Second, even if arbitrators and arbitration providers have an incentive to make decisions that businesses want, it is not necessarily the case that those decisions will be unfavorable to consumers. As Gordon Tullock explains, while "a bias toward the retailer might be the arbitrator's profit-maximizing course of action," it might not be. Instead, "the retailer might be interested in his general reputation and want an arbitrator who was either impartial or, for that matter, actually procustomer." For example, even though the workers at return desks are employed by the retailer to resolve disputes with customers who are seeking to return goods for a refund, their usual reaction is not one of making a fair judicial decision between themselves and [the customer] but of giving [the customer] every benefit of the doubt (Drahozel & Zyontz 2010).[106]

At this point, it is important to distinguish between two different levels of potential repeat player advantages that have been considered in the employment arbitration debate, advantages at the provider level and at the arbitrator level.

--Provider Bias

One fundamental concern is that private dispute resolution providers have a financial incentive to satisfy those who are in a position to select amongst providers and those who frequently arbitrate. This would likely influence a provider's decisions regarding minimum standards of due process and the recruitment and selection of arbitrators. Professor Sternlight

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[106] "…[A]rbitral institutions have some incentives to ensure that the system does not become biased in favor of the repeat player. If it were to do so, that might call into doubt the neutrality of the tribunal and, consequently, the enforceability of any award. Finally, as I have explained elsewhere, at least some arbitrators, like arbitral institutions, have an incentive to cultivate a reputation for neutrality, which may, over the long run, create more opportunities for business than if they develop a reputation as an industry-friendly or claimant-friendly arbitrator." (Rutledge 2008: 566).

explains the concern that many employee advocates have regarding the consequences of competition between providers:

Arbitration critics frequently discuss a phenomenon known as the "repeat provider" problem. Arbitration providers, such as the American Arbitration Association or the National Arbitration Forum, are now competing to provide arbitration services for particular companies that require their consumers to arbitrate future disputes. Companies and providers often sign agreements to the effect that a particular company will be named as the provider in a particular arbitration clause. Obviously, once a company is named as the provider, financial benefits accrue to that company. Although the arbitrator fees may be paid to individual arbitrators, rather than the company, the company itself at minimum earns fees for administering the disputes. Thus, charge the critics, providers have a financial incentive to make sure that the company is pleased with the results in arbitration. If the company is displeased with the results secured through a particular provider it may well switch providers (Sternlight 2006: 144-45).[107]

While some private arbitration providers are non-profit, all are subject to the competitive pressure to secure and retain customers.[108] In the context of employer-promulgated arbitration

[107] "If arbitration providers, including AAA, refuse entirely to cater to the wants of those customers, the market dries up. AAA, like the other arbitration providers, has an incentive to stay just a step ahead of legal fairness requirements, perhaps, but to make arbitration as defendant friendly as possible without failing a judicial sniff test." (Schwartz 2012); "Of equal concern is that these new providers of decision-reaching services are private economic actors, not public agencies. It is already apparent that their activities are subject to economic influences inconsistent with the standards of impartiality and independence associated with public justice and the rule of law. The privatization of public justice brings the risk that public justice as we know it is being eroded." (Murray 2008: 27); "The potential for submerged bias, however, may precede the parties choosing an arbitrator from a panel; the potential bias may be built into the naming of the panel from which the arbitrators are chosen. In Hooters of America, Inc. v. Phillips, the employer compiled the list of approved arbitrators from which complaining employees were required to choose…In Gilmer, employer control was only one step removed from Hooters' direct employer control; the panel was selected by officers of the stock exchange who had been elected by the employers." (Summers 2004: 690-91); "Arbitration providers cannot, of course, avoid the problem of potential bias when compiling their list of arbitrators because the providers feel they must continue to satisfy the employers who designate the providers. The most obvious cure for this would be the use of a public agency-such as the FMCS---or state mediation agencies to provide panels of arbitrators." (Summers 2004: 733).

[108] "In a surprising set of developments, JAMS, the third-largest private arbitral body, announced in November 2004 a new policy to allow classwide arbitration even where the arbitration clause explicitly prohibits it. JAMS' decision to disavow collective action waivers "was made out of concern that the prohibitions unfairly curtail the rights of consumers and employees involved in an increasingly large number of class action arbitration claims." The move immediately angered its corporate clientele, some of whom accused JAMS of trying to "insert itself as a guardian of social policy" by interfering with the freedom to enter into contracts. A number of these clients, including Discover and Citibank, swiftly changed their contracts to remove JAMS as an acceptable forum for arbitrating disputes. Then, in March 2005, in a somewhat less surprising move, JAMS abandoned its policy of not enforcing class action

agreements, the employer's unilateral control over the content of the arbitration agreement provides reason to doubt that market forces will promote fair and just providers:

Arbitration through private agencies, such as the AAA, NAF, and Employer Dispute Services (EDSI), does not eliminate, but rather obscures the potential for systemic bias. These arbitration agencies compete to sell their services to employers; and in mandatory arbitration, it is the employer who unilaterally chooses the agency. The agencies have a financial and institutional interest in offering arbitrators that are acceptable to employers; the agency which is considered to have the most favorable list of arbitrators will have a competitive advantage (Summers 2004: 691).[109]

However, some commentators maintain that fear of judicial condemnation will encourage providers to adopt sensible reforms. [110]

--Arbitrator Bias

Concerns over neutral providers and rosters have received much less attention than concerns over neutral adjudicators. There are at least three somewhat distinct forms of arbitrator bias

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waivers in arbitration clauses, citing "confusion and concern" over how the policy would be applied and criticisms that it undermined the neutrality of the arbitration process. More likely, the pressure put on JAMS by its corporate clients was too much to bear." (Gilles 2005: 411-12).

[109] "Moreover, AAA, like other arbitration providers, oversees arbitrator selection: it determines who is in its pool of arbitrators; and from that pool, it will provide a short list to disputants under its arbitrator-selection protocol. When an important customer sits down for dinner at a restaurant, do you think the manager is indifferent about who will wait on the table?" (Schwartz 2012: 9-10).

[110] "But for several reasons providers may implement, and businesses may accept, reasonable arbitration reform.

First, judicial scrutiny limits the extent to which providers can favor their business customers, and in fact may create pressure to increase the level of "due process" afforded consumers. Providers need courts to view their procedures as fair, and businesses want assurances that courts will respect a provider's rules and enforce awards issued by its arbitrators. Thus, providers may file amicus briefs defending their procedures, and they may adjust their procedures in response to judicial criticism. These are investments in reputation; to a judge familiar with an ADR provider, designation of that provider in a contract may signal that the agreement should be upheld. This dialogue between courts and providers, moreover, is a two-way street. Provider rules and due process protocols inform courts about best practices in arbitration, and courts may come to view the absence of these practices as a warning sign. Over time, this dialogue may limit contract drafters' efforts to impose procedures that conflict with those "reputable" providers view as fundamental to a fair arbitration process." (Weidemaier 2007: 109-110).

being discussed in the literature. First, there is a form of "bias" that could be more usefully termed for purposes here legal predispositions or legal inclinations. Second, there are subconscious biases, including motivated reasoning, which unintentionally influence decision-making. Third, there are behaviors viewed as corrupt and the result of conscious and deliberate bias.

One advantage repeat employers may have over employees is increased information regarding the predispositions of certain arbitrators:

> In principle, both judges and arbitrators are neutral, but as every lawyer knows, some are more neutral than others. Judges and arbitrators have idiosyncratic predispositions in how they weigh the facts and interpret the law, and these predispositions may, in varying degrees, consciously or subconsciously, affect their judgments. The outcome of a case may depend on who is chosen to sit in the judgment seat… They are chosen by the parties with consideration of their competence and assumed predisposition, with the parties seeking opposite predispositions. The employer seeks an arbitrator who will tend to see the case from the employer's viewpoint; the employee seeks an arbitrator who will tend to see the case from the employee's viewpoint. If the parties are equally informed about the arbitrators, those with known predispositions will be rejected by one of the parties with the likely result that an arbitrator who is relatively neutral will be selected. But in most individual arbitration cases, the parties will not be equally informed. The employer and its law firm are repeat players, and through their various associations may know an arbitrator's record and indications of his predispositions. The individual, a one-time player, knows nothing about an arbitrator except what is revealed on his resume, which will studiously accent his neutrality (Summers 2004: 689-90).[111]

The asymmetrical access to information provides the employer with a strategic advantage in the arbitrator selection process increasing the likelihood they will be able to secure a neutral sympathetic to their cause.

The second form of bias, subconscious bias, is seemingly more unscrupulous, but is natural and somewhat inescapable. Since arbitrators' compensation depends on case

[111] "The most direct manner in which an employer can stack the deck in its favor is by controlling the choice of arbitrator. Rather than giving both parties an equal voice in selecting the arbitrator and requiring that the person selected be neutral, the employer can design a system in which it unilaterally chooses the arbitrator. In the worst possible case, the employer could choose an arbitrator with whom it has an economic relationship. Even if this is avoided, the employer could select someone whose views on the issue predispose him or her to rule in the employer's favor." (Maltby 1998: 33).

appointments they hope to conduct themselves in a manner that would encourage parties to select them for a future case. When one party to the dispute and the applicable representative are significantly more likely than their opposition to be involved in future arbitrations there exists an economic incentive for the arbitrator to issue a decision that would satisfy that party. In the employment arbitration industry it is generally in arbitrators' self-interests to make decisions that would encourage employers and their representatives to select them in future arbitrations. Absent any malice, this self-interest influences arbitrators' decision-making.[112]

A third form of biased behavior that presents concern is the purposeful skewing of arbitral decisions in order to serve the arbitrator's economic interests. In the context of collective bargaining and grievance arbitration, the union and the employer serve as competing repeat entities providing the adversarial balance necessary to maintain a relatively level playing field in arbitration. In the field of labor-arbitration, frequent suggestions are made that arbitrators deliberately "split the baby" in order to remain in the good graces of both labor and management. While plainly recognized in these related fields, it is nonetheless considered controversial to extend this same logic to the non-union context. In employment arbitration, the concern is that arbitrators will deliberately skew their decision in favor of employers:

> One of the great dangers to employee-plaintiffs is the "repeat player syndrome." In the traditional labor arbitration context, the arbitrators know that they will receive future business only if both the union and management believe they are fair. An arbitrator who always rules for one side will not prosper. But when the union and its institutional memory are removed, the arbitrator's incentives change dramatically. There is no need to satisfy the employee, who is highly unlikely to have another opportunity to choose an arbitrator. The employer, however, is

[112] "Psychological research shows that our desires powerfully influence the way we interpret information, even when we're trying to be objective and impartial. When we are motivated to reach a particular conclusion, we usually do. That's why most of us think we are better than average drivers, have smarter than average children, and choose stocks or funds that will outperform the market-even if there's clear evidence to the contrary. Without knowing it, we tend to critically scrutinize and then discount facts that contradict the conclusions we want to reach, and we uncritically embrace evidence that supports our positions. Unaware of our skewed information processing, we erroneously conclude that our judgments are free of bias." (Bazerman, Loewenstein & Moore 2002: 98).

likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it (Maltby 1998: 33).[113]

To be concerned about economic influences on decision making does not require that one believe arbitrators are immoral people; rather, just that they are people. To echo Professor Schwartz's sentiments:

I am not suggesting that arbitrators – either as a class or any particular Individuals -- are venal or otherwise prone to acting in bad faith. The point is that the system of arbitration as a structural matter creates financial incentives to decide questions of arbitrator jurisdiction ("who decides") and even merits issues favorably toward those who pay them. That argument does not depend at all on individual good faith or bad faith. The objections I frequently hear at conferences from arbitrator colleagues – which boil down to "but *I* am a fair person!" – were conclusively answered long ago by James Madison: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." The Federalist, No. 51 (Madison) The due process principle that the role of neutral adjudicator will not be given to a financially interested party is, in effect, one of those necessary external controls. I merely suggest that even arbitrators are not angels (2012: 10).

Critics add that the confidential nature of arbitration serves to facilitate corrupt behavior.[114]

These repeat player concerns are not free from refutation. While not denying the presence of economic inducements, some commentators suggest that the combined force of

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[113] **"**Arbitrators know that employers are repeat players and will be familiar with competing arbitrators' records. To continue their acceptability, arbitrators may, consciously or subconsciously, tend to avoid a record which employers will view as unfavorable" (Summers 2004: 690).

[114] "Judicial review of both arbitration awards and mediated settlements is very limited. Arbitrators and mediators can handle and decide cases more or less in their own economic interests without fear that their activities and decisions will be subject to effective judicial oversight. ADR gives private, profit-making enterprises a certain amount of public power that can be misused in their private interests, and then clothes their activities in secrecy and dispenses with oversight to maximize the practical possibility that such misuse might occur.

The result is that the current movement to privatize civil justice is not only undermining the clarity and authority of our public legal norms, it is also leading to a system of active injustice, in which repeat players and parties with prospect of future business exercise subtle power to influence private decision makers and facilitators to favor their interests under conditions of secrecy and unaccountability that would be considered unacceptable for any kind of public institution." (Murray 2008: 315).

reputational concerns and bipartite selection processes sufficiently counteracts any economic incentives. They argue that:

Other research challenges head-on that employers are unfairly and systematically favored by neutral third parties in employment ADR over employees. These researchers maintain that arbitrators tend to be retired judges and other long-time practitioners with interest in maintaining their established reputations for integrity and neutrality. Also, arbitrators are jointly selected by both sides. They are often not selected by employers or employees, as such, but by the legal counsel representing each party; lawyers are the real repeat players. As with the selection of labor arbitrators in a unionized context, each side's counsel is able to vet arbitrators based on available information. This system of bipartite selection reduces or eliminates the repeat-player effect when both employer and employees are represented by counsel (Estreicher & Eigen, 2010: 416) (citations omitted).[115]

It is worth noting that while they have been critical of the magnitude of concern expressed by critics and certain research methods used by empirical scholars in this area, proponents of employment arbitration have, at times, conceded that repeat player concerns are legitimate.[116]

[115] "Before discussing this research, we must note that the concept of repeat player bias is tenuous. The argument is that arbitrators will rule in favor of employers because they are more likely than plaintiffs to hire the arbitrator again. Such an argument makes no sense. No rational plaintiff would select an arbitrator who does not have a well-established reputation for integrity; arbitrators with skewed track records find themselves jobless. Because of this fact, the repeat player effect would exist only if: (1) arbitrators are able to hide their past relationships from the plaintiffs and the agencies in charge of arbitrator selection; or (2) plaintiffs and their attorneys are so unsophisticated that they do not do any research before exercising their right to help select the person who will decide their case." (Sherwyn, Tracy, Eigen 1999: 143).

[116] See, e.g., "Nevertheless, the case of the unsophisticated worker with limited bargaining power presents a legitimate concern that private arbitration will fail to adequately protect workers' rights and will compromise the integrity of the public law scheme. I refer not only to the repeat-player problem (likely to be aggravated where claimants are uncounseled) but also to the prospect of contracts calling for arbitration before tribunals comprised of individuals experienced in the industry who presumably may exhibit a systemic bias in favor of employers." (Estreicher 1990, 782-783); "A claim that does point to a possible systematic advantage for employers is the "repeat arbitrator effect" – that is because the same arbitrator will be appearing in more than one dispute with the employer, the arbitrator might be inclined to give close calls to the employer (Colvin 2011)." (Estreicher & Eigen 2010, 416); "This system of bipartite selection reduces or eliminates the repeat-player effect when both employer and employees are represented by counsel. However, it does not eliminate the risk of bias when employees represent themselves or where arbitral rosters are skewed to favor employers." (Estreicher & Eigen, 2010); ""[R]epeat player" effects may result in a system that favors employers. We believe the problems are either overstated or can be corrected by our proposed statute, the Mandatory Arbitration Act (MAA)." (Eigen, Menillo, Sherwyn 2012: 280).

Some arbitration advocates believe that the FAA's legal grounds to vacate awards serve as a sufficient check against biased decisions of providers and arbitrators. Too often ignored, however, are the practical constraints that deference to arbitrator decisions, confidential arbitral proceedings and brief written awards present when attempting to substantiate such a claim. Furthermore, many of these arguments assume a form of conscious behavior that produces clearly evident partiality, which likely would only make up a small subset of the cases at issue. The more pressing concern is that all claims are subject to a dispute resolution system in which there are structural incentives for private actors, purportedly serving as neutral providers and adjudicators, to systematically favor one party in these disputes. This raises concerns not only of blatantly unlawful or immoral behavior, but also concerns about the expected impact of repeat players on the decisions of private providers competing for business[117] and the decision making of neutral adjudicators.[118]

-Comparing RP advantages in arbitration to RP advantages in court

The comparison between the repeat player advantages in arbitration and litigation has been arguably the weakest aspect of the repeat player debate. Consider the statement, "[t]he

[117] "The problem with private ADR services is that they are private. Private actors will always act to maximize their well-being under whatever system they function. The private ADR system under which decision makers are paid on a case-by-case basis inevitably tends to reward those who satisfy the repeat players to the detriment of objective merits.

It may be that over time a fully informed and open market will provide an incentive for dispute resolution professionals to maintain strict neutrality. However the market for private dispute resolution services is neither open nor fully informed. One of the touted advantages of ADR is confidentiality. The only parties who can monitor the performance of dispute resolution professionals, be they arbitrators or mediators, are those who are regularly involved in dispute resolution proceedings. It is the repeat players who are able to "keep score." (Murray 2008: 315).

[118] "While many arbitrators may prefer to view themselves as completely free of bias in any given case, the fact is that as humans, arbitrators are constantly in the process of making judgments about what is going on in arbitrations, and that these judgments are shaped in part by the conscious and unconscious biases that arbitrators bring with them into the room." (Reuben 2005: 296-297).

repeat-player effect is, in any event, irrelevant to the present discussion because it simply reflects the advantages that large employers would have under any system, arbitration or litigation" (Estreicher & Eigen: 2010). This is a dramatic oversimplification of the complex nature in which repeat player advantages would manifest in two different systems. To say that there would be repeat player advantages in both arbitration and litigation, while true, in no way means the manner or magnitude in which these advantages manifest in these two forums are identical or of equivalent concern.[119]

Arbitration, while a private forum, operates in the shadow of the judicial system.[120] The court is involved in determining the parameters for the types of disputes that are arbitrable under the FAA and the decisions of the court provide guidance for arbitrators as to the correct application of law. Therefore, many of the repeat player advantages that contribute to court decisions influence the practice of arbitration. For example, if repeat player advantages helped employers secure a court decision that heightened the burden for claims of employer retaliation, that precedent would likely impact an arbitrator's consideration of similar cases. Furthermore, repeat players may have an advantage creating and/or identifying favorable test cases to take to the Supreme Court. The *AT&T Mobility v. Concepcion* case, it has been argued, reflects such an instance. Thus, some repeat player effects are layered in litigation and arbitration.

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[119] Similarly, one party's height advantage would be of different significance when playing basketball as opposed to chess.

[120] Similar to what is said about divorce – See Robert H. Mnookin and Lewis Kornhauser (1979), Bargaining in the Shadow of the Law: The Case of Divorce. Yale Law Journal. See also Galanter: "…ADR is typically situated near legal institutions and dependent upon legal norms and sanctions. Correspondingly, most of what goes on in and around courts is not ""raditional adjudication" if that means the decisive application of legal norms to fully presented specific cases. Instead we find maneuvering, bargaining, and (often) mediation in the shadow of possible adjudication— and the expense and risk of obtaining it. That ADR and adjudication reside in distinct normative worlds is a persistent element in the mythology of the partisans of each, in spite of ample evidence of the pervasive continuities." (Galanter 1989: xiii).

Where it is more appropriate to view repeat player effects in arbitration and litigation as direct trade-offs is when looking at certain procedural elements that are unique to each forum (e.g., an employer's repeat player advantages present in jury selection versus arbitrator selection). However, many who have engaged this debate focused on whether those who have a certain advantage in arbitration would also have that advantage in litigation; and, if so, they conclude that the concern becomes insignificant since it is non-unique. Professor Peter Rutledge maintains:

> Why might repeat players do well in arbitration? One reason might be that the repeat player may have superior knowledge about the arbitral process and, therefore, may be able to exploit that informational asymmetry to its advantage. The validity of that proposition, however, is not unique to arbitration. Rather, it would be equally valid in any other dispute-resolution forum, including litigation. The employer, the corporation, or the franchisor would appear in the forum more frequently and, therefore, could have superior knowledge about the forum's operations. Thus, to the extent informational asymmetries explain the repeat player's success in arbitration, eliminating arbitration does not correct the asymmetries (Rutledge 2008: 565).

