

PROBLEMS WITH ARBITRATION IN THE USA¹

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A. Adhesive Nature of the Contract

Arbitration has advanced dramatically since 1925 when the US Congress passed the Federal Arbitration Act. It has now advanced to the point where some contracts contain arbitration provisions for which the parties did not really negotiate. These contracts are “take it or leave it.” For example, credit card companies, including Visa, Master Card, and Discover Card, now have arbitration clauses in their member agreements specifying arbitration as the mechanism to resolve any claim or dispute that arises; neither party has the right to litigate the claim in court.² Consumers have challenged such adhesion arbitration clauses, arguing that they had no choice but to accept the clause since virtually all credit card company agreements contain arbitration clauses.³ And the courts have refused to call these contracts of adhesion.

Arbitration clauses are increasingly included in employment contracts. Employees may not realize they are waiving their right to a trial by signing the agreement. When an offer of employment is conditioned upon the signing the employment contract with contains an arbitration agreement, the employee may have no choice but to sign if he/she really wants the job. Most courts will say this is not a contract of adhesion, even though it can be argued the clause is the very definition of “adhesion contract”.⁴

B. The Problem of Neutrality

The neutrality of the arbitration proceeding is a concern. The manner in which arbitrators are chosen; the potential for bias on the part of a party-appointed arbitrator; institutional bias; the “repeat player effect”; and the potential for bias of arbitrators who sit on permanent panels are all situations which can affect the neutrality of an arbitrator. The U.S. Supreme Court stated “any tribunal permitted by law to try cases and controversies not only

¹ This article was adapted from an article written by Joseph L. Daly, “Arbitration: The Basics,” 5 *The Journal of American Arbitration* 1(2006). The concept for Problems with Arbitration came from an article written by Scott Atlas, Chair of the Section of Litigation of the American Bar Association. See Scott Atlas, *Have You Ever Tried to Make Up Your Mind – About Arbitration?*, 29 NO. 1 LITIGATION 1 (Fall 2002).

² See Discover Card, *Discover Platinum Card Important Information*, at <https://www.novusnet.com/acqs/stdapp/req?cmd=impInfoDefault&cardType=PLAT> (2005).

The Cardmember Agreement provides that we may choose to resolve a claim relating to your Account by binding arbitration, in which case, you will not have the right to have that claim resolved by a judge or jury. You may reject the arbitration provision with respect to your new Account within 30 days after receiving your Card.

Id.

³ *Nefores v. Branddirect Marketing, Inc.*, 2002 WL 31057387, 7 (Ohio Ct. App. 2002). Cardmember argued that “the subject arbitration clause is unenforceable since ‘one-sided arbitration clauses forced on the consumer via an adhesion contract are unenforceable in Ohio as against public policy.’” *Id.*

⁴ *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, (4th Cir. 2002) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)). Many commentators argue that employees should have the choice to arbitrate after a dispute has arisen. The assumption that post-dispute arbitration agreements are better for employees assumes that the employer would agree to arbitrate at that point. However, once a dispute has arisen, the employer may often see a tactical benefit from litigating the claim. For example, if an employer knows that an employee does not have a large enough claim to retain an attorney, the employer will not agree to arbitrate. Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 *Colum. Hum. Rts. L. Rev.* 29, 43 (1998).

must be unbiased but also must avoid even the appearance of bias.”⁵ An unbiased arbitrator is critical for a fair arbitration, especially because an arbitrator’s decision is subject to limited review.⁶

First, there is concern that the arbitrators on an agency list are not chosen by a balanced neutral process.⁷ The choice of an arbitrator from a pool is meaningless if the system of choosing arbitrators for the pool is biased.⁸ How does someone get on an agency’s list of approved arbitrators? Is diversity part of the mix?

Second, arbitration proceedings involving party-appointed arbitrators can raise questions of neutrality of the proceeding. A party-appointed arbitrator may feel obligated to the party who chose him/her. The arbitrator may be closely allied to the industry by experience and training.⁹ Yet this “industry bias” is permissible bias under the AAA rule.¹⁰ Parties might favor experience in an industry over impartiality, “[F]amiliarity with a discipline often comes at the expense of complete impartiality.”¹¹

A third concern involves institutional bias. Institutional bias refers to a “tendency for arbitration outcomes to favor one class of participants over another.”¹² Institutional bias is alleged in internet domain name arbitration and in securities arbitration.¹³ Institutional bias can occur because of the “repeat player effect.” Evidence shows that an arbitrator may render a decision in favor of an institutional client because the arbitrator wants to repeat business from the client.¹⁴ In employment cases, the employer may arbitrate many claims, often using the same

⁵ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

⁶ Lewis Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. Sch. J. Hum. Rts. 1, 18 (1994).