While Professor Rutledge is right that uneven knowledge may be present in both arbitration and litigation and that, consequently, eliminating arbitration would not eliminate the information imbalance present in an employment relationship, he provides no reason to believe the manner and extent to which these advantages influence outcomes would be of equal concern. For instance, on the question of the extent of the advantage, one might argue that the confidential nature of arbitral proceedings as opposed to the public nature of court cases might amplify the informational advantages of repeat players who have substantial first-hand experience in the arbitral forum and with particular arbitrators. Furthermore, that arbitrators are functionally both the judge and jury, and are not as strictly bound by precedent, may make information advantages in arbitrator selection of much greater impact than the impact of information advantages in jury selection. Employers and their representatives may also use their information advantages to help design arbitral rules and proceedings to their advantage to an extent that far exceeds any

analogous ability to tailor procedures in the court system. Employers can also use information advantages to lobby for reform in a manner less publicly scrutinized than would be the reform of the employment statutes that arbitration may be used to thwart.[121] Hence, the fact that a particular advantage would exist in both arbitration and litigation is far from the end of the discussion.

While it should be clear that the comparison already is not as simple as some contend, the preceding analysis has ignored the interactions between repeat player advantages and economic influences:

The susceptibility of private entrepreneurial dispute resolvers to influence by hope for future business is one of the primary justifications for systems of justice designed to insulate public decision makers from such influence. Public civil justice functionaries, be they judges or juries, are immune to pressure from repeat player parties based on hope for future business (Murray 2008: 315).[122]

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[121] For one example see special rules and award requirements for punitive damages in Uniform Arbitration Act (2000: 69-70):
(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.
(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.
(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.
(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.
(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

[122] See also Rutledge, "Another reason for the repeat player's success might be the financial incentives of arbitrators. The argument would go that arbitrators, unlike judges, depend on repeat business to generate a stream of income and, therefore, have an incentive to render awards favoring the party more likely to appoint them in the future. Unlike the informational-asymmetry explanation, this reason is indeed unique to arbitration." (2008: 565).

While there are undoubtedly benefits to being a repeat player in both the current litigation and arbitration systems there appears reason to believe that the effects of repeat player advantages that are present in both are of greater impact in arbitration due to heightened process control and the privatized nature of the industry.[123] However, this is far from a definitive analysis of the relative repeat player advantages. Publicly elected judges may be disproportionately subject to the influences of repeat players (often referred to as special interests) and these influences ought to be weighed in the debate. Proponents of arbitration are quick (and probably right) to emphasize the need for a more comparative repeat player discussion; however, that does not justify the rather callous nature in which they proclaim equivalency of repeat player concerns in arbitration and litigation. These matters are in need of greater not less investigation.

Fees

Early in the debate there was great concern that fees associated with arbitration would prove prohibitive to employees trying to pursue claims subject to arbitration agreements. In the

[123] In what may be the worst publicized instance to date, The Attorney General of the State of Minnesota, accused the National Arbitration Forum of violations of statutory prohibitions against consumer fraud, deceptive trade practices, and false advertising. The complaint alleged:

> "The Forum represents to the public, the courts, and consumers that it is independent, operates like an impartial court system, and is not affiliated with any party. The consumer does not know that the Forum works alongside creditors behind the scenes—against the interests of consumers—to convince creditors to place mandatory pre-dispute arbitration clauses in their customer agreements and to appoint the Forum as the arbitrator of any disputes that may arise in the future…The consumer also does not know – and the Forum hides from the public—that the Forum is financially affiliated with a New York hedge fund group that owns one of the country's major debt collection enterprises…Consumers also do not know that –despite representing to the public that it has "no relationship with any party" and does not "counsel our users" -- the Forum works closely with creditors behind the scenes to: (1) encourage them to file arbitration claims as an alternative way to collect debt from consumers; (2) draft arbitration clauses, advise creditors on arbitration legal trends, and in some cases, help them draft claims to be filed against consumers; and (3) refer them to debt collection law firms, which then file arbitration claims against consumers in the Forum." (State of Minnesota by its Attorney General vs. National Arbitration Forum – Complaint – District Court Fourth Judicial District).

employer-promulgated context, some dispute resolution providers address these concerns by requiring that the employer pay all forum costs or all forum costs beyond an initial filing fee. However, there is no requirement in the FAA, and thus it rests with the unilateral discretion of the employer to decide whether to include such a provision in the arbitration agreement or to choose a provider that enforces such a requirement. [124] The court's effective vindication doctrine does provide some recourse for employees who believe the costs of arbitration would constitute a barrier, but the court places the burden on the employee to establish that the obstacle presented is sufficiently prohibitive. Ironically, the proving of such a claim may itself come at a substantial cost.

Judicial Review

The limited nature of judicial review in arbitration is believed to present mixed outcomes for employers and employees. Both parties should benefit from the process cost savings that limited judicial review provides. However, some contend that judicial scrutiny is needed to deter and/or correct erroneous or potentially biased decisions. The limited nature of judicial review makes submitting a controversy to an arbitrator a more risky endeavor since the parties have foreclosed the appeals process that can serve as a safety net for correcting flawed decisions.[125]

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[124] "Congress has vested workers with various civil rights that can be adjudicated by the payment of $150; employers have imposed on workers a substitute forum in which they can get their rights adjudicated only by the payment of thousand of dollars." (Summers 2004).

[125] "An arbitrator's decision enjoys an invulnerability not conferred on any judge's ruling, jury verdict, or administrative agency's decision. Decisions by trial courts and administrative agencies can be appealed to appellate courts. Their determinations of fact can be rejected if not supported by the evidence; a trial judge's application of the law can be displaced by an appellate court's independent determination; and an administrative agency's decisions sometimes receive the limited deference of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. Even jury verdicts can be overruled by the trial judge on question of law. In contrast, section 10 of the FAA limits the grounds for vacating an arbitrator's award to proven corruption, fraud, partiality, or misconduct by the arbitrator. It provides no review for the

Beyond the limited standard of review employed when reviewing arbitrators decisions the practical realities of how private arbitration is practiced makes it even more difficult for courts to provide effective review.[126] Critics often assert the limited review in arbitration provides too much deference to arbitrators' resolution of statutory claims.

Outcomes

The debate over outcomes occurs roughly on three levels. First, disagreements arise over the purpose and desired objectives of dispute resolution systems. Second, disagreements exist regarding which criteria offer the best measures of whether a particular method of dispute resolution promotes or detracts from the relevant objectives. Third, disagreement transpires regarding how best to empirically compare the desirability of competing systems (primarily arbitration and litigation).

Efficiency and fairness have been the major objectives discussed in the debate, often evaluated via the criteria of speed, win rates, award amounts, forum costs and disposition types (settled, dismissed or heard). However, how best to operationalize these terms is contested. For instance, when determining if the claimant succeeded in a given case, disagreements surface over

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arbitrator's determinations of fact or application of law." (Summers 2004); "It seems incongruous that a decision determining an individual's public rights by a private tribunal, tailored by one of the parties and imposed on the other, gets much less scrutiny than decisions by publicly constituted tribunals judge, jury, or administrative agency." (Summers 2004); "This "minimal" review strives at a compromise between a policy of voluntarism-promoting private resolution of disputes by means of arbitration- and the policy of the external law. On certain assumptions that the parties are sophisticated, the forum selected is competent to adjudicate the dispute according to external law, and the policy of the external law is indifferent as to the nature of the adjudicative forum, the *Mitsubishi* compromise is understandable. In contexts where these assumptions would be inappropriate, however, the balance may have to be struck differently." (Estreicher 1990, 778).

[126] "Judicial check on arbitrary, willful, or incompetent arbitrators is even less than the articulated standard, "manifest disregard," might suggest because the arbitration procedure makes it difficult for a court to penetrate the basis of the arbitrator's decision." (Summers 2004).

what constitutes a win: should it be any award, only an award larger than any counter award, or only an award that equals or surpasses the claim amount? The majority of the debate concerning outcomes focuses on how appropriately to compare the relative outcomes of arbitration and litigation. The general concern is that by looking exclusively at outcomes of adjudicated disputes researchers are erroneously making an apples-to-oranges comparison since the nature of disputes that reach final adjudication in arbitration and litigation may not be comparable.

The cases that reach a final binding decision may not be analogous for a variety of reasons. First, arbitration and litigation present different outlooks to a claimant when they evaluate whether it is worth filing a claim. Second, arbitration and litigation are accompanied by different procedural rules and pre-hearing processes that may result in dissimilar filtering of cases.[127] Third, the employers who choose to promulgate arbitration agreements may be systematically different from employers who do not choose to implement arbitration agreements. This difference would be particularly problematic if these employers had dramatically different approaches to dispute resolution. The fact that one group of employers chose to draft arbitration agreements and the other group did not serves to enhance the credibility of this concern.

While these worries are valid, empirical questions are still better answered through imperfect empirical studies than by personal anecdotes and pure conjecture. Some commentators capitalize on gaps created by the limitations of existing studies to fill in their preferred explanations, but claims that samples are skewed in a particular manner should be based on

[127] For example, some employers have in-house integrated conflict management systems that terminate in arbitration. Additionally, the quickness of arbitration relative to litigation would affect the appropriate amount of back pay.

evidence. That being said, those comparing outcomes in arbitration and litigation should avoid drawing conclusions that assume an ideal apples-to-apples comparison.[128]

Public Interest

A core component of the debate over the efficacy of arbitration as an ADR option revolves around whether that process serves the public interest as a method for resolution of civil disputes. In democratic societies where the people through the constitution and subsequent legislation determine the proper handling of criminal and civil disputes and provide guidance as to the available remedies there exists both implicit and explicit public interests in the handling of civil disputes:

> Traditionally, civil justice has been considered a function of democratic government. In civil litigation private parties invoke the power of the state, dispensed by public decision makers, to compel the participation of opposing parties to actually decide the dispute according to law, and then to enforce the resulting decision by public force. Part and parcel of civil litigation is the enforcement and implementation of public norms and processes (Murray 2008: 272).[129]

Just because there is a public interest in the handling of civil disputes does not presuppose that the public interest is best served by significant government involvement. The public interest could be best served by encouraging parties to resolve civil disputes on their own without state involvement, including pre-determined private mechanisms of dispute resolution. There are some

[128] Some of these concerns also apply to comparisons of arbitral outcomes administered by different providers.

[129] "Although civil justice is found in many forms in the modern world, all systems have four key characteristics: 1) The processes of civil justice are transparent, in that the parties and the public are given access to the proceedings by which public norms are applied to issues raised by private powers; 2) The public decision makers are chosen, paid, and regulated so as to insulate them from influence from parties or other private elements; 3) The decision makers are expected to base their decisions on legal norms that are publicly known before the decision is made; and 4) The decisions are subject to some form of oversight and control by appeals to superior courts, and this oversight can be invoked by the parties. It is safe to say all of these features are comprehended by the concept of "due process of law" as it has developed in the United States over the last 200 years." (Murray 2008: 272).

that argue the costs of private disputes should fall entirely on the litigants since there is often no or little social consequence to private disputes.[130] However, more accurately, all private disputes have some social consequence, but there exists a wide spectrum from "minor disputes" with negligible damages and little precedential value to "major disputes" that imminently implicate health and safety and have great precedential value. Consequently, the notion that we should eliminate our civil justice system because private disputes have no social consequences is misguided:

A radical variation of this perspective…holds that the jurisdiction of government courts should be limited to those cases directly involving some clear public interest (e.g., protection from crime). This argument for privatization is based on the notion that public courts have more normative firepower than is needed for ordinary dispute resolution. But this is an impoverished view of what courts do. Courts not only resolve disputes, they also provide mechanisms for citizens to assert grievances, contest issues, and participate in public life. Moreover, government courts formulate public standards, radiating messages that educate public attitudes and provide guidance for private behavior (Galanter & Lande 1992: 411).[131]

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[130] "The chief Justice, by endorsing arbitration, was, however, implying something of broader significance. If civil disputes can be satisfactorily resolved by arbitrators, why is there ever any need to settle them at public expense? Why should the taxpayers have to support a civil court system? More to the point, why should jurors have to pay in time and lost wages to enable a condo developer to extract a cash settlement from a builder? Private disputes, unlike criminal proceedings, often have no social consequences. The full costs should fall on the litigants themselves." (WSJ, Aug 22, 1985, Settling out of Court) (Originally found in Galanter & Lande: 1992).

[131] Owen Fiss confronted a similar position with regard to settlements:

"The dispute-resolution story makes settlement appear as a perfect substitute for judgment, as we just saw, by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment-peace between the parties-but at considerably less expense to society. The two quarreling neighbors turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.

In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them." (Fiss 1984:1085-86); Edwards: "Obviously, many disputes cannot be easily classified as solely *private* disputes that implicate no constitutional or public law. Many commentators have tried to distinguish "public" and "private" disputes; but, in my view, no one has been fully successful in this effort. The problem is that hidden in many seemingly private disputes are often difficult issues of public law." (1986: 671).

A role exists for both public and private dispute resolution, but determining the authority of and the types of claims submitted to public and private mechanisms requires consideration of the purposes of our justice system. The objective of policymakers should be to maximize societal welfare by optimally allocating disputes between public and private (or "publicer" and "privater") adjudication.[132]

Court Congestion

A prime-motivating factor behind the shift to ADR was a concern over court congestion:

American judges, facing burgeoning dockets, have been more than willing to delegate to employers the authority to resolve public claims using private methods…Many scholars believe that a seminal event in the development of ADR in the United States was the Pound Conference, held at Harvard in April 1976. At that conference, attended by more than 200 influential leaders of the bar, Warren Burger, Chief Justice of the US Supreme Court, called for the development of informal dispute resolution processes, including arbitration, as an alternative to litigation. Scholars also credit a paper presented at the Pound Conference by Harvard Professor Frank Sander for propelling the ADR movement (Seeber & Lipsky 2006: 720-25) (citations omitted).[133]

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[132] "What about private courts? Are there such things as private courts? Certainly there are, if we may strain the language, privater and publicer courts. In some, the influence of public authority is quite attenuated and indirect. But the private courts that are of interest in current policy debates rent- a-judges and various forums for commercial, consumer, environmental; and employment disputes that are presently in the courts-are all located much closer to the public end of the spectrum. We could imagine these courts becoming more private (or more public) in various ways. How public or private they should be does not admit of a single correct answer. We have tried to show that it is not even a single question, and to ask about the consequences of privatizing or publicizing particular courts along particular dimensions." (Galanter & Lande 1992: 410).

[133] "The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices of our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. ADR is no longer shackled with the reputation of a cult movement." (Edwards 1986: 668); "As courts in the United States have become more and more clogged with time-consuming litigation, judges have sought ways to have "public" disputes resolved in other fora. Thus, in recent years, we have witnessed a trend toward what has come to be known as "alternative dispute resolution" (or "ADR") mechanisms, including mediation and arbitration, to resolve public disputes out of court." (Edwards 1999: 294-95); "Between

At the Pound Conference, Chief Justice Burger explained the necessity of efficiency in ensuring justice[134] and then continued to advocate for arbitration as a means of alleviating court dockets:

As the work of the court increases, delays and costs will rise and the well-developed forms of arbitration should have wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedure Act, arbitration can divert litigation to other channels (Burger, Chief Justice of the Supreme Court, Keynote at Pound Conference: 33).

The role of arbitration in alleviating the overburdened courts has been widely touted and also extended to administrative agencies.[135] While most critics do not refute that employment arbitration would provide some litigation diversion, they doubt whether this is sufficient justification for endorsing arbitration. First, they believe that other types of claims will fill-in any gap created by cases diverted to arbitration. Second, some counter that there are alternative ways to deal with overburdened courts that are preferable to resorting to arbitration, for instance investing more resources in the courts.[136]

1940 and 1980, the number of cases filed each year in federal district court nearly tripled, from 68,135 to 198,710.85 This dramatic increase gave rise to the meme that the country was enduring a "litigation explosion."" (Horton 2010: 619).

[134] "There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited—to use the words of Moorfield Story, a former president of the American Bar Association—by the litigant "with the longest purse." Every person in this conference knows how the "long purse" has been used to produce long delay and a depreciated settlement. Efficiency—like the trial itself—is not an end in itself. It has as its objective the very purpose of the whole system—*to do justice.* Inefficiency drains the value of even a just result either by delay or excessive cost, or both." (Burger, Chief Justice of the Supreme Court, Keynote at Pound Conference: 32).

[135] "Allowing this option is in the best interest not only of employers but also of most employees, not to mention overburdened courts that cannot effectively process these fact-sensitive, emotional disputes (today representing 15% of the federal docket)." (Estreicher 2001) "Moreover, to the extent arbitration relieves the administrative agencies of the burden of charge processing, agency resources would be freed to pursue systemic claims." (Estreicher 2001: fn 20).

[136] "Suits to enforce statutory rights of individual employees make up nearly ten percent of the civil cases

Public Savings

In addition to docket clearing, the lower process and outcome costs to employers who utilize arbitration may be passed on to employees and consumers. The extent of this transfer will depend on the supply and demand in the relevant markets for labor, capital, and whatever goods the workplace produces:

> Adhesive arbitration agreements are controversial; their enforcement is opposed by many commentators. Nevertheless, the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties. Those who dispute this are apparently focused on the few consumers and employees who are harmed by enforceable arbitration agreements, that is, the few consumers and employees who have claims that could lead to a big dollar jury award. In contrast to this myopic focus on the few, a more complete view of adhesive arbitration agreements would consider the majority of consumers and employees who benefit from their enforcement, that is, those who never have a dispute (but benefit from the better price or wage generated by arbitration's lower costs to businesses)… (Ware 2006: 292).[137]

While there may be merit to Professor Ware's statement that the economic public benefits are rarely directly responded to by critics, the argument he outlines far from substantiates the claim that the long-term economic and social impacts of adhesive arbitration agreements will be net-beneficial to society.

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filed in the federal courts and federal judges, led by the continuing crusade of Supreme Court Chief Justice Rehnquist, have protested that they are overloaded. Moving these cases to a private forum would provide substantial docket relief. However, to do this at the expense of important individual statutory rights is difficult to justify. The onus, however, cannot be put solely on the judges, assuming that they are, in fact, overworked; the primary responsibility must be placed on Congress for not providing a sufficient number of judges. This situation is due, in part, to the political deadlock that has caused continuing vacancies, but is more a product of Congress's failure to create more seats for budgetary reasons. It is an example of the all-too-common practice of declaring statutory rights but not providing adequate funds to enforce them." (Summers 2004: 711-12).

[137] This sort of criticism is often levied at worker and consumer protections such as safety regulations that are suggested to benefit the few who may have been injured at the expense of higher costs of the many who may not have been. At least in some cases, society has decided it is desirable to enact such regulations.

More Decisions on the Merits

Many proponents of arbitration contend that arbitration agreements encourage merit adjudications. This is regarded as an improvement, since, there is a belief that the content of many settlement agreements of claims subject to the public courts often hold little relation to the merits of the particular claim. Instead, the terms of such settlements are disproportionately determined by the economic cost of pursuing or defending a case and the cost of the associated public scrutiny. Due to the lower process costs in and confidential nature of arbitration, some argue that the arbitral forum may encourage more decisions to be adjudicated based on the merits of the dispute. More merits determinations may serve the dual purpose of reducing the number of meritless claims and helping deter unlawful behaviors.[138] However, more merits adjudications, arguably, decreases the efficiency of arbitration as a dispute resolution process.

Limited Public Scrutiny and Accountability

That private arbitration (and ADR generally) is typically a confidential process that keeps the public uninformed about the allegation, handling and disposition of disputes presents significant concern:

[138] "Arbitrators adjudicate cases in a fraction of the time and for significantly less cost than when the parties go into litigation. With arbitration, well-meaning employers would no longer be extorted into hasty settlements by the high costs of litigation, while truly wronged employees would not face unattainable barriers to receiving damages to which they are entitled. Conversely, damage-seeking employees will be unable to leverage *de facto* severance payments and will receive little or nothing at all. Moreover, employers with bad intentions will be unable to force a plaintiff-employee to accept an otherwise less-than-deserved settlement. Instead, such employers will likely pay full damages (or closer to full damages than in some other settlement). Therefore, in comparison to alternative forms of dispute resolution, like mediation, and in comparison with traditional litigation, arbitration offers the parties savings in costs and time as well as incentives that may actually hinder discrimination and harassment in the workplace." (Sherwyn 2002: 65); "But when settlement becomes the overwhelming goal, the merits of each individual case tend to lose their significance, thereby creating an opportunity and incentive for employees to file frivolous claims. Employers, in turn, have an incentive to settle claims, even if they are frivolous, because of the high costs of the agencies' investigations and the even more exorbitant costs of prospective litigation." (Sherwyn 2002: 64).

Judicial proceedings are open to the public and judges explain, in published opinions, the reasons for their decisions. Those decisions are subject to examination and criticism by other judges, lawyers, and scholars. Arbitration proceedings, on the other hand, are confidential and arbitration rules and practices, except in grievance arbitration, do not require a publicly available opinion explaining the reason for the decision. They are thus shielded from examination and criticism by other arbitrators or anyone else. Arbitration awards without published opinions are shrouded law (Summers 2004).

The information is not only of interest to jurist and legal academics, but also to the public at large, including legislatures charged with addressing public needs, and current and future employees and consumers:

Our public litigation system performs an educative function as well. By making court hearings open to the public and by publishing judges' reasoned written opinions, we inform not only the parties but also the public at large regarding how the laws are being interpreted. That is, our public court hearings educate the public and potential wrongdoers as to how the law is being interpreted, thereby deterring potential wrongdoers from violating the law, educating victims as to their rights, and inviting the public to take action to help reform the law should it not be satisfied with the public results. As well, the public justice system may discover and publicize facts, and this information can then be used in our legal and political system. The popular phrasing is that the public benefits from processes being "transparent." (Sternlight 2005).

Deterrence

Some commentators are concerned that arbitration minimizes the deterrent effect of statutory protections. The potential for employment litigation serves a large deterrent function:

The judicial system plays a relatively small direct day-to-day role in regulating employment relations. Despite concerns over burgeoning employment litigation, the actual number of cases filed each year, let alone the number that eventually reach some type of hearing, are miniscule in comparison to the overall size of the workforce. Yet avoiding litigation provides a powerful motivation for many employers in deciding how to manage their employees. Studies have found managers' fear of litigation extends far beyond the actual extent of protections provided to employees under current employment law and vastly exaggerates the actual probability of successful litigation by employees. This fear of litigation among managers gives the legal system a powerful deterrent role with respect to how organizations treat their employees that far outweighs the direct effect of individual cases in reviewing and correcting individual management misdeeds.

This powerful deterrent role provided by employment litigation derives not from the certainty or regularity of employee recourse to the courts, but rather from the uncertainty and potentially severe consequences of employment litigation (Colvin 2001: 663-664).

Arbitration agreements could increase the deterrent effect of employment protections, due to greater accessibility for average claims and more binding adjudications on the merits. However, employment arbitration agreements may minimize the deterrent effect of statutory protections due to the lack of public scrutiny, class action waivers, avoidance of "runaway" jury awards and suppression of claims by employers' strategic design of arbitration provisions.

- *Public Scrutiny*

The first level of alleged lost deterrence lies in the loss of public scrutiny:

> The public interest critique focuses on the fact that arbitration is typically private and usually does not yield public precedent. Therefore, to the extent that consumers' claims are resolved privately, other consumers and members of the public will not be able to benefit from the public exposition that would occur through litigation. Specifically, if claims regarding defective tires or fraudulent financial practices or dangerous medical practices were all resolved through private arbitration, illegal practices might continue longer than would have been the case had such claims been litigated. Public litigation helps serve the public purposes of deterring illegal conduct and educating companies and potential consumers regarding the permissibility (or not) of particular practices (ALA 2005, Sternlight 147-48).[139]

While Prof. Estreicher agrees that highly publicized claims have a deterrent effect he proposes that due to the increased accessibility the net-deterrent effect may be the same in both systems:

> Does arbitration provide the same incentives for deterring improper employment decisions as litigation? Certainly, highly publicized law suits have had an important deterrent effect in the employment arena, but such law suits occur so infrequently that once the factor of likely exposure is discounted for the probability of suit, it is not clear what their net deterrent effect is. Conceivably, arbitration, by making possible more frequent production of claims even if the median awards (and hence settlement values) are lower, may results in the same level of deterrence (Estreicher 2001: N.20).

Others argue that the number of cases that privately settle make the problems associated with private adjudication non-unique. Critics are often guilty of ignoring the large effect

[139] "There are, however, problems with arbitration. For example, the fact that it is private reduces the disincentive to discriminate…" (Eigen, Menillo, Sherwyn, 2012: 280).

settlements would have on similar concerns; however, it is important to recognize settlement is a voluntary post-dispute process. These disputes are resolved in a context where access to the courts remains open, which is distinct from the pre-dispute nature of most arbitration agreements where recourse to the court system has been cut off at the start of the contractual relationship.[140]

While the number of disputes handled in arbitration is important, the quantity of disputes that are eliminated from the public purview is not the only concern.[141] Compounding the concerns of some is that employers are generally in the position to decide which disputes are arbitrable and thus can make a calculated judgment as to which types of disputes, if public, would be most damaging. These disputes, in many cases, involve the types of behavior for which it is most critical that employees, consumers, and the general public be informed.[142]

- Claim Suppression

If arbitration agreements function as a tool to discourage rather than encourage claims then they would diminish the deterrent effects of the implicated statutes. Prof. Schwartz is

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[140] "In addition to the issue of judicial review discussed here, the public interest would have a bearing on confidentiality provisions. Consider a clause that commits the parties and the arbitrator to confidentiality about arbitration proceedings and decisions. Should employers be able to ensure in advance that whatever they do that is illegal or actionable cannot be made public in connection with an employee's legal claim against it? Or is the employer's interest trumped by the public's interest in learning about allegations or findings of wrongful conduct by employers, and in the development of precedent through published opinions? This issue arises in connection with confidentiality agreements in ordinary settlements, but it is more acute in the context of a predispute agreement that imposes a vow of silence even before the claim is made." (Estlund 2006: 433 fn. 141).

[141] "Second, it demands a certain kind of myopia to be concerned only with the number of cases, as though all cases are equal simply because the clerk of the court assigns each a single docket number. All cases are not equal. The Los Angeles desegregation case, to take one example, is not equal to the allegedly more typical suit involving a property dispute or an automobile accident. The desegregation suit consumes more resources, affects more people, and provokes far greater challenges to the judicial power." (Fiss 1984: 1087) .

[142] "…prospective employees can gain only limited knowledge of an employer's practices, as contrasted with the platitudes contained in the employee handbook. Thus, the employer is shielded from the reputational effects of its actions. One of the reasons that employers prefer arbitration is because it avoids potentially unfavorable publicity, thereby limiting consumers,' and others,' ability to know whether they are patronizing a lawbreaker." (Summers 2004).

adamant that this is the outcome of many arbitration agreements:

let's stop calling it "mandatory arbitration," that bloodless, hypertechnical and misleading term. Mandatory implies that the arbitration process is binding on both sides, but that is less than half true: it is voluntarily chosen by the defendant, who drafts the arbitration clause, and "mandatory" only on the party who doesn't want it, typically the plaintiff. So what is this thing? It is claim-suppressing arbitration. It is designed and intended to suppress claims, both in size and number (Schwartz 2012: 2).

The potential avenues that critics claim employers can exploit to draft arbitration provisions to their advantage, while staying well in bounds of the law, are plentiful if not endless. Limited discovery, witness caps, skewed arbitrator rosters and selection, strategic award requirements and other means that introduce uncertainty into employees' calculations could all serve to limit the amount of claims filed.[143]

A large portion of the claim suppression debate in recent years has revolved around the availability of the class action mechanism for resolving disputes. As a result of Supreme Court decisions that confirmed the validity of class action waivers in combination with arbitration agreements, many individuals who consent to arbitration are prevented from pursuing claims as a class member.[144] The concern with this development is that many awards that are too small for an individual to pursue on their own, and thus, without the deterrent function of the potential class action mechanism, companies are likely to face little if any recourse for widely spread injustices that may be felt only in small amounts individually:

The trend is for employers to expressly exclude class actions in their mandatory arbitration

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[143] "This lack of published arbitration opinions has four substantial consequences. First, the parties are unable to know their rights and duties, for there are no precedents to guide them indeed, one of the traditional rules in arbitration is that there is no stare decisis. Lawyers, therefore, cannot reliably advise the parties." (Summers 2004); "Although the arbitrator may ultimately assess costs against the employer, the wronged employee has no advance assurance, and the risk of large expenses will discourage her from pursuing the enforcement of her rights and from serving as a private attorney general." (Summers 2004).

[144] While other means exist to combine parties to a dispute, these alternative mechanisms are not immune from employer attempts to minimize their feasibility.

provisions as a precaution against a court or arbitrator sensibly interpreting silence. One employer member of the Federalist Society panel stated that he counseled employers that the primary advantage of arbitration is not that it is cheaper, quicker, or less burdensome than litigation, but rather that it allows employers to avoid class actions: "[d]espite the potential disadvantages to employers who require arbitration, the primary question asked by companies considering arbitration is: 'Can we cut off class and collective actions by requiring arbitration?'

Courts, by enforcing those exclusionary clauses, permit employers to deny employees access to class actions which would be available in the courts. This is in the face of a statute that sought to facilitate limited class action in order to enable employees to enforce their rights and to encourage them and their lawyers to serve as private attorneys general. Contrary to the reassuring words of Gilmer, arbitration requires the employee to "forgo the substantive rights afforded by the statute," and the statute will no longer "serve both its remedial and deterrent function." (Summers 2004: 702-703).[145]

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[145] "The extensive revision of Rule 23 in 1966 was designed to rationalize practice under the class action rule and eliminate its metaphysical 1938 text so that it would provide a useful procedural vehicle, particularly for civil rights cases. But more was intended. The amendment also clearly envisioned the use of the class action to empower those without "effective strength" to advance their claims, most notably when each individual's damages were so small that economically they had no independent litigation value." Permitting the aggregation of claims in this latter context incentivizes private remediation of wrongdoing and promotes the important goal of deterrence even if the compensatory payment to each individual is low, thereby enhancing the regulatory utility of Rule 23. When private class actions supplement or substitute for official regulation-as often occurs in the antitrust, consumer, and securities fields, for example-the effect can be to overcome the inefficiency and limitations inherent in governmental enforcement. In combination, the private attorney general concept and the class action serve to subsidize the much-needed private enforcement of public policies as well as to provide access and legal services to those whose economics or claim size deny them any possibility of legal recourse. Over the years following the 1966 amendment, not surprisingly, Federal Rule 23 was employed in an ever-widening range of substantive contexts in cases asserting claims of both a public and a private character." (Miller 2013: 315-16); "Consider, for example, a challenge to employer policies that exact several minutes per day of work from employees "off the clock" and without pay. Such policies may deprive hundreds or thousands of employees of a fraction of the pay to which they are entitled—perhaps $2000 or $3000 per worker over a few years. That is not a trivial amount for the average worker, but it is surely less than the cost of adjudication even in a lower-cost arbitral forum. Each individual thus has a "negative value claim" that is very unlikely to be brought. But the whole class of affected employees may have a perfectly viable aggregate claim. A class action waiver provision, as applied to such claims, would amount to a waiver of the substantive claim itself. Let us be clear on what this means: for employees who are bound by a class action waiver, an employer has a virtual free pass to engage in these illegal practices, and to skim thousands or millions of dollars off their employees' paychecks, with virtually no worries about liability. Where a class action waiver or any other procedural hurdle to adjudication effectively insulates the employer from liability altogether, it simply nullifies employment protections that are enforced primarily through private rights of action." (Estlund 2006: 428-29).

Arbitration advocates counter that critics exaggerate the deterrent effect of class actions and argue it is plaintiffs' lawyers, and not the consumers or employees, that have the most to benefit from class actions:

> Plaintiffs' lawyers like to argue that class actions are essential to provide compensation and deter wrongful conduct. But the vast majority of class actions produce little compensation, and most corporate officials view them as a "cost of doing business," not a badge of dishonor. Deterrence comes from government enforcement and, increasingly, from the use of social media in which the threat of brand damage is used as a "stick" to reform corporate behavior (Pincus NYT 05/24/2012).[146]

Some also doubt the weight of the class action in the context of employment arbitration since they believe employment claims are generally of larger value then the types of consumer claims that are prominent in the class action debate.[147]

- No Risk of High Jury Awards

The "runaway jury" awards that employers often complain are unjust, regardless of their merit, increase settlement values for cases where juries are the final adjudicators. Removing the possibility of jury consideration would, as a result, likely lessen the perceived cost of workplace

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[146] "Finally, it bears emphasis that class actions do not necessarily represent a beneficial alternative for claimants. While a detailed discussion of class actions is beyond the scope of this paper, some literature does cast doubt on the viability of class actions to overcome the access-to-justice problem. Many scholars have questioned the efficacy of current class-action mechanisms to afford meaningful recovery for class members. Sometimes, the class action results in a settlement that offers class members simply a coupon or some other nonpecuniary benefit that may be of little or no value to the consumer. Moreover, the value of the class action will depend on the "take rate" (that is, the rate at which class members actually complete the steps necessary to obtain a benefit)." (Rutledge 2008: 572-73).

[147] "Parties in a superior bargaining position, such as employers and business firms, frequently impose prohibitions on class actions in their arbitration agreements with employees and customers. The primary purpose is to discourage the pursuit of small monetary claims, where the individual may have so little at stake that it is not worth the costs even to seek arbitration. Only a class or collective action is a realistic option. Not surprisingly, most challenges to waivers of the right to bring a class action in arbitration have dealt with consumer claims rather than employee claims. Employees typically have a dispute over a job and often thousands of dollars in lost pay. That is generally worth pursuing even on an individual basis." (St. Antoine 2008: 805).

injustices. As Prof. Colvin explains:

Of even greater concern, employment arbitration may actually reduce the effectiveness of workplace procedures for employees by reducing the incentives on management behavior created by the deterrent role of employment litigation through the court system. By insulating employers from the uncertainty and potential for large jury awards of litigation, employment arbitration may in fact undermine the deterrent role of employment law and reduce the incentives that help promote fairness in the management of workplace procedures (Colvin 2001: 668).[148]

Avoiding juries is critical to employers' efforts to avoid high punitive damages which are assumed to be more likely awarded by peers of the claimants than by professional arbitrators.[149]

Maintenance & Development of Law

A major concern of arbitration critics is that arbitration provides an obstacle to the accomplishment of the objective of statutes intended to protect workers:

[S]tatutory employment rights are enacted when a legislature believes that workers cannot adequately protect themselves simply by bargaining with their employers. That is, they reflect a legislature's view of market failure in the contracting process. Legislatures act to ensure healthy and safe workplaces, protect privacy on the job, or to provide other protections when they believe that there is a public policy concern so compelling that it warrants intervening in the wage bargain. To then relegate enforcement or interpretation of these employment rights to a privatized tribunal-a tribunal whose composition and internal rules reflect and instantiate the very power imbalances that gave rise to the need for legislation in the first place-permits, indeed invites, de facto nullification (Stone 1996: 1043).[150]

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[148] "There are three main reasons we favor arbitration as an organization…Second, there is the issue of the run-away jury, which was shown in the data that was presented by Professor Colvin. We definitely like to avoid juries in California, in particular, so that is another benefit to arbitration. The data that were presented were consistent with what I have seen personally as far as the result of arbitrations. Even if they are decided for the plaintiff, they tend to be a much more reasonable verdict as opposed to what you can sometimes see form a jury." (Yechout 2012: 252-53).

[149] This widely held assumption may be incorrect: "The rate of punitive awards by arbitrators was higher than the overall rates for juries and judges and slightly lower than the rate of punitive awards by juries in cases lacking bodily injury. " (Choi & Eisenberg 2009: 1).

[150] "Arguments against mandatory arbitration are easy to make, and they are conceptually powerful. That is especially true when sensitive statutory rights are at stake. Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the enforcement of those rights. In a given case the specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights themselves. No employer, acting alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum,

The limited public oversight of arbitration makes it difficult to verify the extent statutory protections serve their function in the arbitral forum.[151] This concern is exacerbated by the lack of precedent created by increased resort to private dispute resolution.[152] Many of these criticisms

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procedures, and remedies as the price of getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy." (St. Antoine 2008: 787); "We must also be concerned lest ADR becomes a tool for diminishing the judicial development of legal rights for the disadvantaged in the reduction of possibilities for legal redress of wrongs suffered by the poor and underprivileged, "in the name of increased access to justice and judicial efficiency." Inexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication. The decisionmakers may not understand the values at stake and parties to disputes do not always possess equal power and resources. Sometimes because of this inequality and sometimes because of deficiencies in informal processes lacking procedural protections, the use of alternative mechanisms will produce nothing more than inexpensive and ill-informed decisions. And these decisions may merely legitimate decisions made by the existing power structure within society." (Edwards 1986, 679); "With respect to the adjudication of claims governed by external law, however, adjustments are necessary to ensure that the interests of a third party, the public, are given effect in the arbitral forum. As a public adjudicative mechanism, mandatory arbitration is a highly problematic alternative to administrative agencies." (Estreicher 1990: 797).

[151] ""When public laws are enforced in the private fora, however, we have no assurance that the underlying public interests are fully satisfied. This is not to say that private fora are incapable of resolving disputes in a manner protective of the public interest. However, conflicts that are resolved through mediation and arbitration usually are not subject to public scrutiny, so we do not know whether such resolutions are consistent with prevailing interpretations of public law or whether the procedures followed were equitable." (Edwards 1999: 295); "It also makes it impossible for Congress to enact effective legislation for worker protection because whatever is stipulated by statute can be compromised away by employer-designated arbitrators. In addition, by removing labor cases to private arbitral tribunals, courts are taking employment concerns out of the public arena, away from public scrutiny and political accountability. Because the arbitral tribunal is invisible, no one knows to what extent arbitration enforces these publicly conferred employment rights, if at all." (Stone 1996); "But if employers are able to establish private court systems under employer control, equal employment opportunity laws may become completely unenforceable." (Maltby 1998: 29); "Third, and more important, when statutory rights are at stake, the public needs to know how these statutes are, in practice, being interpreted and applied. This is essential for the public to make any sensible political judgments as to whether, and how, the statute should be amended" (Summers 2004: 704).

[152] "Fourth, and perhaps most important, the lack of opinions stunts the growth of the law. Arbitrators working from the bare words of a statute cannot build a body of precedent systematically elaborating the statute. One need only compare the poverty of the bare words of Title VII with the richness and complexity of the body of law that now surrounds it, including protection from harassment, responsibility for supervisors' conduct, shifting burdens of proof, recognition of disparate impact, and affirmative action remedies." (Summers 2004); "The most significant attacks on mandatory binding arbitration relate to its

also apply to most methods of settlements since they similarly deprive a public adjudicator of input in a decision making process that effects the public interest. However, some settlements require court approval in order to address this concern.

Arbitrators who by contract are entrusted to resolve claims of statutory protections are not public agents, and their duties are only to the parties that selected them. They do not make decisions regarding the public interest and have been admonished by courts that doing so, in some instances, would exceed their contractual authority. This seems particularly problematic when they adjudicate claims that implicate statutes of great public import:

> The arbitrator will focus primarily on the interests of the parties before him, largely ignoring the public interest. These employment rights statutes are an expression of the public will for public purposes and thus the controlling law should be developed and defined by the courts, not by private arbitration tribunals unguided by others' judgments and unbound by precedent (Summers 2004).[153]

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effect on society as a whole, rather than to its effect on individual consumers or employees. Even if it could be shown that mandatory arbitration were beneficial for many or potentially all consumers and employees who had claims, some argue it would still be detrimental to society in that it curtails the use of public (sometimes jury) trials and eliminates the development of public precedent." (Sternlight 2005).

[153] "private alternative dispute resolution cannot function unless it has the coercive power of the state at its disposal. Private arbitration relies on the power of the state to compel parties to participate in its processes and to enforce its awards… In a very real sense, the judicial acceptance of arbitration and mediation, and the clothing of their results with the coercive attributes of judicial determinations, is a kind of delegation of the judicial function to private dispute resolvers. In civil litigation judges evaluate competing fact scenarios and apply public norms to the facts and thus guide the application of public force to resolve private party disputes. The judges are held accountable to the norms themselves and a fair process by appellate review and public transparency." (Murray 2008: Judicature 274); "When arbitrators sit to adjudicate a dispute governed by public law, there is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest in ensuring that the law is correctly and consistently being applied. Whereas an arbitrator serves as an agent or "alter ego" for the parties to a collective bargaining agreement, an arbitrator who resolves statutory claims serves simply as a private judge. Yet, unlike a judge, an arbitrator is neither publicly chosen nor publicly accountable." (Edwards 1999: 297); "Private actors are by definition subject to economic influences that can corrupt their capacity to make or facilitate decisions of matters objectively. We should not be too enthusiastic about wholesale resort to ADR without meaningful safeguards. Some of these may seem onerous to the ADR industry. Without them we should not give private dispute resolvers access to public power. Unless we make sure that there is some relationship between the application of public judicial power and the proper and transparent application of public norms, the rule of law is sure to erode." (Murray 2008: 315).

Summary

The debate over employment arbitration is contentious. As to access, proponents believe that arbitration provides greater access for those with claims that are not sizeable, those who wish to appear pro se and/or those who desire continued employment. Critics doubt not so much the possibility that a well-designed arbitration system could provide these benefits, but whether this represents the reality of arbitration as currently practiced.