⁷ *Id.* at 21 (stating that “[b]efore a court can legitimately defer to the decision of an arbitrator, it must know that the pool from which the arbitrator was chosen was not biased”).

⁸ *Id.*

⁹ Robert D. Taichert, *Why Not Provide for Neutral Party-appointed Arbitrators?*, 57-JAN DISP. RESOL. J. 22 (Nov. 2002– Jan. 2003).

¹⁰ AAA, *Code of Ethics*, at Canon X (A)(1), cited in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759-60 (11th Cir. 1993). The AAA Code of Ethics provides that “arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness.” *Id.*

¹¹ *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984)

¹² Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1985-86 (Fall 2002).

¹³ *Id.* The Internet Corporation for Assigned Names and Numbers (ICANN) deals with disputes over domain names. *Id.* Under ICANN’s dispute resolution policy, trademark holders may institute a claim against a person who has registered a domain name (the registrant may not bring a claim against a trademark holder). *Id.* Because only four arbitration companies can administer ICANN disputes, the companies have an incentive to find for the trademark holder to secure their repeat business. *Id.* According to two studies, trademark holders prevail approximately 60% of the time in front of a panel of arbitrators and 83% of the time before a single arbitrator who was chosen by the arbitration provider. *Id.* at 1987. The securities arbitration system is often criticized, because the majority of the arbitrators are older, white men who are former securities industry executives; however, in spite of this criticism, there is some evidence that employees in securities arbitration fare better than in litigation. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 4, at 50.

¹⁴ Stuart H. Bompey, Michael Delikat, & Lisa K. McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 37 (Summer 1997). See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in the Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 234 (1998). According to one study of 270 arbitration awards, employees bringing claims against one-time player employers win over 70% of the time. *Id.* When employees bring claims against repeat player employers, the win rate drops to 16%. *Id.* In addition, in repeat player arbitrations, plaintiffs recovered approximately 11% of the amount demanded. *Id.* In non-repeat player arbitration, the amount recovered was 48% of the amount demanded. *Id.*

arbitrator.¹⁵ On the other hand, the employee is not likely to need the services of this or any other arbitrator after the resolution of the claim.¹⁶

Fourth, there is concern that an arbitrator who sits on a permanent panel is less likely to be impartial. In labor disputes between an employer and a union a permanent arbitrator may unconsciously or consciously keep the number of decisions balanced so neither the employer nor the union wins too often. The arbitrator may want to keep the decisions balanced for fear of being removed from the panel by the union or the employer. An arbitrator on a permanent panel becomes quite familiar with the advocates.

Until recently arbitrators have rarely been removed for bias. Partiality of the arbitrator is a more recent basis to challenge an arbitration award.¹⁷ A court can vacate an award if the arbitrator has had substantial past communications with one of the parties, or fails to disclose past dealings which may present a conflict of interest.¹⁸ But, failure to disclose a conflict will not necessarily result in the vacatur of an arbitral award on the basis of evident partiality.¹⁹ U.S.

¹⁵ See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1355 (1997). It has been suggested that the lawyers for both plaintiff and defendant are the true “repeat players” rather than the employers themselves.

¹⁶ Alternative explanations other than bias exist to explain the repeat player effect. For example, it is possible that cases that go to mandatory arbitration have little merit, because employers settle stronger claims earlier. Lisa B. Bingham, *Self-determination in Dispute System Design and Employment Arbitration*, 56 U. Miami L. Rev. 873, 900 (2002). Repeat players enjoy a number of advantages over non-repeat players: “(1) experience leading to changes in how the repeat player structures the next similar transaction; (2) expertise, economies of scale, and access to specialist advocates; (3) informal continuing relationships with institutional incumbents; (4) reputation and credibility in bargaining; (5) long-term strategies facilitating risk-taking in appropriate cases; (6) influence over rules through lobbying and other use of resources; (7) playing for precedent and favorable future rules; (8) distinguishing symbolic and actual defeats; and (9) resources invested in getting rules favorable to them implemented.” Bingham, *supra* note 14, at 223.