As to process, critics believe that arbitration often functions as a tool to suppress claims as opposed to a mechanism that encourages them. Their fears are exacerbated by employers' unilateral control of the design of arbitral process in the employer-promulgated context. Critics contend that the enforcement of societal protections should not be subject to a private justice system vulnerable to the very power imbalances that necessitated the initial societal intervention in the contracting process. Proponents respond that the reputational concerns of employers, providers and arbitrators in combination with judicial review sufficiently alleviate these concerns. They point out that many critics ignore that litigation is similarly susceptible to power imbalances, but is more costly to both employers and employees.

As to the public interest, proponents argue that greater use of arbitration will decrease court congestion and the costs of funding the public courts, and increase the number employment disputes adjudicated on their merits. Critics, on the other hand, maintain that arbitration lacks transparency, lessens the deterrent effect of statutory employment protections and hinders the maintenance and development of law.

Much of this debate falls along the familiar lines of whether one places greater trust in the free market or in government intervention. Typically even the most adamant free market enthusiasts believe the government has some role to play in setting relevant constraints and in

resolving disputes. Even in private arbitration the use of coercive force, to compel compliance with the contract and the arbitral award, is subject to limited judicial review and requires government enforcement. While still requiring government action, the extent of that involvement in arbitration is meager in comparison to litigation. Thus, the core of the disagreement goes to the extent of government involvement in the resolution of employment disputes that maximizes societal welfare.

While empirical studies are unlikely to resolve all areas of disagreement, some areas are susceptible to empirical analyses. Yet even in these areas unsubstantiated empirical claims are often the basis of dispute. Participants on both sides attempt to shift the burden of proof to their opposition and then proceed to declare themselves the victor since their opponents are unable to provide conclusive evidence to substantiate their propositions. This form of debate is largely unproductive. To improve the employment arbitration debate, participants need to do a better job contextualizing the results and explaining the limitations of the available empirical evidence. The next chapter reviews research on employment arbitration to help assess arguments presented in this chapter and in order to help contextualize the JAMS study, which is described in the chapter that follows.[154]

[154] It is worth noting that not all the relevant issues are readily measurable; these elements of the debate do not become unimportant due to researchers' current inabilities to subject them to rigorous empirical study.

CHAPTER 4: THE EVIDENCE

EMPIRICAL STUDIES OF ARBITRATION

Current State of Empirical Research on Employment Arbitration:

The academic literature on employment arbitration has often been described as "descriptive, anecdotal, proscriptive, and normative" (Bingham & Chachere 1999: 97).[155] The main obstacle to rigorous empirical research has been, and largely still is, limited access to data. This is unsurprising because the desirability of private dispute resolution is due, in part, to its confidentiality. Consequently, an inherent tension exists between the ADR industry's desire to keep its doings private and researchers' desires for the information necessary to comprehensively study the industry. Recently, California (California Code of Civil Procedure § 1281-1281.96) and Washington D.C. (2012 District of Columbia Code § 16-4430) decided to require that arbitration providers publish basic characteristics of certain cases they administer. These policies have allowed researchers to begin to evaluate arbitration based on public filings instead of information voluntarily disclosed by companies or providers. The voluntary and selective nature in which prior data was released contributes to the concern that much of the early empirical findings may not have been representative of the broader population of arbitration cases (Colvin 2011: 2). While access to data is still far from ideal, the comprehensiveness and sophistication of empirical studies of employment arbitration have increased in recent years. These studies have enabled researchers to more confidently construct an accurate image of employment arbitration (Colvin 2007: 407).[156]

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[155] See also Rutledge 2008: 551: "Until recently, much of the debate rested largely on anecdotes, not data. Such horror stories and success stories allow commentators to score rhetorical points. But they provide an extremely flimsy foundation upon which to construct policy prescriptions."

[156] The most extensive studies of employment arbitration, and consequently, the studies most relied on in this review, were conducted by Professor Alex Colvin using data on employment arbitrations

Coverage of Employment Arbitration

A preliminary empirical question about employment arbitration is to what extent do such procedures cover the workforce. There is no reliable public data set that regularly tracks organizations that have adopted employment arbitration procedures. As a result, the existing research on this question is scattered.[157] Although there are limitations to all the current predictions, most indicate an expansion of the coverage of employment arbitration agreements in the decades since *Gilmer* (Colvin 2007: 411).[158]

Bingham and Chachere cite evidence from multiple studies to substantiate that ADR generally grew in the non-union workplace just prior to and after the *Gilmer* decision:

> [T]here is ample evidence from the descriptive, legal, and empirical literature to suggest the adoption of ADR is rapidly increasing. Indeed, a limited but growing body of research on the implementation of ADR procedures for nonunion employees supports the conclusion that about half of "large" private employers have established some sort of formal dispute resolution procedure for their nonunion employees. For example, Delaney, Lewin, and Ichniowski (1989) found these procedures existed in half of their sample of almost 500 large employers; Edelman (1990) found that 65% of 52 organizations had established at least one nonunion grievance procedure; and Feuille and Chachere (1995) reported the existence in 57% of 111 large manufacture firms. A broad government study of ADR among private organizations and federal agencies also found that the use of ADR had increased during the 1990s and further concluded

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administered by the American Arbitration Association (AAA). Many regard, "Alex Colvin as this country's foremost empirical expert on employment arbitration" (St. Antoine 2012b: 255). Furthermore, the empirical data available on employment arbitration is believed to be better than the data available on consumer and franchise arbitration (Rutledge 2008: 551 fn.5).

[157] "To get a picture of the extent to which employment arbitration has spread through American workplaces, we need to draw on evidence from a series of different studies that in the course of examining various related issues gathered statistics on the adoption of employment arbitration." (Colvin 2007: 408).

[158] An exception is Avgar, Lamare, Lipsky, Gupta, 2013 report on the results of the second two of Fortune 1000 surveys, which showed a drop in corporations that had used employment arbitration at least once in the prior three years. The portion of companies that indicated use of employment arbitration dropped from 62% in the 1997 survey to 38% in 2011 survey. (Lipsky et al. 2013).

that 52% of large private companies had some form of ADR for nonunion employees (U.S. GAO 1995) (1999: 99-100).

Regarding employment arbitration specifically, the 1995 GAO survey found that 9.9 percent (later lowered to 7.6 percent in a follow-up to their survey)[159] of the 1,488 organizations subject to the reporting requirements of the Office of Federal Contract Compliance Programs had adopted binding arbitration procedures for non-union employees. The report indicated that half of these employers required employees to sign pre-dispute binding arbitration clauses as a condition of their employment (Gough 2008: 6).

Between 1993 and 1996, the employment arbitration caseload of the American Arbitration Association (AAA), a major provider of dispute resolution services, doubled. Between 1997 and 2002, the AAA disclosed, the number of employees covered by AAA arbitration procedures grew from 3 million to 6 million employees. Accompanying this growth in coverage, the AAA reported that its employment case filings grew from 1,342 cases in 1997 to 2,133 cases in 2002 (Stipanowich 2004: 900).[160]

A 1997 Cornell/PERC study, based on responses from over 600 companies listed on the Fortune 1000, reported that 80 percent of companies surveyed indicated that they had been involved in arbitration in the past three years. Regarding employment disputes specifically, the researchers found that 62 percent of companies that had used arbitration indicated participation in employment arbitration at least once in that time frame (Seeber & Lipsky 2006: 731).[161] In

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[159] See Colvin, 2007: 409, "[f]ortunately, the GAO's additional step of contacting employers for follow-up questions allows us to correct for this problem in the responses. With this correction made, the GAO survey results indicate a 7.6 percent incidence of employment arbitration."

[160] The 2002 AAA data indicates 1 filing per year for every 2,813 employees covered.

[161] However they reported, "[o]n average, a Fortune 1000 firm had arbitrated three or four employment cases annually in the previous three years." (Seeber & Lipsky 2006: 731).

2003, the AAA undertook a survey of ADR use by American companies largely modeled on the Cornell/PERC survey. The AAA surveyed 254 corporate representatives and found across-the-board increases in ADR involvement between 1997-2003. The report revealed that 72 percent of companies had used arbitration and 69 percent of companies had used employment arbitration over the prior 3 years.[162] Colvin reported that the number of AAA employment arbitrations that reached final disposition grew continuously from 2004-2007: 2004—803 cases; 2005—906 cases; 2006—957 cases; 2007—982 cases (Colvin 2001: 4 fn.3).

In 2006, Professors Lipsky and Seeber concluded that the impact of employment arbitration was increasing:

> We believe the limited data available suggest that the number of employment disputes submitted to arbitration has been growing. Regardless of how often it is actually used, decades of research on dispute resolution supports the proposition that the availability of arbitration, combined with incentives to parties to settle disputes before resorting to arbitration, has a significant effect on the resolution of employment disputes (2006: 733).[163]

In a 2007 article, Professor Colvin suggested that based on the best available empirical research, "a current estimate in the range of 15 to 25 percent of employers having adopted employment arbitration seems reasonable" (2007: 411). This estimate was based, in part, on two

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[162] See Seeber & Lipsky describing the AAA study: "The AAA's findings on Fortune 1000 companies largely replicated our own…In comparing its findings with ours, the AAA noted that there had been across-the-board increases in the use of ADR procedures between 1997 and 2003 (American Arbitration Association 2003: 27)" (2006: 732); See also Eisenberg & Miller, "[t]he empirical evidence that does exist suggests that arbitration has been expanding as a dispute resolution mechanism. The overall case load of the American Arbitration Association grew "from about 1000 cases in 1960 to more than 17,000 in 2002," with a decline to 15,800 in 2003." (Eisenberg & Miller 2007: 346).

[163] See also Rutledge: "Therefore, the available data support three main conclusions about the frequency of arbitration. First, over a medium-term horizon, arbitration caseloads have risen. Second, while an increasing percentage of businesses are employing arbitration clauses, particularly in their employment and consumer contracts, only a fraction of those clauses actually result in arbitration. Third, arbitration must be seen in context, as part of a larger strategy of alternative-dispute-resolution techniques that companies use to manage conflicts with employees and customers. With this picture in mind, we can now turn to the main fault lines of the arbitration debate." (2008: 556).

studies Colvin had conducted in the telecommunications industry (Colvin 2003; 2004).[164] In the more recent study, Colvin found that 14.1 percent of 291 respondents had adopted employment arbitration procedures. He concluded that adjusting for the workforce size, 22.7 percent of nonunion employees in the establishments surveyed were likely subject to employment arbitration agreements (Colvin 2007: 410). In 2012, Colvin updated his estimate:

> Although there is no definitive accounting of the number of mandatory arbitration procedures, the best survey evidences suggests that around a quarter to a third of all nonunion employees in the U.S. are now covered by mandatory arbitration procedures. With union membership now down to 12.3% of employees in the U.S., this suggests that mandatory employment arbitration has already become a significantly more widespread institution governing employment relations than collective bargaining and labor arbitration (Colvin & Pike 2012: 5) (citations omitted).

With recent reports showing union membership at 11.1 percent (BLS 2015, http://www.bls.gov/news.release/union2.nr0.htm), the best available data supports the conclusion that the number of workers covered by employment arbitration continues to far exceed the number of workers covered by labor arbitration.[165]

Average Claimants/Low-value Claims

Few researchers have examined whether the available evidence supports the notion that arbitration is an accessible forum for "average claims." In a recent study of employment

[164] Alexander J.S. Colvin, Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures, 56 INDUS. & LAB. REL. REV. 375, 381-83, 385 (2003); Alexander J.S. Colvin, From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution, 13 CORNELL J.L. & PUB. POL'Y 581, 586-92 (2004).

[165] For a well-reasoned analysis arguing the jury is still out on the claim that the proportion of employees covered by mandatory arbitration exceeds the proportion of employees covered by collective bargaining agreements see Lipsky, Lamare, Maffie 2014. The key arguments being: 1. Most coverage predictions are based off Colvin's studies of the telecommunications industry which may not be representative of the rest of the economy; 2. 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 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. It is worth noting, however, that the authors stop short of claiming the empirical research supports the opposite conclusion.

arbitrations administered by the AAA in 2008, Colvin and Pike (2014) reported that cases arising from employer-promulgated agreements comprised 72.4 percent of the caseload and cases arising from individual-negotiated agreements constitute the remaining 27.6 percent. The median demand for employees subject to employer-promulgated agreements was over $160,000 and three quarters of demands were for amounts above $60,000. The median demand for employees subject to individually-negotiated agreements was over $230,000 and three quarters of demands were for amounts above $80,000. That the vast majority of claims were for over $60,000 indicates that it requires a rather large claim for arbitration to be feasible (2014: 67). Furthermore, the researchers report that of the 217 cases in which they could determine the nature of the claim, 54 percent of cases brought pursuant to employer-promulgated agreements involved statutory claims while only 11.4 percent of claims pursuant to individually-negotiation agreements involved statutory claims (2014: 68). These results suggest that the majority of claims subject to employer-promulgated agreements that make it to arbitration are not small day-to-day workplace disputes, but statutory claims. The authors conclude that employment arbitration under employer-promulgated procedures is "strikingly similar to litigation system in providing relatively little accessibility to employees who do not have strong cases and large provable damages" (2014: 82).

Self-Represented Claimants

Another contention regarding accessibility is that employment arbitration is more hospitable to self-represented claimants than litigation. It is argued that by reducing the need for lawyers arbitration procedures enable self-represented claimants to pursue claims that they would be unable to pursue in court. Elizabeth Hill in a study of 200 AAA employment

arbitrations administered between 1999-2000 reported that employees with employer-promulgated agreements were self-represented in 33 percent of cases as compared to 5.1 percent of cases for employees with individually-negotiated agreements (Hill 2003). Surprisingly, in cases arising from employer-promulgated agreements, Hill reported win rates of 34.6 percent for employees with representation and 32.5 percent for self-represented employees.[166]

Colvin examined the effect of self-representation in his study of close to 3,000 employer-promulgated employment arbitrations administered by the AAA between 2003 and 2006 (Colvin 2007). Overall, employees proceeded without representation in 25 percent of cases. Self-represented employees received some compensation in 13.7 percent of their awards whereas employees represented by counsel received some compensation in 22.6 percent of their awards (Colvin, 2007: 433).[167] The average award for a self-represented employee was $13,222 as compared to an average award of $28,009 for an employee with representation (Colvin, 2007: 433).[168] These differences may reflect the effectiveness of legal representatives, but they may also reflect that those who are able to retain counsel are filing systematically different cases from those who are unable to retain counsel. Claims of lower quality (small damage amounts and limited evidence) are less likely to attract attorneys compensated on a contingency basis and would result in an association between lower awards and self-representation as a consequence of the lower underlying value of such cases.

After expanding the AAA data to include cases filed between 2003-2013, Colvin and Gough found that 32 percent of employees in the new sample were self-represented (2015: 1028 Table 1). The win rate for self-represented employees was 12 percent as compared to a win rate of

[166] This difference was not statistically significant.
[167] This was a statistically significant difference ($p<0.01$).
[168] This was a statistically significant difference at ($p<.05$).

22.4 percent for employees with representation (2015: 1028 Table 1).[169] The average award for employees with representation in all cases was $33,548 more than double the $9,806 average award amount for self-represented employees.[170]

Colvin & Pike, looking at AAA cases that terminated in 2008, found that 31 percent of employer-promulgated cases and 8 percent of individually negotiated cases involved self-represented employees (2014: 69). Examining self-represented employee claimants in employer-promulgated cases the researchers found that these employees won 17 percent of the time as compared to the 27.9 percent win rate for employees with representation. Looking at the average awards for all adjudications (including both employee wins and losses), Colvin and Pike report a mean award of $27,722 for employees represented by an attorney and a mean award of $1,781 for self-represented employees (2014: 78).

Continued Employment

Arbitration is believed to be preferable to litigation since it is less formal and divisive and, as a result, is more conducive to employees who desire to preserve their employment relationship. Looking at AAA cases decided in 2008, Colvin & Pike found that only 5 percent of cases could be identified as arising from non-termination situations (2014: 68). Of that 5 percent, it is unclear how many of those employees actually continued their employment post-arbitration. The researchers conclude that the available evidence suggests that employment arbitration is predominantly used by those who have been fired or quit and rarely serves as a mechanism for resolving disputes of employees who remain employed (2014: 68).

[169] This difference was statistically significant at (P<.01).
[170] This difference was statistically significant at (P<.01).

Time to Disposition

Studies have consistently found that arbitration is faster than litigation although the extent of the difference fluctuates. In 1998, Lewis Maltby reported that the average employment discrimination case in litigation was resolved in approximately 22 months while the average arbitration case took only 9 months to resolve (Maltby 1998).[171] Eisenberg and Hill (2003) found a mean time to disposition for civil rights based employment arbitrations administered by the AAA of 276 days (approx. 9 months) compared to a federal court average of 709 days (approx. 24 months) and a state court average of 818 days (approx. 27 months) for employment discrimination claims. Eisenberg and Hill (2003) reported that average time to disposition for non-civil-rights-based employment arbitrations administered by the AAA was 250 days (approx. 8 months) while the mean time to disposition for non-civil-rights-based state court cases was 723 days (approx. 24 months). The authors concluded, "[b]y any measure, arbitration terminates more quickly than litigation. Mean and median times in arbitration range from about seven to thirteen months. Mean and median litigation times, in both federal and state courts, all exceed twenty months" (2003: 20). [172] In a more recent study of 3,945 arbitrations, Colvin found that the average time from initial hearing to arbitration award was 361.5 days (approx. 12 months) (2011: 8).[173]

Outside the AAA, Gough 2008 found that in cases in which awards were issued the

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[171] Maltby was relying upon Gary G. Mathiason & Pavneet S. Uppal, Evaluating and Using Employer-Initiated Arbitration Rules and Agreements, in Employment Discrimination and Civil Rights Actions in Federal and State Courts (ALI-ABA Course of Study, Apr. 28-30) 875, 894 (1994), for this claim.

[172] Looking at employment discrimination cases filed in federal court in New York from 1997-2001, Delikat and Kleiner, reported a median time to disposition of 25 months. Michael Delikat & Morris M. Kleiner, "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?" 58 (4) Disp. Resol. J. 56 (Nov. 2003-Jan. 2004).

[173] Colvin found that employment arbitrations that settled prior to an award took approximately 9 months.

average time to disposition for cases administered by JAMS was 380 days (approx. 13 months) and the median time to disposition was 308 days (approx. 10 months). Researchers studying cases administered via the FINRA dispute resolution system between 1986-2008 found the mean time between initial filing and award was 513 days (approx. 17 months). (Lipsky et al. 2010: 57).

Fees

A frequent criticism of employment arbitration is that arbitrators and service providers charge fees that may be larger than the fees required in court. The concern is that sizable fees will deter or prevent employees from vindicating their rights. Looking at cases administered by AAA between 2003-2007 Colvin found that, in cases with heard awards, the mean and median arbitrator compensation was $11,070 and $7,138 respectively (2011: 9).[174] A 2008 study of JAMS employment awards found substantially larger fees, with a mean fee of $25,634 and a median fee of $18,600 (Gough 2008: 22).[175]

If employees were required to cover significant portions of these arbitrator fees it is likely that the impending costs would deter the pursuit of many claims. However, findings regarding the distribution of arbitrator fees provide important context. In employer-promulgated cases administered by the AAA, Colvin found that the employer paid 100 percent of the arbitrator fee in approximately 97 percent of cases (2011: 9). In this respect JAMS and AAA are quite similar. Gough found that in approximately 95 percent of cases administered by JAMS the employer paid 100 percent of the arbitrator fee (2008). Empirical studies of employer-promulgated employment arbitrations administered by major providers support the conclusion that potential liability for arbitrator fees should not be a significant deterrent to employee claims. However, it is important

[174] In all cases median arbitrator fee was $2,475 and the mean fee was $6,340

[175] Including all cases the mean arbitrator fee was $9,509 and the median fee was $1,200.

to remember that the FAA contains no requirement that parties involve a third-party provider; this portion of the employment arbitration industry still operates largely out of view (Colvin 2007: 424).

Win Rates

Table 1. Employee Win Rates in Prior Studies[176]

Author(s)	Sample Size	Data	Employee Win(%)	Employer-Promulgated/Individually-Negotiated Win(%)	Post-Due Process Protocol
Bingham (1995)	--	1992 AAA	74	--	No
Howard (1995)	--	1993-94 AAA	68	--	No
Bingham (1997)	270	1993-94 AAA	70	--	No
Bingham (1998b)	203	1993-95 AAA	52	21/69	No
Maltby (1998)	--	1993-95 AAA	66	--	No
Bingham &Sarraf (2000)	58	1996-97 AAA	40	28/61	Yes
Eisenberg & Hill (2003)	297	1999-2000 AAA	--	40/65	Yes
Hill (2003)	200	1999-2000 AAA	43	34/57	Yes
Colvin (2007)	836	2003-06 AAA	20	20/-	Yes
Gough (2008)	65	2003-07 JAMS	27	--	Yes
Colvin (2011)	1,213	2003-07 AAA	21	21/-	Yes
Colvin & Gough (2015)	2,802	2003-13 AAA	19	19/-	Yes

Empirical studies of employment arbitrations administered by dispute resolution providers in the United States began in, and have continued since, the early 1990s. Lisa Bingham, William Howard and Lewis Maltby all conducted studies looking at arbitrations

[176] This is an updated version of a chart that appears in (Gough 2008).

administered by the AAA in the first half of the decade. In one of the earliest empirical investigations of employment arbitration Prof. Bingham found a 74% employee win rate in AAA cases decided in 1992 (1995). William Howard studying a sample of AAA cases from 1993-1994 found an employee win rate of 68 percent (1995). When Bingham conducted a study of AAA cases from the same time period she found a similar win rate of 70 percent (1997). Looking at AAA cases decided between 1993-1995, Lewis Maltby found a 66 percent employee win rate (Colvin 2007: 412). Prof. Bingham continued her studies of AAA employment arbitration examining cases administered between 1993-1995 and reported an overall employee win rate of 52 percent. However, in this study, Bingham considered separately claimants subject to employer-promulgated agreements and claimants subject to individually-negotiated agreements. Employees subject to individually-negotiated agreements had a 69 percent win rate while employees subject to employer-promulgated agreements had a 21 percent win rate (1998b).

There are reasons to be skeptical that the employee experience in the early 1990s is representative of the experience in employment arbitration today. Since that time there are some changes that would indicate that employees should fair better today. For example, certain providers' adoptions of the due process protocol[177] and court decisions rejecting unconscionable

[177] "The Due Process Protocol was established in 1995, ―in order to assure some measure of fairness and due process to employer-promulgated schemes for private resolution of statutory disputes (American Bar Association, 1995). The Due Process Protocol recommends specific features and processes that should be present in mandatory arbitration agreements and hearings including (1) freedom of representative choice; (2) adequate prehearing discovery; and (3) joint selection and compensation of the arbitrator, among others. It was supported and endorsed by multiple organizations including the National Academy of Arbitrations, American Arbitration Association, Society of Professionals in Dispute Resolution, National Employment Lawyers Association, Federal Mediation and Conciliation Service, and the American Civil Liberties Union, and is now the standard. Theoretically, the adoption of the Due Process Protocol should make the arbitration process more friendly and fair to employees, and employee win rates, *ceteris paribus*, should be higher today than in the 1990s" (Gough 2008: 14).

elements of arbitration agreements should aid employees pursuing legitimate claims. However, the population of individuals subject to arbitration has changed substantially over two decades:

> During the 1990s when this early research was conducted, relatively fewer employers had yet adopted mandatory arbitration procedures and few cases had been heard in arbitration based on these employer promulgated procedures. Indeed, the larger number of employer arbitration cases during this period were based on individually negotiated agreements, typically involving higher level employees such as senior executives who are able to negotiate detailed individual contracts, often with the assistance of their own legal counsel. Since that time, employer promulgated procedures have spread more widely and we have seen larger number of cases in arbitration based on these procedures (Colvin & Pike 2014: 60).[178]

Since, the number of employer-promulgated arbitration provisions has grown relative to individually-negotiated provisions, it is likely that the current employee win rate is lower than previously documented (Colvin 2007: 413).[179]

Lisa Bingham and Shimon Sarraf found that of 58 cases administered by the AAA in 1996 and 1997, the years following implementation of the due process protocol, the employee win rate was 40 percent. The researchers found a 28 percent win rate for claims subject to employer-promulgated agreements and a 61 percent win rate for claims under individually-negotiated agreements (Bingham & Sarraf 2000). In a study of 200 AAA awards from 1999 to 2000, Elizabeth Hill (2003) found an employee win rate of 43 percent. She reported that employees subject to employer-promulgated agreements won 34 percent of the time and employees subject to individually-negotiated agreements won 57 percent of the time. Eisenberg

[178] Referring specifically to Bingham (1997), Maltby (1997), Bingham and Sarraf (2003) and Eisenberg and Hill (2003), Colvin and Pike (2014) caution extrapolating results from studies primarily consisting of individually negotiated agreements to the present day context of arbitration which consists predominantly of arbitration subject to employer-promulgated agreements.

[179] See also Prof. St. Antoine statements, "I am prepared to concede that some of the early studies were overly optimistic about the chances of rank-and-file employees in arbitration. Apparently the initial surveys did not adequately distinguish between those employees, usually relying on 'just cause" policies in personnel manuals, and professional and executive employees with individualized contracts of employment. The latter were significantly more successful" (2008: 811).

& Hill (2003) built on this database and created a sample of 261 decisions between 1999 and 2000 and found a similar difference based on the nature of the underlying agreement. They found a 40 percent employee win rate in employer-promulgated cases and a 65 percent win rate in individually-negotiated cases.

Colvin and Pike (2014), in their study of AAA cases decided in 2008, found that out of sample of 449 total cases, 325 (72.4%) were subject to employer-promulgated agreements and the remaining 124 cases (27.6%) were subject to individually-negotiated agreements. Bingham had previously reported that approximately 60 percent of awards were based on individually-negotiated agreements and approximately 40 percent were based on employer-promulgated agreements. (1998c: 39).

Colvin analyzed 836 employer-promulgated arbitration awards between 2003-2006 and found an employee win rate of 19.7 percent. When the dataset was later expanded to 2,211 decisions administered from 2003-2011 the employee win rate remained essentially the same – 19.99 percent (2011: 5). Outside the AAA, in an examination of 65 employment arbitration awards administered by JAMS between 2003 and 2007, Gough found a 27.2 percent win rate. JAMS cases may not be analogous to AAA cases since JAMS is based primarily in California, which is known to be particularly employee favorable (2008).[180] Furthermore, JAMS is believed to be more expensive than the AAA, which could attract different employers and, as a consequence, different types of employee claims. Lipksy et al, in a study of 3,200 cases in the securities industry administered by FINRA, found a 61 percent employee win rate. (Lipsky et al. 2010). Employees subject to FINRA are securities professionals likely more similar to

[180] Colvin & Gough report that employee claims filed in California have a win rate 9.1 percentage points above the win rate for employee claims in Texas and 6.5 percentage points above the win rate for employee claims filed in all other states. This difference is significant at the P <.01 level (2015: 1028 Table 1).

employees covered by individually-negotiated agreements than to employees subject to employer-promulgated agreements; notwithstanding the fact that their arbitration agreements are a component of required securities registration forms.

Award Amounts

Looking at non-civil rights employment disputes administered by AAA in 1999 and 2000, Eisenberg and Hill (2003) found a mean award of $211,720 and a median award of $94,984 in the forty-four cases involving individual-negotiated agreements. In the 26 cases involving employer-promulgated agreements they found a mean award of $38,723 and a median award of $13,450. Colvin & Pike (2012: 17-18), examining AAA case files from 2008, reported that successful employees subject to employer-promulgated agreements had a mean award of $81,835. When employee losses were factored in the mean award dropped to $19,966. Individually-negotiated employee plaintiffs averaged $220,376 in employee wins and $142,465 when including losses.[181] Colvin & Gough found the mean and median amounts awarded to successful employee claimants subject to employer-promulgated agreements were $135,316 and $48,670 respectively. When losses were included the average award dropped to $22,632 (2015: 1028 Table 1). Outside the AAA, reporting on arbitrations administered by FINRA, Lipsky et al. found a mean award around $256,000 and a median award around $44,000 in cases where the employee was successful (Lipsky et al. 2013: 326).

Repeat Player & Pairing Effects

[181] "Compared to the outcomes of litigation in the U.S. courts, these are relatively lower win rates and award amounts. For example, studies have found employee win rates ranging from 36.4% in federal courts to 57% in state courts, with mean damage awards for successful plaintiffs of $336,291 in the federal court cases and $462,307 in the state court cases. However it is also important to recognize that there may be differences in the types of cases that end up in arbitration compared to litigation, which can affect these outcomes." (Colvin & Pike 2012: 17-18).

Table 2. Employee Win Rates vs. Repeat Players & Pairings in Prior Studies[182]

Author	**Sample Size**	**Data**	**Employee Win (%)**
Bingham (1997)	270	1993-94 AAA	
Non-Repeat			70
Repeat-Employer			16
Repeat Employer-Arbitrator Pairing			--
Bingham (1998b)	203	1993-95 AAA	
Non-Repeat			67
Repeat-Employer			23
Repeat Employer-Arbitrator Pairing			25
Colvin (2007)	836	2003-06 AAA	
Non-Repeat			32
Repeat Employer			14
Repeat Employer-Arbitrator Pairing			11
Gough (2008)	65	2003-07 JAMS	
Non-Repeat			43
Repeat Employer			26
Repeat Employer-Arbitrator Pairing			--
Colvin & Gough (2015)	2,802	2003-13 AAA	
Non-Repeat			39
Repeat Employer			15
Repeat Employer-Arbitrator Pairing[183]			11

How to appropriately define repeat players for empirical study has been the subject of some debate. Some believe repeat player is best considered as a binary – employers who makes multiple appearances are repeat players and employers who make only one appearance are not. However, others believe it is preferable to measure repeat players on a continuous scale, where each additional case in the total dataset is taken into account. To date, most studies have used the binary formulation. Another consideration is whether a repeat player should be coded as such in their first appearance or should they only be considered repeat players in their additional

[182] This is an updated version of a chart that appears in Gough (2008).
[183] For the purposes of this table Colvin & Gough (2015) definition of repeat pairing is (repeat pairing > 1) a binary variable. This differs from the other studies since the first instance of a pairing is not coded as a repeat pairing.

appearances. In most studies, researchers have included the first appearance of a repeat player in the dataset as an instance where a repeat player was present.

Similar concerns effect the coding of repeat pairings, where a party has cases in front of the same arbitrator on multiple occasions. When defining repeat party-arbitrator pairings disagreement exists regarding whether the initial instance of an employer-arbitrator pairing should be coded as a repeat pairing. Sherwyn, Estreicher, and Heise argue that the first case should not be coded a repeat pairing since at that point there would be no way of knowing that the pairing would repeat in the future. Alternatively, Colvin (2007: 431) argues that:

> [S]ubsequent selection of the arbitrator by this employer will be based in part on how the arbitrator decided this first case. If there is a repeat employer-arbitrator effect we would expect arbitrators in these first cases to be issuing more employer-favorable decisions in hope of being selected in future cases. So, if in fact such an effect does exist, we would expect to see it reflected in the first as well as subsequent cases involving the employer-arbitrator pairing....

In his 2011 article, Colvin tested both versions of the repeat employer–arbitrator classification and found that the results were essentially the same (2011: 18).

One of the first studies to examine repeat player effects in arbitration was conducted by Lisa Bingham and published in 1997. Bingham (1997) examined 270 AAA consumer arbitrations decided between 1993 and 1994 and found an employee win rate of 71 percent in cases involving non-repeat employers as compared to a 16 percent win rate in cases involving a repeat employers. In a study of AAA employment arbitration awards from 1993 to 1995, Bingham (1998b) found that the employee win rate drops from 67 percent against non-repeat employers to 23 percent when facing repeat employers. Prof. Bingham also examined repeat employer-arbitrator pairings in this study. Bingham (1998b) found an employee win rate of 25 percent in cases involving a repeat employer-arbitrator pairing and a 55 percent win rate when in cases not involving such a repeat pairing.

Colvin (2007) analyzed a sample of AAA employer-promulgated arbitrations administered between 2003-2006 and found an employee win rate of 32 percent in cases against non-repeat employers compared to an employee win rate of 14 percent when facing repeat employers.[184] Colvin also investigated repeat employer-arbitrator pairings and found a 21.2 percent win rate in cases that did not involve a repeat employer-arbitrator pairing and an 11.3 percent employee win rate in cases with repeat employer-arbitrator pairings.[185]

After updating the dataset Colvin & Gough found that of employer-promulgated AAA awards from 2003-2013 employees had a 29 percent win rate against non-repeat employers, but a 15 percent win rate when facing a repeat employer (2015: 30 Table 1).[186] Confirming Colvin's prior results, the researchers found a 21 percent win rate in cases without repeat employer-arbitrator pairings and an 11 percent employee win rate in cases with repeat employer-arbitrator pairings (2015: 30).[187] Colvin & Gough report that average employee award amount, when considering all claims that reach a decision, was $20,978 when facing a repeat employer and was $36,406 when facing non-repeat employers (2015: 30).[188] Furthermore, the average employee award amount in such cases was $9,882 when facing a repeat employer-arbitrator pairing and $29,029 in cases without a repeat employer-arbitrator pairing (2015: 30).[189]

In his 2011 study Colvin estimated a logit regression model to identify the independent effect of each factor he considered on employee win rates. Colvin determined that the chance of an employee win was 48.6 percent lower when the employee faced a repeat employer (2011:

[184] This was a statistically significant difference at the $p<0.001$ level.
[185] This was a statistically significant difference a the $p<0.01$level.
[186] This was a statistically significant difference at the $p<0.01$ level.
[187] This was statistically significant at the $p<0.01$ level.
[188] This was statistically significant at the $p<0.01$ level.
[189] This was statistically significant at the $p<0.05$ level.

19).[190] Similarly, Colvin determined that the chance of an employee win was 40.2 percent lower in cases with repeat employer-arbitrator pairings than in cases without repeat employer-arbitrator pairings (2011: 19).[191] When this dataset was updated and different independent variables were included in the regression model, Colvin & Gough found that for each unit increase in repeat employer, the odds of an employee win decrease by .3% (2015: 1032). The authors found that for each additional prior employer-arbitrator pairing the odds of an employee win decrease by 6.2%. (2015: 1033).

Gough (2008) looked at repeat player effects in cases administered by JAMS, but a small sample size limited his analysis. He found that the win rate of employees facing repeat player employers was 17 percent lower than the win rate of employees facing non-repeat player employers (43% vs. 26%). Additionally, Gough found that in the five cases where employees received a nominal award against a non-repeat employer the average award was $973,870, but in the eleven cases where the employee received a nominal award against a repeat employer the average award amount dropped to $329,878.

There are many possible explanations for repeat player effects. Bingham suggests that potential explanations include asymmetrical information in arbitrator selection, unequal representation in the hearing itself and systematic differences in the merits of cases and arbitrator bias. Elizabeth Hill has argued that the repeat player effect is likely the result of internal dispute resolution processing and employer learning effects. Often referred to as the "appellate effect" argument, Hill argues that well-developed internal dispute filtering procedures adopted by large repeat employers allows them to more accurately identify and settle cases they are likely lose in arbitration. This would lead to a lower win rate for claims against repeat employers since settling

[190] This was statistically significant at the $p<0.01$ level.
[191] This was statistically significant at the $p < 0.05$ level.

cases they are likely to lose, would leave these employers with a less meritorious sample of cases that reach an arbitral award than the sample of cases of a less sophisticated employer. While the "appellate effect" may contribute to the repeat player effect, no evidence to date supports the claim that it accounts for all, or even most, of the effect.[192]

When it comes to repeat pairing effects the existing empirical evidence leaves fewer benign explanations. Case merits are unlikely to be systematically different in cases that involve repeat employer-arbitrator pairings. While alternative explanations remain, as Colvin explains, "If the effect is due to either arbitrator bias or an employer ability to systematically select more employer favorable arbitrators, one should be concerned that the employment arbitration system is being slanted against employees in these cases" (2011: 15). While the presence of repeat player plaintiff attorneys may help counteract employers' advantages, the results of these studies indicate that in the status quo their influence is insufficient to counteract employers' repeat-pairing advantages (2011: 21).

Arbitrator Gender

The effect of arbitrator gender has been examined in many studies, but the results have been mixed. Zerkel in a study of 396 cases grievance arbitrations decided by 225 arbitrators did

[192] See Colvin (2007: 428-29): "Hill argued that there was an alternative explanation for this finding other than repeat-player bias. She argued that there was an "appellate effect" in which the repeat-player employers tended to be larger companies with well-developed internal dispute resolution procedures that filtered out and resolved meritorious cases before they got to arbitration, leaving only the weaker employee cases to go to arbitration. In support of this argument, she noted that in twenty-five of the thirty-four repeat-player cases the employer had an in-house dispute resolution program and that in these cases the employer win-loss ratio was 3.2:1. By contrast, in the remaining nine repeat-player cases where the employer did not have an in-house program, the employer win-loss ratio was only 1.25:1, similar to the employer win-loss ratio of 1.3:1 in the non-repeat-player cases. Based on this evidence, Hill concluded that the repeat-player employer advantage was due to the internal procedures, not due to arbitrator bias. Hill did not provide any tests of the statistical significance of the difference between the in-house program and no in-house program groups, however a simple chi-square test on the results presented indicates that the difference is not statistically significant."

not find a significant arbitrator gender effect (1983: 38). In a study of 104 discharge cases Bemmels (1998) reported that male arbitrators treated female grievants more leniently than male grievants, but female arbitrators showed no significant difference in their treatment of male and female grievants. Bingham and Mesch (2000), in an experimental study, found that male arbitrators were more lenient on female grievants, but the results were not statically significant.

Colvin & Gough's study of 2,802 AAA employment arbitration awards found that male arbitrators adjudicated 65 percent of these cases and female arbitrators adjudicated 35 percent of these cases. The researchers reported that in cases with male arbitrators the employee win rate was 21 percent, but in front of female arbitrators the likelihood of success dropped to 16 percent (2015: 1028 Table 1).[193] Furthermore, their results showed that average employee awards for all rulings were $7,740 more in cases adjudicated by male arbitrations.[194] Using a logit regression the researchers determined that the presence of a male arbitrator was significantly associated with higher employee win rates controlling for other factors; odds of an employee win increased by 19.2 percent if the arbitrator was male as opposed to female.[195]

In his study of employment arbitrations administered by JAMS, Gough (2008) found that approximately 28 percent of arbitrators were female and the remaining 72 percent of arbitrators were male. He found that employees had a 21.3 percent win rate with male arbitrators and 50 percent win rate with female arbitrators.[196] However, the average award for employee claims adjudicated by a male arbitrator was $803,792 as compared to an average award of $265,078 for claims adjudicated by female arbitrators.

Lipsky, Lamare and Gupta (2013), analyzing data from FINRA arbitrations, found

[193] This was statistically significant at the $p<0.01$ level.
[194] This result was not statistically significant.
[195] This was statistically significant at the $p<.10$ level.
[196] This was a statistically significant difference at the $p<.05$ level.

evidence that indicated arbitrator gender influenced awards. The awards issued by male arbitrators, across all four definitions of a win that they tested, were lower than the awards issued by female arbitrators. The authors noted that although the gender of the principal participants was related to case outcomes the results say little without controlling for other variables that may influence these outcomes (2013: 330). Logistic regressions performed by Lipsky et al. to test the independent effect of arbitrator gender controlling for other variables did not reveal a significant effect of arbitrator gender on awards.

It remains to be determined whether the inconsistent results in this area are caused by a lack of gender differences in arbitral decision-making or because of the limited sample sizes of female participants.[197] Additionally, even if consistent effects were found there may be "hidden" characteristics contributing to the results. For instance, if, hypothetically, arbitrator gender serves as a proxy for different professional backgrounds, dissimilar prior experiences could skew the types of cases that reach male and female arbitrators and be the true cause of the apparent gender effects.

Arbitrator Judicial Experience

Colvin & Gough (2015) examined the effect of prior judicial experience on arbitrator awards.[198] Around 10 percent of the arbitrators in their sample had prior judicial experience,

[197] See Colvin & Gough (Draft Sept, 2012: 6): "The weak and inconsistent findings in the literature are likely the result of small sample sizes of female actors. Still today, and to a greater extent historically, the arbitrator and judge professions were predominantly male. The 1982 labor arbitrator roster at the Federal Mediation and Conciliation Service (FMCS) comprised 0.33 percent women (47 out of 14,075) (Bemmels, 1990). In 1993, the percentage of women in the federal judiciary was around 12 percent (American Bar Association 2006)."