¹⁷ Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815 (Spring 2003). However, the Federal Arbitration Act does not establish guidelines for determining if there is a conflict, so guidelines are distilled from case law and the recommendations of various organizations. *Id.* at 821. For example, the American Bar Association’s *Code of Ethics for Arbitrators in Commercial Disputes* provides that an arbitrator must reveal any “‘financial or personal interest in the outcome of the arbitration,’ as well as business, professional, familiar, or social relationships with any party, counsel, or witness that might impugn their own impartiality.” *Id.* at 822.

¹⁸ *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (holding that it is improper “to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another”).

¹⁹ Korland, *supra* note 17, at 821-822. In *ANR Coal v. Cogentrix of North Carolina, Inc.*, the Fourth Circuit set forth four factors to consider when an arbitrator fails to disclose a potential conflict of interest: “(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.” *Id.* at 828 (citing *ANR Coal v. Cogentrix of North Carolina, Inc.*, 172 F.3d 493, 500 (4th Cir. 1999)). Rule 16 of the AAA’s Commercial Arbitration Rules provide:

- (a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.”

Id. (citing American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures*, Rule 16 Disclosure, at <http://www.adr.org/sp.asp?id=22440> (July 1, 2003)).

Supreme Court Justice White cautioned courts to “minimize [their] role... as judge of the arbitrators' impartiality. . . . That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.”²⁰ The AAA has become so concerned with potential conflicts of interest that it requires a detailed check sheet and cautions if there is an allegation of conflict of interest the arbitrator will be removed from the list of arbitrators until the matter is settled.²¹

C. Limited Discovery for Even Complex Cases

The arbitration process limits discovery. One of the key objectives of arbitration is to avoid the complex procedures and costly and time consuming discovery which seems part of even the most ordinary of U.S. lawsuits. “[A]s a general rule”, said a Colorado court, “discovery as to arbitrable disputes is denied except upon a showing of need.”²² The Court went on to say that discovery may be permitted “where the taking of discovery would not unnecessarily delay the arbitration proceedings and the plaintiff could obtain evidence to prove its case to the arbitrators that was otherwise unavailable.”²³ In complex commercial and international arbitration cases there may be more than minimal discovery necessary, but the extent of discovery is still limited and not as expansive as U.S. court litigation would allow.²⁴ Arbitrators are not inclined to grant extensive discovery even when the advocates think it may be necessary.²⁵ Extensive discovery is contrary to the “quick, efficient, economical and fair” objectives of the arbitration process. Some arbitrators see discovery as inimical to the very reason for arbitration. The parties can include in the arbitration clause language which permits extensive or limited pre-arbitration discovery. Such language will be binding on the parties.²⁶

D. Process Too Complicated, Too Slow, Too Expensive

As the use of arbitration has increased, the process has become more complicated, legalistic, expensive and slow.²⁷ The complexity of the arbitration procedure has increased. Rules have developed almost like rules of civil procedure. The process can be much too slow. The Federal Mediation and Conciliation Services (FMCS) reported that in 2007, 385.27 days was the average time for an arbitration to reach resolution once a grievance was filed.²⁸ The arbitration

²⁰ *Commonwealth Coatings Corp.*, 393 U.S. at 151 (White, J. concurring).

²¹ AAA, *Code of Ethics*, at Cannon II. AAA *Rules*, at R-17, 18.

²² *Block 175 Corp. v. Fairmont Hotel Management Co.*, 648 F. Supp. 450, 453 (D. Colo. 1986).

²³ *Id.*

²⁴ AAA *Rules*, at L-2(c). “The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.” *Id.*

²⁵ See Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 6, at 33. In an employment discrimination claim, limited discovery is more likely to hurt the plaintiff-employee than the employer. *Id.* The plaintiff carries the burden of proof, and the employer is likely to have information that the employee cannot easily get access to. *Id.* The employer maintains employee records and has access to other employees who may be witnesses. *Id.*

²⁶ See *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1995) (holding that the court “must rigorously enforce the parties’ agreement as they wrote it”).

²⁷ See Frank E. Massengale and Karen Kaler Whitfield, *Arbitration: Be Careful What You Wish For*, 44 La. B.J. 120, 121 (1996). See also Alain Frécon, *Delaying Tactics in Arbitration*, 59 Disp. Resol. J. 40 (2004).

²⁸ Federal Mediation and Conciliation Service, *Arbitration Statistics Fiscal Year 2007*, at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=196&itemID=21224> (January 2, 2008).

hearing itself averaged 317.14 days from panel request to final award.²⁹ This may be faster than getting to trial, but not that much faster in many states.³⁰

The arbitration process can be too expensive. One of the often cited benefits of arbitration is that it saves money.³¹ Yet, there is no scientific evidence to prove that litigation is actually more costly than arbitration.³² Arbitrators in large commercial disputes and important labor disputes are well paid. It is not unusual for well-known arbitrators in the United States to charge two to three thousand dollars per day.³³ International arbitrators charge fees in excess of their domestic counterparts.³⁴ The nature and complexity of disputes submitted to arbitration have increased. The costs of arbitrating highly complex claims are similar to the costs of litigation.³⁵ Yet, in favor of arbitration it is said "[a]daptability and access to expertise are hallmarks of arbitration". Maybe for these reasons, arbitration today is favored.³⁶

E. Non-Lawyer Oriented

The arbitration process uses both lawyer and non-lawyer arbitrators and advocates. In labor arbitration, it is not unusual for a non-lawyer, business representative to act as the advocate in a grievance arbitration hearing. Because of business expertise, business experts are chosen as arbitrators. The AAA rules do not require an arbitrator to have a legal background. "They are experts in their own fields, they are known for their good judgment, they are respected for their

²⁹ Federal Mediation and Conciliation Service, *Arbitration Statistics Fiscal Year 2004*, at <http://www.fmcs.gov/assets/files/AverageDays.doc> (Oct. 5, 2004).

³⁰ U.S. District Court for the District of Minnesota, Rules of Procedure for Expedited Trials (effective July 2, 2001), at <http://www.mnd.uscourts.gov/> (2005) (expedited trial rule is separate from U.S. District Court for the District of Minnesota Local Rules L-1 thru L-83 (effective May 16, 2005)).

³¹ Bompey, Delikat, & McClelland, *supra* note 14, at 34.

³² Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 784 (2003).

³³ Richard M. Alderman, *Pre-dispute Mandatory Arbitration In Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237, 1250 n. 53 (2001).

³⁴ See ICC Rules, Appendix III B. In the following table one can see that an arbitrator handling a \$100 million case for the ICC would be compensated between \$61,750 and \$285,800. *Id.*

SUM IN DISPUTE (in US Dollars)	A. ADMINISTRATIVE EXPENSES(*)		B. ARBITRATOR'S FEES(**)			
	(in US Dollars)		Minimum		Maximum	
up to 50 000	2 500		2 500	17.00% of amount in dispute		
from 50 001 to 100 000	2 500 + 3.50% of amt. over 50 000	50 000	2 500 + 2.00% of amt. over 50 000	50 000	8 500 + 11.00% of amt. over 50 000	50 000
from 100 001 to 500 000	4 250 + 1.70% of amt. over 100 000	100 000	3 500 + 1.00% of amt. over 100 000	100 000	14 000 + 5.50% of amt. over 100 000	100 000
from 500 001 to 1 000 000	11 050 + 1.15% of amt. over 500 000	500 000	7 500 + 0.75% of amt. over 500 000	500 000	36 000 + 3.50% of amt. over 500 000	500 000
from 1 000 001 to 2 000 000	16 800 + 0.70% of amt. over 1 000 000	1 000 000	11 250 + 0.50% of amt. over 1 000 000	1 000 000	53 500 + 2.75% of amt. over 1 000 000	1 000 000
from 2 000 001 to 5 000 000	23 800 + 0.30% of amt. over 2 000 000	2 000 000	16 250 + 0.25% of amt. over 2 000 000	2 000 000	81 000 + 1.12% of amt. over 2 000 000	2 000 000
from 5 000 001 to 10 000 000	32 800 + 0.20% of amt. over 5 000 000	5 000 000	23 750 + 0.10% of amt. over 5 000 000	5 000 000	114 600 + 0.616% of amt. over 5 000 000	5 000 000
from 10 000 001 to 50 000 000	42 800 + 0.07% of amt. over 10 000 000	10 000 000	28 750 + 0.05% of amt. over 10 000 000	10 000 000	145 400 + 0.193% of amt. over 10 000 000	10 000 000
from 50 000 001 to 80 000 000	70 800 + 0.06% of amt. over 50 000 000	50 000 000	48 750 + 0.03% of amt. over 50 000 000	50 000 000	222 600 + 0.136% of amt. over 50 000 000	50 000 000
from 80 000 001 to 100 000 000	88 800	100 000 000	57 750 + 0.02% of amt. over 80 000 000	80 000 000	263 400 + 0.112% of amt. over 80 000 000	80 000 000
over 100 000 000	88 800	100 000 000	61 750 + 0.01% of amt. over 100 000 000	100 000 000	285 800 + 0.056% of amt. over 100 000 000	100 000 000