[198] See Colvin & Gough (Draft Sept, 2012: 8-9): "Another aspect of professional background and status that may be associated with differences in arbitral decision-making is if the arbitrator is a former judge. Increasing numbers of judges have developed arbitration practices after retirement from the Bench.

which they found was generally associated with better employee outcomes. In the 284 awards issued by arbitrators with prior judicial experience the employee win rate was 23 percent; whereas, in the 2,518 awards issued by arbitrators without prior judicial experience the employee win rate was 19 percent (2015: 1028 Table 1).[199] The mean and median award amounts were also greater in cases adjudicated by former judges. Including all rulings the average award of arbitrators with prior judicial experience was about $25,000 greater than the average award for arbitrators without judicial experience, $50,369 and $23,162 respectively (2015: 1028 Table 1).[200]

Summary

The initial waves of empirical conclusions regarding employment arbitration were based primarily on the results of AAA cases administered in the early 1990s. These studies found relatively high, when compared to litigation, employee win rates which were typically above 60 percent. However, the available evidence supports the proposition that the nature of the employment relationships that underlies AAA claims has changed substantially over the past two decades. Recent studies indicate that providers' current caseloads largely arise from employer-promulgated agreements not individually-negotiated agreements, which made up the majority of the cases sampled in the early studies. The largest study of AAA cases to date found that employer-promulgated claimants receive a favorable award in 19 percent of cases. The available research on cases administered by JAMS shows a similar win rate of 27 percent.

Indeed, the relatively low judicial salaries and potential to earn substantial arbitration fees has prompted growing numbers of judges to take early retirement in order to pursue this new career path. This phenomenon has become so widespread in the state of California that it prompted a warning from the Chief Justice of the California Supreme Court that it was causing significant shortages in staffing of the courts in that state."

[199] This difference was statistically significant at the $p<.10$ level.

[200] This difference was statistically significant at the $p<0.01$ level.

The available evidence suggests that the "Saturns for Rickshaws" analogy imperfectly depicts the nature of employment arbitration as currently administered by major providers. Claimants are largely pursuing statutory and substantial contractual claims in arbitration, not low value day-to-day workplace disputes. The limited available evidence does not indicate that the speed and less adversarial nature of arbitration serves to encourage claims of employees seeking continued employment. While the percentage of self-represented claims is around 5 percent larger in arbitration than litigation, the value of this access is mitigated by the fact that self-represented claimants do significantly worse than claimants with representation.[201]

The available evidence also reveals repeat player effects. Most recently, Colvin has documented both repeat employer and repeat employer-arbitrator pairing effects. While these effects are justification for concern there are competing explanations for the true cause or causes. Some write off malicious explanations for repeat employer effects since they believe that repeat employers likely defend different types of claims than non-repeat employers. However, they have more trouble constructing plausible benign explanations for the repeat employer-arbitrator pairing effects.

The evidence on arbitrator gender is inconclusive. The AAA results indicate that grievants are more likely to win in front of male arbitrators while the JAMS results indicate the opposite. While limited, the available evidence on prior-judicial experience suggests that employees are better off in cases presided over by arbitrators with judicial experience than by arbitrators without judicial experience. Both AAA and JAMS arbitrators received substantial compensation, averaging over $10,000 and $25,000 respectively in cases where an award is

[201] See Colvin & Pike (2014: 69): "In employment litigation, just under a quarter of employee plaintiffs are self-represented."

issued. Studies of both providers reveal that in at least 95% of cases employers' pay 100% of arbitrators' fees.

CHAPTER 5: THE PRESENT STUDY

JAMS EMPLOYMENT ARBITRATION 2003-2013

JAMS

JAMS claims to be the largest private alternative dispute resolution provider in the world (JAMS Fact Sheet)[202] and is widely recognized as a leader in the industry. JAMS employs over 195 employee associates and maintains a roster of more than 300 full-time neutrals who hear over 10,000 cases annually (JAMS Fact Sheet). Services provided by JAMS include: facilitative and evaluative mediation, binding arbitration, neutral case evaluation, settlement conference, mini trial, summary jury trial, neutral expert fact finding, special master, discovery referee, class action settlement adjudication, project neutral and dispute review board services. These services are provided in a variety of areas of law including: antitrust, bankruptcy, class action, commercial, construction, construction defect, e-discovery, education, employment, engineering and construction, family, financial markets, franchise, healthcare, insurance/reinsurance, intellectual property, landlord/tenant, lender liability, professional malpractice, marital dissolution, mass tort, partnership, personal injury, probate, product liability, public policy, real estate, securities, toxic tort, trusts and estates (JAMS Fact Sheet).

Hon. H. Warren Knight founded JAMS as Judicial Arbitration and Mediation Services in 1979. In 1994 JAMS merged with Endispute, an ADR provider on the east coast, to form JAMS/Endispute. By 1998 JAMS/Endispute had grown to more than 200 neutrals and had 20

[202] However, AAA is generally considered the most active arbitration provider: "JAMS, which is headquartered in Irvine, California, handles approximately 30,000 cases a year in its twenty-six Resolution Centers around the country, employs more than 165 individuals, and lists more than 200 full-time neutrals, many of whom are former judges and prosecutors. JAMS Won't Restrict Class Action Right, Consumer Fin. Services L. Rep., Dec. 29, 2004, at 1. In comparison, the AAA has thirty-four offices in the United States and Europe, and is widely viewed as the industry leader in private arbitration. See Am. Arb. Assoc., About Us, http://www.adr.org/About (last visited Oct. 23, 2005)" (Gilles 2005: 411 fn. 195).

nationwide centers. The Los Angeles Times reported that in less than 20 years since its founding JAMS/Endispute had become the largest for-profit private judging business in the country (Wagner 1998). In July of 1999, a group of 45 JAMS neutrals and managers purchased the company from the existing investors. Soon after, JAMS/Endispute officially changed its name to JAMS (JAMS Fact Sheet). Since 2000, JAMS has continued to expand its presence within the United States as well as internationally with the formation of JAMS International (JAMS Fact Sheet).

Methodology

Section 1281.96 of the California Code of Civil Procedure, provides that any private arbitration company (except as provided in paragraph (2) of subdivision (b) of the code) must publish select characteristics of all consumer arbitration cases it administered within the prior five years.[203] The Judicial Council of California defines "consumer arbitration" as an arbitration conducted under a pre-dispute arbitration provision contained in a contract, excluding arbitration

[203] The code requires arbitration providers to make available:
(1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.
(2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000).
(3) Whether the consumer or nonconsumer party was the prevailing party.
(4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.
(5) Whether the consumer party was represented by an attorney.
(6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.
(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.
(8) The amount of the claim, the amount of the award, and any other relief granted, if any.
(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party. (Section 1281.96 subdivision (a) - http://law.onecle.com/california/civil-procedure/1281.96.html).

proceedings arising out of public or private sector labor-relations laws and agreements, where: the contract is with a consumer party,[204] the contract was drafted by or on behalf of the nonconsumer party and the consumer party was required to accept the arbitration provision in the contract (California Rules of Court (2015)). These publications must be made at least quarterly and apply to all such cases administered after 2002. JAMS states on its website:

Pursuant to Section 1281.96 of the California Code of Civil Procedure and D.C. Statute 16-4430, JAMS provides information regarding consumer arbitrations administered by JAMS. This information includes, among other things, the name of the non-consumer party, the result of the consumer arbitration and the number of past arbitrations and mediations JAMS has had with the non-consumer party for the previous five years. The website will be updated quarterly (JAMS Disclosures for Consumer Arbitrations. Accessed at http://www.jamsadr.com/consumer-arbitration-disclosures/ (last accessed June 2013)).[205]

This study analyzes an original dataset, consisting exclusively of employment arbitrations conducted under the auspices of JAMS between April 2003 and January 2013.[206] The complete

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[204] "**(e)** "Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following:

(1) An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code;
(2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code;
(3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or
(4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement."
(http://www.courts.ca.gov/cms/rules/index.cfm?title=ethics&linkid=ethics2).

[205] JAMS disclosures are not consistent with California's requirements in so far as the disclosure documents reviewed for this study did not provide claim amounts and provided employee salary levels in only 10% of cases.

[206] While the vast majority of employment cases disclosed by JAMS were included in the dataset, due to the manner in which the disclosures were downloaded the author could not independently verify that all cases in this time period were captured. Additionally, looking at the number of arbitration awards by month, it is likely that there are some missing cases, but there is no evidence suggesting that the missing cases would skew the sample.

dataset consists of 1,486 employment arbitrations. In 1,427 (96%) cases employees filed claims against employers. 922 (65%) of these employee claims were settled, 258 (18%) resulted in post-adjudication awards and the remaining 247 (17%) were cancelled, dismissed prior to award or alternatively resolved.[207]

The JAMS disclosures include the following variables:

- Case date
- Arbitrator appointment date
- Disposition date
- Disposition type
- Defendant name
- Plaintiff's Law Firm
- Defendant's Law Firm
- Number of previous cases with JAMS (both plaintiff and defendant)
- Award
- Prevailing party
- Arbitrator name
- Arbitrator fee
- Arbitrator fee distribution

Using these variables, it is possible to analyze:

- Employee win rates
- Award amounts
- Settlement rates
- Time to disposition
- Representation effects
- Repeat player effects
- Arbitrator background effects

Dependent Variables

I analyze four dependent variables: *employee win rates*, *employee award amounts*,

[207] In 233 cases there are employee claimants with a usable post-hearing adjudicated decision (heard award). In 348 cases in the JAMS data set there are employee claimants with what appeared to be some decision (all decisions). These 115 cases represent claims that may have been dismissed by an arbitrator prior to a hearing. The coding of these dismissals required subjective determinations that diminish the reliability of conclusions based on this sample of cases as compared to conclusions based on the sample of heard awards. Accordingly, almost all the results below were calculated using the heard award sample and not the all decisions sample.

arbitrator compensation and *settlement rates*. An *employee win* is defined as any award where the employee receives any form of monetary or non-monetary compensation; conversely, an employee loss is an award where the employee did not receive any form of compensation.[208] *Employee award amount* is the nominal monetary amount awarded to the employee by the arbitrator. *Arbitrator compensation* is the nominal amount paid to the arbitrator by the parties.[209] Cases were coded as settled where the JAMS disclosures indicated that the case disposition type was settled. *Settlement rates* were calculated using this dependent variable.

***I**ndependent Variables - Claim Characteristics & Arbitrator Background Characteristics*

I analyzed the repeat player statuses and repeat pairing statuses of employers, employee law firms and employer law firms.[210] The repeat player status is dependent on how many appearances the entity, in that particular position (i.e., defendant, claimant law firm or defendant law firm) appears in in the dataset.[211] The repeat pairing status looks to how many appearances

[208] This definition of employee win was used for a variety of reasons. First, it was used in order to ease comparison between this study and prior studies that adopted this definition (ex. Colvin 2011; Colvin & Gough 2015; Gough 2008). Second, the JAMS data did not provide claim amounts, which could be used as a meaningful reference point to evaluate the award amount (for an example of a study that did examine employee win rates using the relationship between awards and claim amounts, see Lipsky & Lamare's FINRA study). Third, any award represents a finding by the arbitrator of some liability on the part of the defendant (Colvin & Gough 2015: 1027-29). However, it is important to recognize that the defendant may only have been meaningfully contesting the amount of damages, another theory of liability or another claim; consequently, categorizing the finding of any liability as an employee favorable decision may be deceiving. Fourth, a broad definition of employee win provides an arbitration favorable view in comparison to litigation and an upper-limit estimate of employees' chances (Colvin & Gough 2015: 1029).

[209] Statistical analyses of arbitrator fees excluded cases where there was an arbitration panel.

[210] The author believes this is the first empirical study of arbitration to examine the repeat player and/or pairing effects of law firms. The author is aware of one study of arbitration that looked to the repeat player and pairing effects of lawyers and multiple that have looked at the parties involved, but none that have looked at law firms.

[211] All repeat player and repeat pairing coding describes a particular entity in a particular position. Accordingly, if an employer appeared in the dataset as a plaintiff that would have no impact on the employer's repeat player status as a defendant. Similarly, appearances as a claimant law firm would not influence that law firm's defendant law firm repeat player status.

that entity, in that particular position, has had before that arbitrator. Repeat player status is capturing an entity's experience and relationship with JAMS employment arbitration while the repeat pairing status is capturing an entity's experience and relationship with a particular arbitrator.

I coded repeat player status and repeat pairing status for each entity using three different methods: binary coding, time sequenced coding and aggregate coding. *Binary coding* identifies an entity as a repeat player if the entity has more than one appearance in the dataset. Binary coding identifies a repeat pairing as any entity that appears in front of the same arbitrator on more than one occasion.[212] *Time sequenced coding* identifies how many prior appearances or pairings a particular entity has had in the dataset. This is coded as a continuous variable based on the disposition dates of each case. The first instance is coded as 0 since at that point there are no prior cases in the database and the proceeding cases are coded consecutively. *Aggregate coding* identifies how many total appearances a particular entity has had and how many total pairings that entity has had with an arbitrator in the dataset. That total is assigned that to all cases with that entity or that pairing. This is also as a continuous variable.

These three methods of coding the repeat player and repeat pairing statuses of employers, employee law firms and employer law firms capture different information about the experiences of these entities and, consequently, provide different insights into the relationship between the specific conceptualizations of these experiences and the dependent variables that are tested. The binary coding is a simple coding method that tracks whether or not the entity has had any other appearances in the dataset. This has the benefit of distinguishing the truly inexperienced from those entities with any semblance of experience; however, it does not allow you to differentiate

[212] This form of binary coding includes the first appearance of an entity or of a pairing as a repeat instance. Colvin (2011) compared the results of including coding the first appearance as a repeat instance and not doing so and did not find a statistically significant difference.

experience levels within the large group of entities that have some experience. As Galanter pointed out decades ago, repeat player status exists on a continuum, so while binary coding is helpful to compare those with one appearance or pairing from those with more than one, it is overly simplistic.

The aggregate coding takes the total appearances that the entity has had in the dataset or the total amount of pairings that entity has had in the dataset. This is arguably preferable to binary coding because it is a continuous coding scheme that allows for differentiation among entities with some experience. However, a problem with this coding is that it allows subsequent selections to be attributed to prior cases. For instance, the first case in which an employer and the arbitrator interact is given the repeat pairing value for the total amount of pairings over the entire timespan of the database. If these entities had 14 more pairings after that first pairing, the first pairing would be ascribed a repeat pairing value of 15. This is problematic because it inaccurately depicts the nature of the relationship of the party and the arbitrator at the time the particular decision in question was made. In the context of repeat pairings, it ends up capturing, in part, whether entities are selecting arbitrators on a future occasion because of a prior favorable decisions. While an interesting inquiry, it is the opposite causal relationship of the causal relationship that most researchers are trying to study. The intended focus is on whether the entity has an advantage in this case because of *prior* interactions, not whether an arbitrator will be more likely to be selected in the *future* because of a favorable decision in the past.[213]

The time sequenced coding has the benefit of being a continuous coding scheme so it

[213] Interestingly, if it can be proven that arbitrators are selected in the future because of favorable prior decisions and it can be proven that arbitrators are aware that this is the case, then there would be additional reason to believe that arbitrators would skew their decisions in hopes of future selection. Although most commentators likely assume, and most practitioners would likely concede, that the first proposition is true, future research should explore whether the chances of future arbitrator selection are influenced by the arbitrators prior decision.

captures the continuous nature of being a repeat player or involved in repeat pairings. Additionally it accurately captures the nature of the entities experience in JAMS employment arbitration and its relationship with that arbitrator at the moment the case was decided. Whether or not there are future interactions between these parties is appropriately irrelevant to how the time sequenced coding scheme codes this particular case because it cannot be assumed that these entities are aware of what their futures hold. Thus, while each coding scheme has merit, the time sequenced coding scheme is the most helpful for testing repeat player and repeat pairing effects because it accurately conceptualizes repeat player status and pairing status as continuous variables and accurately captures the nature of these continuous variables at the time the case in question was decided.[214]

An employee was coded as *self-represented* if the employee was not represented by counsel in that case. Employee self-representation is a binary variable coded as (0) if the employee had representation and (1) if the employee proceeded without representation. *Arbitrator Female* is a binary variable coded as (0) if the arbitrator was male and (1) if the arbitrator was female.[215] *Arbitrator Former Judge* is a binary variable coded as (0) if the arbitrator was a non-former judge and (1) if the arbitrator was a former judge.[216]

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[214] The author believes this is the first study to test the binary, time sequenced and total methods of coding repeat player and repeat pairing effects, to discuss the relative merits of each method or to advocate for time-sequenced coding. Subsequent to first draft of this paper, Colvin & Gough used time-sequenced coding of repeat pairings in a study published in Cornell's Industrial and Labor Relations Review in 2015.

The author notes that all three of these coding schemes are impacted by truncation bias (cases that were resolved prior to the start of the database and cases outside of JAMS employment arbitration) and that the existence of truncation bias influences the relative merits of these coding schemes. Assuming these form of truncation bias, the author still believes time sequenced coding is the most desirable for testing repeat player and pairing effects.

[215] This was coded based on first names and/or pictures available on the JAMS website.

[216] This was coded using arbitrator background information provided on the JAMS website. If no information was available the arbitrator was coded as a non-former judge.

Results

Descriptive statistics are presented for basic analysis of the JAMS dataset. For analyses involving binary independent and binary dependent variables chi-squared test for association were used to test the independence of the independent variables. For analyses involving binary independent variables and continuous dependent variables independent samples t-tests were employed to determine whether the difference in means between the two groups was statistically significant. Binomial logistic regression (or logistic regression) models were estimated to determine the probability of being in a particular category of the dependent variable (i.e., employee win or loss or settled or not settled) given the independent variables included in the model.[217]

Self-represented Claimants

The claimants in the dataset were self-represented in 68 (4.8%) of the 1,427 cases with employee claimants. Interestingly, self-represented claimants make up 11.6 percent of employee claimants whose cases lasted through the award stage. This indicates that their cases are less likely than the cases of claimants represented by counsel to be disposed of through pre-award mechanisms (such as settlement). In the 27 cases with self-represented employee claimants that resulted in heard awards the employee received some form of compensation in 2 cases. This constitutes a 7.4 percent win rate. In comparison, employees represented by counsel received some form of compensation in 33.4 percent of cases (See Table 4).[218] The average nominal award in the cases where self-represented employees received monetary awards was $2,263,

[217] https://statistics.laerd.com/premium/blr/logistic-regression-in-spss.php.
[218] This difference was significant at $P < .01$. Including dismissals, the win rate for self-represented claimants dropped to 5.1 percent while the win rate for claimants with representation dropped to 22 percent. This difference was significant at $P< .05$.

considerably lower than the $634,607 average award amount for employees with representation (See Table 5).[219] Including heard awards where employees lost (*Heard Awards*) the average monetary award for represented employees was $148.075 compared to a $168 average for self-represented employees.[220] Including the cases coded as dismissals (*All Decisions*) the average award amount for self-represented employees was $116 as compared to an average award amount of $94,182 for employees with representation.[221]

Time to Disposition

For the 1,422 employee claimant cases in the dataset with usable appointment and disposition dates the average time to disposition was 311 days (approx. 10 months) and the median time to disposition was 272.5 days (approx. 9 months). 25 percent of cases took over 403 days (approx. 13 months) while 75 percent of cases took over 172 days (approx. 6 months). For cases that resulted in heard awards the average time to disposition was 417.94 days (approx. 14 months) and the median number of days was 379.5 (approx. 13 months). 25 percent of cases with heard awards took over 458 days (approx. 15 months) and 75 percent of cases took over 273 days (approx. 9 months). For cases that settled the average time to disposition was around 300 days (approx. 10 months).

[219] T- Test significance < .000.
[220] T- Test significance < .000.
[221] T- Test significance < .000.

Repeat Players & Pairings

Table 3. Heard Awards - Repeat Players & Pairings

	Binary Coding	*Time Sequenced Coding*	*Aggregate Coding*
Entity	*Percent of Cases*	*Average # of Prior Cases*	*Average # of Total Cases*
Repeat Employer	53%	2.35	5.72
Repeat Employer-Pairing	16%	0.12	1.26
Repeat Claimant Law Firm	37%	0.59	2.33
Repeat Claimant Law Firm-Pairing	8%	0.05	0.96
Repeat Employer Law Firm	71%	9.92	19.1
Repeat Employer Law Firm-Pairing	24%	0.3	1.57

N = 233

The information included in the JAMS disclosures allows for consideration of the repeat player status of claimant representatives, defendants and defendant representatives. Employees were listed as private parties so the available information on repeat player employee claimants is limited. For employee representatives, employers, and employer representatives, the information provided in the disclosures allows consideration of how often particular parties appear in JAMS administered employment arbitrations and how often those parties interact with particular arbitrators.

Taken as a whole, the evidence suggests that employers and their law firms are both more likely to be repeat players and involved in repeat pairings than are employee law firms. There are 886 unique claimant law firms, 981 unique employers and 446 unique employer law firms in the dataset. The top 10 (1.1% of all) claimant law firms, measured by case appearances, participate in 11.02 percent of all cases. The top 10 (1.02% of all) defendants participate in 12.75 percent of all cases. The top 10 defendant law firms (2.1% of all) participate in 31.5 percent of all cases.