(*)(**) See preceding page

³⁵ Kelly Burton Beam, *Administering Last Rites to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-first Century*, 40 HOUSTON L. REV. 499, 530 (Spring 2003)

³⁶ *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

fairness, and they are honored for putting time and talent at the disposal of others without thought of personal gain.”³⁷

But, non-lawyer arbitrators may lack the legal knowledge to deal with the dispute and the procedural knowledge needed to run a fair hearing. The United States Supreme Court recognized that “the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”³⁸ The various arbitration agencies maintain lists of arbitrators who have both legal and procedural knowledge. It is possible for even an experienced arbitrator, especially a non-law trained arbitrator, to lack the specific legal knowledge involved in the conflict.

The consequences of an arbitrator’s lack of legal knowledge can have serious consequences in cases that implicate important institutional and legal matters such as Civil Rights, Antitrust, RICO, intellectual property, tax disputes, etc.³⁹ Yet such disputes can be heard by lawyer and non-lawyer arbitrators. In these cases, the arbitrator may have to take into account the law and social policy. Application of legal and public policy considerations may be particularly problematic for an arbitrator who has not received legal training.

F. Arbitrability of Statutory Rights

Some argue that disputes which implicate a party’s statutory rights should be dealt with only by courts and not by arbitrators, especially non-lawyer arbitrators.⁴⁰ Yet, the US Supreme Court has repeatedly held that such disputes -even though they involve a party’s statutory rights - are arbitrable.⁴¹ The important question becomes whether an arbitrator should examine the law before making the decision or whether an arbitrator should strictly interpret the “four corners” of the contract without regard to statutory law. The question frequently arises in employment dispute cases because many employment disputes involve civil rights, such as racial discrimination, disability discrimination, or age discrimination. In an employment arbitration, the arbitrator is often required to deal with socially sensitive areas where Congress has enacted specific laws.

Critics of arbitration argue that arbitration is not the appropriate forum for dealing with these sorts of conflicts. The critics contend arbitration of such disputes hinders the development

³⁷ American Arbitration Association, *A Guide for Commercial Arbitrators*, at <http://www.adr.org/sp.asp?id=22016> (2004).

³⁸ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

³⁹ Thomas Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* 49, 2445-246 (ver. 3.d ed. 2003) *See Shearson/American Express v. McMahon*, 482 U.S. 220 (1987)(holding disputes under the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act (RICO) are arbitrable); *Cole v. Burns Int’l Security Services*, 105 F.3d 1465 (D.C. Cir. 1996)(dismissing complaint under Title VII of the Civil Rights Act of 1964 and compelling arbitration).

⁴⁰ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 Tul. L. Rev. 1945, 1958 (1996):

The Court's unbridled support for arbitration is at once surprising and unnecessary. The Court's willingness to curtail major constitutional and political interests--such as states' rights and federalism, civil rights, federal regulatory authority over the marketplace, and generally, due process guarantees--to bolster arbitration benefits neither the legal culture nor, in the long run, the institution of arbitration itself. In addition, the quality of the Court's reasoning in these cases detracts from the credibility of the announced doctrine. To have the highest court in a legal system dominated by the technicalities of legal procedure state that arbitration is a "mere form of trial" that does not affect the content of the statutory rights submitted to arbitration, is incredible and preposterous. Foreign and even domestic arbitrators will view legal claims arising under U.S. statutes differently than federal judges and will conduct hearings in a different fashion.