When the analysis is restricted to Heard Awards (Table 3), repeat claimant law firms represented employees in 36.9 percent of cases. The average number of total appearances for

claimant law firms is 2.33 cases (median of 1 case) and 25 percent had a total of 2 or more cases in the dataset. The claimant was represented by law firm engaged in a repeat pairing in 7.7 percent of cases and the average number of total pairings was .96.[222]

However, claimants face repeat employers in 53 percent of cases. The average number of total appearances for an employer is 5.72 cases (median of 2 cases) and 25 percent of employers had a total of 4.75 or more cases in the dataset. The claimant faced an employer engaged in a repeat pairing in 16.4 percent of cases and the average number of total pairings is 1.26. [223]

The starkest difference is seen in comparisons to law firms that represent employers. In cases resulting in heard awards the employer's law firm was a repeat player in 70.7 percent of cases. The average total repeat law firm defendant is 19.1 cases (median of 4 cases) and 25 percent of employer law firms appear in more than 29 cases. The defendant is represented by a law firm engaged in a repeat pairing in 24.5 percent of cases and average number of total pairings is 1.57.[224]

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[222] In all cases with employee claimants the claimant was represented by a law firm engaged in repeat arbitrator pairing in 12 percent cases and the average number of total pairings was 1.15.

[223] Looking at all employee claims, the defendant had more than one appearance in the dataset 43.2 percent of the time. The average defendant made 4.31 total appearances in the dataset. And 25 percent of employers had 3 or more total appearances in the dataset. Defendants, in all cases, are engaged in repeat pairings in 10.1 percent of the time and the average number of total pairings is 1.2. In the sample of heard awards the defendant is engaged in repeat pairings in 16.3 percent of cases and the average total pairings is 1.26.

[224] In all cases where the employee was the claimant, the defendant was represented by a law firm that makes multiple appearances in the dataset in 74.7 percent of cases. The average number of total appearances made by law firms that represented defendants is 19.81 cases. 25 percent had 28 or more appearances in the dataset. In all cases with employee claimants the defendant is represented by a law firm engaged in a repeat pairing in 29.7 percent of cases and the average number of total pairings is 1.77.

Table 4. Heard Awards - Employee Win Rates

Independent Variable	*Counts (N(%))*	*Employee Win (N (%))*	*Pearson Chi-Square*
Non-Repeat Employer	109 (47.0%)	41 (37.6%)	0.02**
Repeat Employer	123 (53.0%)	29 (23.6%)	
Non-Repeat Employer Pairing	194 (83.6%)	63 (32.5%)	0.084*
Repeat Employer Pairing	38 (16.4%)	7 (18.4%)	
Non-Repeat Employee Law Firm	147 (63.1%)	38 (25.9%)	0.068*
Repeat Player Employee Law Firm	86 (36.9%)	32 (37.2%)	
Non-Repeat Employee Law Firm Pairing	215 (92.3%)	64 (29.8%)	0.751
Repeat Employee Law Firm Pairing	18 (7.7%)	6 (33.3%)	
Non-Repeat Employer Law Firm	67 (29.3%)	22 (32.8%)	0.566
Repeat Employer Law Firm	162 (70.7%)	47 (29%)	
Non-Repeat Employer Law Firm Pairing	173 (75.5%)	58 (33.5%)	0.049**
Repeat Employer Law Firm Pairing	56 (24.5%)	11 (19.6%)	
Employee With Representation	206 (88.4%)	68 (33%)	0.006***
Employee Self-Represented	27 (11.6%)	2 (7.4%)	
Male Arbitrator	173 (74.2%)	51 (29.5%)	0.75
Female Arbitrator	60 (25.8%)	19 (31.7%)	
Arbitrator Non-Former Judge	51 (21.9%)	16 (31.4%)	0.815
Arbitrator Former Judge	182 (78.1%)	54 (29.7%)	

Notes: N = 233; *= P < .10, ** = P<.05, *** = P<.01

Table 5. Award Amount - T-Tests

	Employee Wins		*Heard Awards*		*All Decisions*	
	Employee Award Amounts		*Employee Award Amounts*		*Employee Award Amounts*	
Independent Variable	*N*	*Mean*	*N*	*Mean*	*N*	*Mean*
Non-Repeat Employer	23	388,228	91	98,124	166	53,791
Repeat Employer	21	844,227	115	154,163	155	114,379
Non-Repeat Employer Pairing	38	484,049	169	108,839	265	69,411
Repeat Employer Pairing	6	1,377,358	37	223,355	43	192,190
Non-Repeat Employee Law Firm	21	400,872	130	64,756**	192	43,845*
Repeat Employee Law Firm	23	793,031	77	236,879	130	140,305
Non-Repeat Employee Law Firm Pairing	40	630,043	191	131,946	283	89,052
Repeat Employee Law Firm Pairing	4	364,070	16	91,017	26	56,011
Non-Repeat Employer Law Firm	15	443,516	60	110,879	87	76,468
Repeat Employer Law Firm	28	713,647	143	139,735	231	86,503
Non-Repeat Employer Law Firm Pairing	35	503,723	150	117,535	226	78,010
Repeat Employer Law Firm Pairing	8	1,125,570	53	169,897	79	113,982
Employee With Representation	42	634,607***	180	148,075***	283	94,182***
Employee Self-Represented	2	2,263	27	168	39	116
Arbitrator Male	31	670,085	153	135,769	229	90,710
Arbitrator Female	13	452,723	54	108,989	80	73,567
Arbitration Non-Former Judge	11	337,093*	46	80,609	72	51,500
Arbitrator Former Judge	33	695,454	161	142,547	237	96,835

Notes: all t-tests were performed with equal variance not assumed; *= P < .10, ** = P<.05, *** = P<.01

The employee win rates show that there are significant differences between the outcomes in cases where repeat players and repeat pairings are involved from the outcomes in cases where they are not (Table 4). The employee award amounts present fewer statistically significant differences among these variables (Table 5).[225] Employees that faced repeat employers, repeat employer pairings, repeat employer law firm pairings and those represented by repeat employee law firms were shown to have significantly different win rates from employees who were not. In terms of award amounts, only being represented by a repeat player employee law firm, out of all the repeat player and repeat pairing independent variables tested, proved significant.

Overall, in the 233 cases with employee claimants and a heard award the employee received some compensation in 70 cases (30%) and no compensation in 163 cases (70%).[226] The average award amount for a successful employee claimant is $605,864.03 (median $245,591.42). 75% of award amounts are above $68,546.47. The average nominal award for all cases with heard awards is $128,782.69 (median $0) and when you include dismissals the average award falls to $82,788.87.

Employees represented by a repeat player law firm win 37.2 percent as compared to the 25.9 percent win rate of claimants who are not (significant at $P < .10$). Claimants facing repeat employers win 23.6 percent of cases, 14 percentage points less than the win rate of claimants against non-repeat employers (significant at $P< .05$). Claimants facing employers represented by repeat player law firms win 29 percent of the time as compared to the 32.8 percent win rate for claimants not facing employers with such representation.

[225] 44 usable monetary awards is a small sample and makes it difficult to find effects even if they are present.

[226] In the 348 cases with employee claimants with some adjudication employees received compensation in 70 cases (20.1%) compared to the 348 cases (79.9%) where they received no compensation.

Claimants represented by law firms engaged in a repeat pairing win 33.3 percent of the time while claimants not represented by law firms engaged in a repeat pairing win 29.8 percent of the time. This narrow difference was not statistically significant. Claimants facing employers engaged in a repeat arbitrator pairing win 18.4 percent of cases whereas claimants not facing employers engaged in a repeat arbitrator pairing win 32.5 percent of cases (significant at $P< .10$). Claimants facing employers represented by law firms engage in repeat pairings win 19.6 percent of time compared to the 33.5 percent of the time claimants win when not facing employers represented by law-firms engaged in repeat pairings (significant at $P< .05$).

Repeat claimant law firm is significantly associated with greater awards when considering the sample of heard awards and all decisions. In light of the limited sample size, this result may represent the impressive ability of repeat employee law firms to garner sizable awards for their clients or the difference may be in the kind of cases repeat employee law firms pursue initially and/or decide to settle. The rest of the T-tests for award amounts are presented in Table 5, but none of the other repeat player or repeat pairing differences was statistically significant.

Arbitrator Background

In the 1360 cases in the dataset with an appointed arbitrator there are 160 unique arbitrators who were assigned cases. The top 10 (6.25% of all) arbitrators are appointed to 34.19% of cases. Of the 160 unique arbitrators in the dataset 122 (76.25%) are male and 38 (23.75%) are female. Of the 1360 total cases in 961 (70.7%) cases male arbitrators were appointed and 399 (29.3%) cases female arbitrators are appointed. Out of the 233 cases that resulted in a heard award, 173 cases (74.2%) were adjudicated by males and 60 cases (25.8%) were adjudicated by females. While the total dataset is male dominated, it is worth noting that of

the top 5 arbitrators ranked according to total case appointments 3 are female and of the top 10 ranked by case appointments 5 were female.

The employee win rate in cases adjudicated by male arbitrators is 29.5% and in cases adjudicated by female arbitrators 31.7%. Male arbitrators were associated with consistently higher awards for employees, but the differences were not statistically significant. In cases with heard awards male arbitrators were compensated an average of $31,221.27 as compared to female arbitrators who were compensated an average of $31,709.80. This difference was also not statistically significant.

Of the 160 unique arbitrators in the data set 98 (61.25%) were former judges and 62 (38.75%) did not appear to have prior judicial experience. Of the 1360 total cases in 1023 cases (75.2%) former judges were appointed as compared to the 337 cases (24.8%) non-former judges were appointed. In the 233 cases with heard awards 182 cases (78.1%) were adjudicated by former judges and in 51 cases (21.9%) non-former judges adjudicated the case. 0 out of the top 5 arbitrators, as measured by case appointments, and 2 out of the top 10 were non-former judges.

The employee win rate in adjudicated cases by former judges is 29.7 percent as compared to an employee win rate of 31.4 percent in cases adjudicated by non-former judges. Employee award amounts are significantly better in front of former judges when considering only cases where the employees won; however, that difference is not significant when losses and dismissals are considered. In cases with heard awards former judges were compensated an average of $29,991.90 whereas non-former judges were compensated an average of $36,223.23.[227]

[227] While this results may seem counterintuitive, it may reflect the substantial qualifications JAMS requires arbitrators without prior judicial experience possess in order to be included on their rosters.

Arbitrator Fee Distribution

The employer paid 100 percent of the arbitrators' compensation in 1,081 cases (97.9%). In .1 percent of cases the employee paid 100 percent of the fee, in 1.9 percent of cases the employee paid 50 percent of the fee and in .1 percent of cases the employee paid 15 percent of the fee. In the cases that resulted in heard awards the employer paid 100 percent of the arbitrator fee 95.3 percent of the time. In 4.3 percent of cases the employee paid 50 percent of the fee and in .4 percent of cases the employee paid 100 percent of the fee.[228]

Regressions:

To identify the independent effect of certain independent variables on *Employee Win* and *Setllement*, regression models were estimated using binary logistic models. Nine different models were estimated (see Table A. 5). Models 1-3 examine the effect of the independent variables on employee win using the binary coding, time sequenced coding and aggregate coding schemes respectively. Models 4-6 examine the effect of the independent variables effects on case settlement using the three different coding schemes. Models 7-9 are presented primarily to verify the settlement effects, and examine the independent variables effects on receiving a heard award. Models 1, 2, 3 and 5 are presented in Table 6.

All four models were chi-squared significant at, at least, the ($p < .05$) level indicating that the models including the independent variables are significantly better at predicting employee outcomes and settlements than the intercept alone. The nagelkerke r square, a pseudo r-square, is included as a rough representation of the portion of the award that is explained by the variables included in the model. The nagelkere r square of models 1-3 was consistently around .11 - .12 while models 4-6 were consistently around .07 - .08.

[228] This is strong evidence that the database consists overwhelmingly of employer-promulgated arbitration agreements.

The coefficients (β) reported in all Models imply that for every unit increase in the particular independent variable, the odds that the employee will win (Models 1-3) or the case will be settled (Model 5) will be multiplied by $e^{\wedge\beta}$. These transformations are presented as the odds ratios in Table 6.

Repeat pairings between employer law firms and arbitrators has the most resilient effect on the chances of an employee win. Its effect is significant in all three models that examine employee wins. Model 1 (binary coding) indicates that the chance of an employee win is 57.8 percent lower when facing such a pairing. Model 2 (time sequenced coding) indicates that for each additional prior pairing between the employer's law firm and the arbitrator the chance of an employee win decreases by 49.6 percent. Model 3 (aggregate coding) predicts that for each additional total pairing the chance of an employee win decrease by 26.6 percent.

Employee self-representation is significant in Model 1 and Model 2. In Model 1 self-representation decreases the chance of an employee win by 71.4 percent. Model 2 predicts that self-representation decreases the chance of an employee win by 81.1 percent. Surprisingly, the effect of self-representation was not significant in Model 3.

Only in Model 2 did the presence of a repeat employee law firm significantly influence the chances of an employee win. For each additional prior appearance by an employee's law firm the chance of an employee win increased by 24.1 percent. In only the third model was the presence of repeat defendant-arbitrator pairing significant. For each additional total pairing the chance of an employee win decreased by 48.3 percent. Neither arbitrator background characteristic had a significant effect on the employee win rate in all three models.

Table 6. Employee Win and Settlement Binary Logistic Models

Category	*Model 1* *Binary Coding* *Employee win* *Logistic* *(Standard Error)* *[Odds Ratio]*	*Model 2* *Time Sequenced Coding* *Employee win* *Logistic* *(Standard Error)* *[Odds Ratio]*	*Model 3* *Aggregate Coding* *Employee win* *Logistic* *(Standard Error)* *[Odds Ratio]*	*Model 5* *Time Sequenced Coding* *Settlements* *Logistic* *(Standard Error)* *[Odds Ratio]*
Repeat Employer				
	-.399	-.013	-.011	-.002
	(.338)	(.034)	(.021)	(.015)
	[.671]	[.987]	[.989]	[.998]
Repeat Employer-Arbitrator Pairing	-.631	.024	-.659*	.061
	(.542)	(.512)	(.393)	(.198)
	[.532]	[1.025]	[.517]	[1.063]
Repeat Employee Law Firm				
	.51	.216*	.016	.119**
	(.336)	(.120)	(.058)	(.038)
	[1.665]	[1.241]	[1.016]	[1.126]
Repeat Employee Law Firm-Arbitrator Pairing	.304	-.317	.400	.172
	(.606)	(.809)	(.518)	(.235)
	[1.355]	[.728]	[1.491]	[1.188]
Repeat Employer Law Firm				
	-.022	.007	.006	.000
	(.362)	(.010)	(.007)	(.004)
	[.979]	[1.007]	[1.006]	[1.000]
Repeat Employer Law Firm-Arbitrator Pairing	-.816*	-.686**	-.309**	.031
	(.426)	(.346)	(.152)	(.058)
	[.442]	[.504]	[.734]	[1.032]
Employee Self-Representation				
	-1.534**	-1.664**	-1.407	-2.052***
	(.777)	(.761)	(.894)	(.360)
	[.216]	[.189]	[.245]	[.128]
Arbitrator Female				
	.339	.345	.500	.164
	(.366)	(.362)	(.373)	(.135)
	[1.403]	[1.411]	[1.649]	[1.178]
Arbitrator Former Judge	.273	.232	.333	.033
	(.391)	(.384)	(.388)	(.142)
	[1.314]	[1.262]	[1.395]	[1.034]
Constant	-.772*	-.989**	-.393	.562***
Chi-square	20.165**	18.382**	19.625**	72.523***
Pseudo R2	.12	.11	.117	.075
N	228	228	228	1303

Notes: *p < .10; ** p< .05; *** p< .01. See Appendix for Models 1-9, Correlation Tables & VIFs.

The odds of settling a case prior to hearing were consistently significantly higher if the employees were represented by counsel. Model 4 shows that the odds that a case will settle are 87.2 percent lower if the employee is self-represented. Self-representation is consistently, throughout Models 4-9 (Appendix A. 5) significantly associated with lack of settlement and heard awards at the ($P < .01$) level. The odds of settling a case prior to hearing were also consistently significantly higher if the employee law firm was a repeat player. In Models 4-8 repeat employee law firm was significantly associated with settlement and lack of heard awards at, at least, the ($P < .05$) level (Appendix A. 5). Model 5 shows that each additional increase in prior appearances for the employee law firm increases the chance of settlement by 12.6 percent.[229]

Limitations & Discussion:

Limitations:

It is important to note the many limitations of the JAMS dataset and this study. First, the disclosure forms provide no reliable means to distinguish between claims subject to employer-promulgated and individually-negotiated agreements. The consistent distribution of arbitrator fees entirely on employers provides reason to believe that most, if not all, of the cases disclosed arose from employer-promulgated agreements. Prior research has established the importance of distinguishing employer-promulgated and individually-negotiated cases. Additionally, JAMS does not provide any information regarding the type of claims at issue (besides classifying the claim as employment claims) so there is no way to evaluate the kind of claims being filed. Future

[229] Employer law firm arbitrator pairings had significant effects in two out of the six models (Models 4 and 8). Employer repeat pairings had a significant influence only in Model 7 and Arbitrator female had a significant influence only in Model 4 (See Table A. 5).

studies would benefit from greater access to case files in order to determine the type of employment disputes at issue.

Second, the JAMS filings did not include claim amounts. This substantially limits the available analyses because there are few useful reference points for award amounts. However, claim amounts, while useful for some statistical purposes, are not always reliable indicators of claim values or merits.

Third, it is important to note that JAMS has certain characteristics that may make the cases it administers different from cases filed in court or administered by other providers. JAMS is headquartered in California and is believed to do a significant portion of its business in California. The impact of California employment laws and arbitrations being based out of California may have an impact on the types of claims and decisions being made. Colvin & Gough (2015) found that employees do significantly better in arbitrations located in California. JAMS is also believed to be more expensive than other providers. The comparison of mean and median arbitrator fees in cases administered by JAMS and the AAA (see Table 7) supports this belief. The more expensive nature of JAMS arbitrations may attract different employers than the employers present in court or AAA. The more expensive nature of JAMS may also influence the likelihood that an employee will file a claim. This could result in different cases being administered in various dispute resolution processes (i.e., JAMS, AAA, courts), which would reduce the value of comparisons that rely on like cases being resolved in each forum.

Fourth, while the total number of cases in the dataset is sizable, there are only 233 usable heard awards. The small sample of decisions, while over an extended period of time, limits the available analyses. The sample size of award amounts is considerably smaller.

Fifth, there are the typical human errors associated with coding a large dataset. Some of the case disclosures contained ambiguous or contradictory information, which required judgment calls to be made in the coding process. Identifying instances when arbitrators dismissed a case prior to hearing was particularly difficult. Identifying law firms that were referred to in multiple ways (often shorthand) or were misspelled was easier for major law-firms than for smaller or less well-known law firms. This may have lead to more accurate coding for employer law firms than employee law firms. JAMS recently began to release its disclosures in digital form, which should help minimize some of these concerns in the future.

Discussion:

Table 7. JAMS vs. AAA

Provider	**JAMS**	**AAA**
Years	2003-2013	2003-2013
Sample Size	233	2,802
Employee Win Rate	30%	19%
Award Amount -Mean (Median)	$605,864 ($245,591)	$135,316 ($48,670)
Time to Disposition – Mean	418 days (approx. 14 months)	362 days (approx. 12 months)
Arbitrator Female	30% of cases	35% of cases
Arbitrator Former Judge	75% of cases	9% of cases
Arbitrator Fees – Mean (Median)	$31,885 ($23,600)	$11,070 ($7,138)
Employee Salary-Under 100k	75% of cases	82% of cases

Notes: Arbitrator appointment to disposition date reported for JAMS, but hearing date to disposition date was reported for AAA. All JAMS data comes from the present study. AAA data comes from Colvin & Gough (2015) (Years, Sample Size, Win Rate and Award Amounts), Colvin (2011) (Time to Disposition, Arbitrator Fees and Employee Salary Level) and Colvin & Gough (Sept. 2012 Draft) (Arbitrator Gender and Former Judge Cases).

What does the data say about JAMS

Until now, JAMS has not received much attention from academics conducting empirical studies of employment arbitration. Therefore, the descriptive statistics of the dataset presented above, while fairly basic, make a modest contribution to the employment arbitration debate by filling in gaps of knowledge in the field. The JAMS employment arbitration caseload is a small component of all the cases they administer. This is an unsurprising finding since JAMS has a reputation for handling commercial disputes. The JAMS employment caseload is much smaller than the AAA employment caseload with the available evidence indicating that the AAA handles about ten times as many employment arbitrations than does JAMS.

The data shows that JAMS win rates and award amount are larger than AAA. Assuming AAA and JAMS arbitrators make similar decisions, this data suggests that the claims that are coming to JAMS are of greater value and/or of greater merit. However, the fact that JAMS is headquartered in California, and thus likely has a greater population of California based cases than AAA, may also contribute to this result. The larger sample of arbitrators with prior judicial experience on JAMS' roster may factor in as well. The sizable arbitrator fees charged by JAMS arbitrators may also create an unrepresentative sample of employers - employers who are not priced out of handling their employment disputes with JAMS.[230] However, looking solely at the descriptive statistics presented in Table 7 and assuming that the employer is paying the arbitrator fee, an employee could rationally prefer to have his/her case administered by JAMS than by AAA.

[230] This is not to suggest all employers who do not use JAMS do so because they could not afford to, but it is likely that some employers would be dissuaded from using JAMS because of the high process costs in comparison to other providers.

What Does the Data Say About the Debate?

JAMS employment arbitration does not appear to be functioning as a viable dispute resolution mechanism for low-value employee claims. The JAMS disclosures did not provide reliable data on claim amounts, but the size of the award amounts suggest that few of these claims are small value day-to-day workplace disputes. This does not mean that employment arbitration cannot be administered in such a fashion and that other providers may be more suited to these types of claims. However, the results from both the AAA and JAMS, two of the most active ADR providers in the United States, do not support the notion that arbitration agreements are facilitating these sorts of claims to a significant extent. This is not to deny that arbitration may still be increasing accessibility at the margins. For example, there does seem to be support for the proposition that arbitration is more accessible to self-represented claimants; however, the difference in accessibility is marginal.[231] Additionally, the JAMS disclosures did not provide information on whether the employee who filed their suit was seeking continued employment. However, the 14 month average time from arbitration appointment to case disposition suggests that awards are not coming fast enough to make continued employment a likely result.[232]

The data confirms the findings off AAA studies that employers are paying the vast majority of arbitrator fees. This should assuage some critics' concerns that arbitrator fees will prove prohibitive to employees interested in filing low value claims. Two points are still worth mentioning. First, even if employers are paying arbitrator fees, any employee and employee representative uncertainty in this regard could still have an influence on the likelihood that certain claims are filed. Requiring employers to disclose that they cover the arbitrator fee to

[231] As noted above in the debate section, the value of increased access is accentuated or mitigated by the likelihood and types of remedy available once accessed. In the entire JAMS dataset only two self-represented employees won their cases and the average award amount was under $2,500.

[232] Assuming the employee was discharged.

employees in the arbitration agreement may be a viable reform that could alert employees to this fact. Second, data on arbitrator fee distributions are only available for arbitrations administered by third-party providers. How fees are distributed outside of these circumstances is still unknown.[233]

This study makes contributions to the repeat player debate by isolating law firms as an actor in the repeat player debate and analyzing repeat player and pairing law firm impacts on arbitration results empirically. The results show that law firms are the more prevalent, and arguably the more important, repeat players than are the parties. The data shows that the law firms that represent employers are substantially more likely to be repeat players and are substantially more likely to be involved in repeat law firm arbitrator pairings than are employers or employee representatives. This basic finding casts doubt on the proposition that a sophisticated plaintiffs bar has emerged that cancels out the repeat player status of employers and employer side attorneys.

The repeat law firm and repeat law firm arbitrator pairing analysis provides another contribution. While there are reasons to be troubled by any repeat player effects, most concerning is the impact and resilience of the repeat employer law firm arbitrator pairing effects. The most realistic benign explanation for why employer law firms consistently do better in front of arbitrators they have used on many prior occasions is the learning effect theory. This argument is that law firms will learn arbitrators' proclivities and be better able to evaluate which particular arbitrator will be persuaded by their positions during the selection process and be better able to persuade the arbitrator in briefs and at oral argument. Even if the learning effect was responsible

[233] The fact that the major studies of employment arbitration all examine major providers suggests that arbitration advocates are getting to argue from the position of the most reputable entities in the field. There are arbitrations conducted absent any provider and often these arbitrations are absent from the debate.

for 100% of the repeat pairing effect, there should still be great concern that employees are at a significant disadvantage in arbitration. A more realistic view is that the learning effect explains part but not all of the repeat pairing effects. However, it is no longer feasible to believe that repeat arbitrator pairing effects are just a result of general experience advantages when each additional pairing with a particular arbitrator is being shown to have a statistically significant influence on the likelihood that an employee will win.

This paper makes a methodological contribution by explaining the value of the time-sequenced version of categorizing repeat players and repeat pairings. Binary coding is oversimplified and does not provide a test of some of the more benign explanations for repeat player and pairing effects. Aggregate coding is inaccurate in the sense that it allows future selection to influence the coding of a prior case. This also causes a causation problem because arbitrators may be selected in the future because of the fact that the employer won in the past. However, the total appearances or pairings are useful in the sense that they provide continuous estimates of total experience in samples that are inevitably truncated in some form. The time sequenced version takes into account the continuous nature of repeat players and pairings, but does not fall victim to allowing future selection to impact the coding of a prior case. However, truncation bias (through the limited time period captured or because arbitrators may have non-employment or non JAMS interactions with a party or law firm) might still impact the external validity of the time sequenced coding.

What Areas Does the Data Suggest Would Be Fruitful Future Research?

This study attests to the value of testing for law firm effects in empirical studies of arbitration. Confirmation of these effects in AAA and FINRA studies would be helpful.

More information about the types of claims would also be valuable in helping to differentiate outcomes based on the nature of cases. For instance, knowing whether the claim is relating to discrimination or unpaid overtime would be helpful. Additionally, whether an employee was terminated or contesting a promotion decision would also be relevant - especially in order to test if arbitration facilitates different types of claims than litigation. Similarly, it would be helpful when calculating monetary awards to have accurate claim amounts in the disclosure forms.

Studies examining the types of employers that are promulgating arbitration agreements and which employees they choose to cover could prove valuable. Even more helpful would be studies that analyzed the terms of these agreements to see how often they contained the types of terms that critics fear. For example, class action waivers, limitations on discovery, skewed arbitral selection processes and procedures that hinder judicial review. These additional studies will help complete the picture of how employment arbitration is currently functions in the United States.

CHAPTER 6: CONCLUSION

LOOKING BACK & LOOKING FORWARD

The FAA has traveled a long road propelled by active Courts and apathetic Congresses. The legal framework created through evolving interpretations of the FAA gives great deference to employment arbitration agreements. While debates rage as to the propriety of the Supreme Court decisions that created the current legal environment for arbitration agreements, the debate that is the focus of this thesis is over the desirability of employment arbitration as currently practiced in the United States. In our society an employer is likely to have resource, experience and power advantages over its employees, but the manner in which dispute resolution systems are designed may amplify or diminish the extent to which these broader inequities influence the resolution of particular disputes. This study of JAMS shows that there is cause for concern that employment arbitration is particularly susceptible to allowing these power inequities to permeate dispute resolution. Accordingly, society should be cautious about allowing employers to relegate claims of public importance to private fora. Undoubtedly, our current system of employment litigation is a suboptimal mechanism for handling many kinds employment disputes. Thus, it is likely a properly designed and regulated system of employment arbitration could supplement our legal system in a manner that would be net-beneficial to society. Conversely, improperly designed and regulated systems of employment arbitration are a harmful supplement. Recent empirical research highlights areas where further investigation and reforms are needed. The results of these studies likely constitute a best-case scenario for the employment arbitration industry since major providers that have some due process protections and are subject to public scrutiny administered these cases. The time has come for an empirically sound and argumentatively rigorous debate over the desirability of employment arbitration.

APPENDIX

Table A1. Correlation Table - Binary Coding

		Repeat Employer	Repeat Employer-Arbitrator Pairing	Repeat Employee Law Firm	Repeat Employee Law Firm-Arbitrator Pairing	Repeat Employer Law Firm	Repeat Employer Law Firm-Arbitrator Pairing	Employee Self-Representation	Arbitrator Female	Arbitrator Former Judge
Repeat Employer	Pearson Correlation	1								
	Sig. (2-tailed)									
	N	232								
Repeat Employer-Arbitrator Pairing	Pearson Correlation	.417**	1							
	Sig. (2-tailed)	.000								
	N	232	232							
Repeat Employee Law Firm	Pearson Correlation	.115	.191**	1						
	Sig. (2-tailed)	.082	.004							
	N	232	232	233						
Repeat Employee Law Firm-Arbitrator Pairing	Pearson Correlation	.176**	.220**	.378**	1					
	Sig. (2-tailed)	.007	.001	.000						
	N	232	232	233	233					
Repeat Employer Law Firm	Pearson Correlation	.044	-.117	-.017	.010	1				
	Sig. (2-tailed)	.512	.079	.802	.886					
	N	228	228	229	229	229				
Repeat Employer Law Firm-Arbitrator Pairing	Pearson Correlation	.092	.200**	.083	.174**	.366**	1			
	Sig. (2-tailed)	.165	.002	.209	.008	.000				
	N	228	228	229	229	229	229			
Employee Self-Representation	Pearson Correlation	.153*	-.015	-.277**	-.105	-.052	-.069	1		
	Sig. (2-tailed)	.020	.816	.000	.111	.435	.299			
	N	232	232	233	233	229	229	233		
Arbitrator Female	Pearson Correlation	.094	.250**	.017	.050	-.082	.083	.032	1	
	Sig. (2-tailed)	.155	.000	.792	.446	.216	.211	.626		
	N	232	232	233	233	229	229	233	233	
Arbitrator Former Judge	Pearson Correlation	-.041	.010	-.133*	-.158*	.194**	.153*	-.003	-.187**	1
	Sig. (2-tailed)	.535	.880	.043	.016	.003	.020	.965	.004	
	N	232	232	233	233	229	229	233	233	233

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Table A2. Correlation Table - Time Sequenced Coding

		Repeat Employer	Repeat Employer-Arbitrator Pairing	Repeat Employee Law Firm	Repeat Employee Law Firm-Arbitrator Pairing	Repeat Employer Law Firm	Repeat Employer Law Firm-Arbitrator Pairing	Employee Self-Representation	Arbitrator Female	Arbitrator Former Judge
Repeat Employer	Pearson Correlation	1								
	Sig. (2-tailed)									
	N	232								
Repeat Employer-Arbitrator Pairing	Pearson Correlation	.471**	1							
	Sig. (2-tailed)	.000								
	N	232	232							
Repeat Employee Law Firm	Pearson Correlation	.108	.026	1						
	Sig. (2-tailed)	.100	.697							
	N	232	232	233						
Repeat Employee Law Firm-Arbitrator Pairing	Pearson Correlation	.033	.129	.559**	1					
	Sig. (2-tailed)	.612	.050	.000						
	N	232	232	233	233					
Repeat Employer Law Firm	Pearson Correlation	.129	.144*	.026	.000	1				
	Sig. (2-tailed)	.052	.030	.699	.999					
	N	228	228	229	229	229				
Repeat Employer Law Firm-Arbitrator Pairing	Pearson Correlation	.116	.337**	.112	.128	.496**	1			
	Sig. (2-tailed)	.081	.000	.092	.052	.000				
	N	228	228	229	229	229	229			
Employee Self-Representation	Pearson Correlation	.065	-.039	-.128	-.074	-.029	-.024	1		
	Sig. (2-tailed)	.324	.554	.051	.262	.663	.719			
	N	232	232	233	233	229	229	233		
Arbitrator Female	Pearson Correlation	.102	.154*	.009	.007	.040	.221**	.032	1	
	Sig. (2-tailed)	.121	.019	.896	.914	.542	.001	.626		
	N	232	232	233	233	229	229	233	233	
Arbitrator Former Judge	Pearson Correlation	.054	.078	-.104	-.161*	.142*	.137*	-.003	-.187**	1
	Sig. (2-tailed)	.417	.238	.113	.014	.032	.038	.965	.004	
	N	232	232	233	233	229	229	233	233	233

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Table A3. Correlation Table - Aggregate Coding

		Repeat Employer	Repeat Employer-Arbitrator Pairing	Repeat Employee Law Firm	Repeat Employee Law Firm-Arbitrator Pairing	Repeat Employer Law Firm	Repeat Employer Law Firm-Arbitrator Pairing	Employee Self-Representation	Arbitrator Female	Arbitrator Former Judge
Repeat Employer	Pearson Correlation	1								
	Sig. (2-tailed)									
	N	232								
Repeat Employer-Arbitrator Pairing	Pearson Correlation	.521**	1							
	Sig. (2-tailed)	.000								
	N	232	232							
Repeat Employee Law Firm	Pearson Correlation	.196**	.022	1						
	Sig. (2-tailed)	.003	.740							
	N	232	232	233						
Repeat Employee Law Firm-Arbitrator Pairing	Pearson Correlation	.090	.077	**.636****	1					
	Sig. (2-tailed)	.172	.240	.000						
	N	232	232	233	233					
Repeat Employer Law Firm	Pearson Correlation	.102	.057	-.020	.065	1				
	Sig. (2-tailed)	.125	.394	.760	.324					
	N	228	228	229	229	229				
Repeat Employer Law Firm-Arbitrator Pairing	Pearson Correlation	.013	.199**	.001	.051	**.508****	1			
	Sig. (2-tailed)	.846	.003	.984	.441	.000				
	N	228	228	229	229	229	229			
Employee Self-Representation	Pearson Correlation	.038	-.039	-.246**	**-.674****	-.065	.006	1		
	Sig. (2-tailed)	.565	.550	.000	.000	.326	.923			
	N	232	232	233	233	229	229	233		
Arbitrator Female	Pearson Correlation	.113	.228**	-.002	-.027	.064	.150*	.032	1	
	Sig. (2-tailed)	.085	.000	.971	.680	.331	.023	.626		
	N	232	232	233	233	229	229	233	233	
Arbitrator Former Judge	Pearson Correlation	-.014	.079	-.176**	-.085	.126	.182**	-.003	-.187**	1
	Sig. (2-tailed)	.830	.233	.007	.198	.057	.006	.965	.004	
	N	232	232	233	233	229	229	233	233	233

**. Correlation is significant at the 0.01 level (2-tailed).

*. Correlation is significant at the 0.05 level (2-tailed).

Table A4. Independent Variables - Variable Inflation Factors

Category	*Binary Coding Tolerance (VIF)*	*Time Sequenced Coding Tolerance (VIF)*	*Aggregate Coding Tolerance (VIF)*
Repeat Employer			
	0.782	0.735	0.665
	(1.279)	(1.36)	(1.505)
Repeat Employer-Arbitrator Pairing	0.689	0.664	0.639
	(1.451)	(1.507)	(1.564)
Repeat Employee Law Firm			
	0.777	0.656	0.502
	(1.287)	(1.525)	(1.991)
Repeat Employee Law Firm-Arbitrator Pairing	0.797	0.649	0.314
	(1.255)	(1.541)	(3.18)
Repeat Employer Law Firm			
	0.794	0.733	0.707
	(1.259)	(1.364)	(1.414)
Repeat Employer Law Firm-Arbitrator Pairing	0.773	0.624	0.663
	(1.294)	(1.601)	(1.508)
Employee Self-Representation			
	0.884	0.972	0.498
	(1.131)	(1.029)	(2.007)
Arbitrator Female			
	0.881	0.881	0.865
	(1.135)	(1.135)	(1.156)
Arbitrator Former Judge			
	0.876	0.892	0.879
	(1.142)	(1.122)	(1.137)
N	233	233	233

Table A5. Employee Win, Settlements and Heard Awards Logistic Regression Models

	Model 1	*Model 2*	*Model 3*	*Model 4*	*Model 5*	*Model 6*	*Model 7*	*Model 8*	*Model 9*
	Binary Coding	*Time Sequenced Coding*	*Aggregate Coding*	*Binary Coding*	*Time Sequenced*	*Aggregate Coding*	*Binary Coding*	*Time Sequenced*	*Aggregate Coding*
	Employee win	*Employee win*	*Employee win*	*Settlements*	*Settlements*	*Settlements*	*Heard Award*	*Heard Award*	*Heard Award*
	Logistic (Standard Error)	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*	*Logistic (Standard Error)*
Category	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*	*[Odds Ratio]*
Repeat Employer									
	-0.399	-.013	-.011	-.072	-.002	-.004	.257	.017	.014
	0.338	.034	.021	.136	.015	.009	.162	.017	.010
	0.671	.987	.989	.930	.998	.996	1.293	1.017	1.014
Repeat Employer-Arbitrator Pairing									
	-0.631	.024	-.659*	-.349	.061	.026	.561**	.174	.116
	0.542	.512	.393	.225	.198	.117	.251	.210	.127
	0.532	1.025	.517	.705	1.063	1.027	1.753	1.190	1.123
Repeat Employee Law Firm									
	0.51	.216*	.016	.378***	.119**	.044**	-.370**	-.125**	-.026
	0.336	.120	.058	.134	.038	.021	.163	.049	.025
	1.665	1.241	1.016	1.459	1.126	1.045	.691	.882	.975
Repeat Employee Law Firm-Arbitrator Pairing									
	0.304	-.317	.400	.309	.172	.218	-.304	-.022	-.298*
	0.606	.809	.518	.220	.235	.136	.274	.266	.174
	1.355	.728	1.491	1.362	1.188	1.244	.738	.979	.742
Repeat Employer Law Firm									
	-0.022	.007	.006	.191	.000	.003	-.273	.006	.000
	0.362	.010	.007	.151	.004	.003	.176	.005	.003
	0.979	1.007	1.006	1.211	1.000	1.003	.761	1.006	1.000
Repeat Employer Law Firm-Arbitrator Pairing									
	-0.816*	-.686**	-.309**	.305**	.031	.016	-.248	-.169*	-.063
	0.426	.346	.152	.153	.058	.036	.187	.093	.048
	0.442	.504	.734	1.357	1.032	1.016	.780	.845	.939
Employee Self-Representation									
	-1.534**	-1.664**	-1.407	-1.914***	-2.052***	-1.77***	1.437***	1.585***	1.274***
	0.777	.761	.894	.365	.360	.384	.303	.295	.340
	0.216	.189	.245	.148	.128	.170	4.209	4.879	3.575
Arbitrator Female									
	0.339	.345	.500	.225*	.164	.179	-.195	-.107	-.141
	0.366	.362	.373	.137	.135	.135	.163	.160	.161
	1.403	1.411	1.649	1.253	1.178	1.196	.823	.898	.869
Arbitrator Former-Judge									
	0.273	.232	.333	.040	.033	.024	-.049	-.034	-.034
	0.391	.384	.388	.142	.142	.142	.168	.167	.168
	1.314	1.262	1.395	1.041	1.034	1.025	.952	.966	.967
Constant	-0.772*	-.989**	-.393	.294*	.562***	.205	-1.125***	-1.390***	-1.135***
Chi-square	20.165**	18.382**	19.625**	79.831***	72.523***	70.848***	60.519***	51.424***	49.048***
Pseudo R2	0.12	.11	.117	.082	.075	.073	0.072	.062	.059
N	228	228	228	1303	1303	1303	1303	1303	1303

Table A6. Heard Award Variable Means, Medians and Standard Deviations

	N	Mean	Median	Std. Deviation	Minimum	Maximum
Award Amount	44	605,864	245,591	922,938	1,508	4,580,350
- AA(2)	43	513,434	230,016	698,026	1,508	2,671,382
Award Amount Including Losses	207	128,783	0	489,432	0	4,580,350
- AAL(2)	206	107,173	0	378,916	0	2,671,382
Days To Disposition	233	418	380	207	86	1,382
Arb Comp	230	31,349	23,483	29,642	1,020	279,562
Agg D Rp	232	5.72	2	9.062	1	38
Agg Ee LF Rp	233	2.33	1	3.44	0	21
Agg Er LF Rp	229	19.1	4	26.815	0	83
Agg D Pairings	232	1.26	1	0.718	1	5
Agg Ee LF Pairings	233	0.96	1	.515	0	3
Agg Er LF Pairings	229	1.57	1	1.765	0	16

Table A7. Employee Claimant Variable Means, Medians and Standard Deviations

	N	Mean	Median	Std. Deviation	Minimum	Maximum
Award Amount	56	527,879	183,844	863,387	1,508	4,580,350
Award Amount Including Losses	323	82,902	0	396,309	0	4,580,350
Days To Disposition	1,422	311	273	205	0	1,547
Arb Comp	1,423	9,849	1,080	19,888	0	279,562
Agg D Rp	1,422	4.31	1	7.462	1	38
Agg Ee LF Rp	1,425	3.21	1	4.059	0	21
Agg Er LF Rp	1,423	19.81	6	26.196	0	83
Agg D Pairings	1,308	1.2	1	0.655	1	5
Agg Ee LF Pairings	1,310	1.15	1	0.673	0	6
Agg Er LF Pairings	1,307	1.77	1	2.082	0	16

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