Id.

⁴¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that claims under the Age Discrimination in Employment Act are arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (holding that claims under the Securities Act of 1933 are arbitrable).

of the law, that arbitration will affect the Equal Employment Opportunity Commission's ability to enforce the law;⁴² that arbitration is too expensive; and that arbitration does not have sufficient procedural safeguards to allow effective vindication of such claims.⁴³ Opponents of arbitration argue that some mandatory pre-dispute agreements are inherently unconscionable because there is unequal bargaining power between the parties.⁴⁴ Even the critics do not oppose agreements to arbitrate employment disputes after the dispute [post-dispute] has arisen.⁴⁵

The US Supreme Court has held that statutory rights are arbitrable. The Court stated that arbitrators can, and should if the contract demands, apply substantive law in disputes that deal with statutory rights.⁴⁶ In *Gilmer*, the Court said "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."⁴⁷ The *Gilmer* court held, "[a]lthough all statutory claims may not be appropriate for arbitration, [h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁴⁸

G. Lack of Transparency

If arbitration involves a socially sensitive area, should the arbitration be open to the public?⁴⁹ An arbitration hearing is closed, open only to parties, advocates and witnesses except

⁴² See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that while employee was compelled arbitrate, EEOC was not barred from pursuing enforcement action and victim specific relief on behalf of employee).

⁴³ David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 22 (2003). Despite criticism that arbitration will affect the EEOC's ability to enforce laws against discrimination, employees can file a claim with the EEOC even when they are forced to arbitrate their claims. *Id.* at 24. The EEOC can still litigate on behalf of an employee, and the employees can be awarded all statutory remedies. *Id.* It should also be noted that the EEOC has taken the position that employees bringing Title VII claims should not be subject to mandatory pre-dispute arbitration agreements. *Id.* at 5 (citing EEOC Notice No. 915.002 (July 10, 1997)).

⁴⁴ Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1353 (1997).

⁴⁵ *Id.* at 1344. If employees could choose whether they wished to engage in arbitration, employers would be forced to either design a fair arbitral scheme or litigate all claims brought against them. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 6, at 37.

⁴⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). It should be noted, however, that a party does forfeit certain procedural rights by agreeing to submit a dispute to arbitration. Employees who are forced to arbitrate their claims give up right to a jury trial. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 6, at 37. The right to a trial by jury is such an important right that many argue that employees should not be forced to waive it as a condition of employment. *Id.* However, a trial is not a reality for most employees. *Id.* at 57. A plaintiff must have approximately \$60,000 in provable damages before a lawyer will accept the case on a contingency basis. *Id.* In addition, many attorneys charge a retainer of about \$3,000 and require the plaintiff to pay all out of pocket expenses (estimated between \$10,000 and \$25,000) as they occur. *Id.* Approximately 95% of employees who seek legal representation for an employment discrimination claim are not able to retain legal counsel. *Id.* at 58. Due process may also be compromised when the employer has the ability to choose the only arbitrator. *Id.* at 33. In 1994, the American Bar Association developed a due process protocol for arbitration which has been adopted by the AAA and JAMS/Endispute. *Id.* at 39. The American Civil Liberties Union, National Employment Lawyer's Association, and the AFL-CIO were involved in the development of the protocol. *Id.* A fair arbitration process includes: "(a) a neutral and unbiased arbitrator; (b) right of the employee to an equal role in selecting the arbitrator; (c) right to counsel; (d) right to reasonable discovery; (e) identical remedies to those available in court; and (f) a written opinion." *Id.*

⁴⁷ *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁴⁸ *Id.*

⁴⁹ Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 6, at 42-43. When employers know that an arbitration proceeding will remain private, they have less incentive to change

by agreement of the parties that it be open to the public. Arbitration matters are not transparent. But this can be a problem. A particular arbitration decision might have a dramatic impact on society. Lack of transparency can mean a decision is made where the public is affected but the public does not know about the decision because it is confidential.

H. Arbitrator's Lack of Power and Control

In some respects, arbitrators lack the power and control needed to carry on an effective adversarial proceeding. The arbitrator has no authority to impose fines or sanctions on an advocate, as a judge does under Rule 11 of Civil Procedure.⁵⁰ The filing of frivolous cases, bad behavior or unethical actions by an advocate are not sanctionable by the arbitrator.

An arbitrator lacks the power to compel a person to comply with a decision or a subpoena.⁵¹ The arbitrator has no power or authority to order the decision to be implemented. The arbitrator has no authority to enforce a subpoena. A subpoena or a decision rendered in an arbitration proceeding is only enforceable in a court of law. "A right without a remedy is not a legal right; it is merely a hope or a wish."⁵² Of course, the parties in their contract can agree to give the arbitrator the power to impose sanctions.

I. Punitive Damages are Unusual Even when the Facts Warrant

An arbitrator has the power to award equitable remedies.⁵³ "To deny arbitrators the full range of remedial tools generally available under the law would be to hamstring arbitrators and to lessen the value and efficiency of arbitration as an alternative method of dispute resolution."⁵⁴

What if one side intentionally and maliciously did something wrong? In a civil lawsuit, punitive damages might be permitted.⁵⁵ While punitive damages are legally permitted in arbitration, arbitrators are hesitant to use them.⁵⁶ Perhaps arbitrators should use punitive damages in egregious circumstances. "Punitive damages are damages . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."⁵⁷

J. No Better Result Than Litigation

discriminatory policies, because there is not a risk of adverse publicity. *Id.* However, employees may also benefit from the privacy aspect of arbitration if the claim involves a sensitive personal matter. *Id.*

⁵⁰ Rule 11 allows a judge to sanction an attorney, law firm or party who bring a lawsuit for purposes of harassment or who brings a frivolous suit. FED. R. CIV. P. 11.

⁵¹ Section 7 of the Federal Arbitration Act grants an arbitrator the power to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper". 9 U.S.C. § 7 (2004).

⁵² Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L. J. 665, 678 (1987).

⁵³ *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*, (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985). See Uniform Arbitration Act § 21 (2000).

⁵⁴ 598 F. Supp. at 362

⁵⁵ Restatement (Second) of Torts § 908 (2004).

⁵⁶ Frank Elkouri and Edna A Elkouri, *How Arbitration works* 307, 1216-1217 (noting that punitive damages may adversely affect continuing working relationships, or may expose an award to vacation by the courts if it is believed the arbitrator exceeded his authority by awarding punitive damages).

⁵⁷ Restatement (Second) of Torts § 908 (2004). See *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, 53 (1995) (holding that the "decision in *Allied-Bruce, Southland*, and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration"). However, if an arbitration agreement or the rules governing the arbitration require the arbitrator to follow the substantive law, the arbitrator exceeds his power if he fails to apply the substantive law. As a result, the award may be vacated. *Buchele & Rute, The Changing Face of Arbitration: What Once Was Old Is New Again*, 72 J. Kan. B.A. 36, 44 (2003).

There is no proof that arbitrators' decisions and awards are superior to judge and jury awards. Research has shown that employees are more likely to win in arbitration but that they receive lower awards than if they had won in litigation.⁵⁸ Some argue the reason for such a result is the tendency on the part of arbitrators to split the decision, but empirical study of this phenomenon is scarce and conflicting.⁵⁹ It may be easier to split the difference rather than make a principled decision, especially if the arbitrator hopes to be picked again.⁶⁰

K. No Review or Appeal

One of the strengths of arbitration is that, once an arbitrator issues an award, the decision is final.⁶¹ But what if the arbitrator is wrong? Case law has allowed incorrect factual and incorrect legal analysis by an arbitrator to stand.⁶² There are limited grounds for appeal of an arbitration decision.⁶³ The standard for overturning an arbitration award is very high and difficult for the parties to meet.⁶⁴ "An arbitrator, in absence of any agreement limiting his authority, is the final judge of both law and fact, including the interpretation of the terms of any

⁵⁸ See Maltby, *Private Justice: Employment Arbitration and Civil Rights*, *supra* note 4, at 48, Table 1. According to one study, employees won 68% of cases submitted to arbitration, but received only 25% of the amount of damages requested. *Id.* In litigation, employees won only 14.9% of claims brought, but prevailing employees received 70% of the relief requested. *Id.*

⁵⁹ Christopher R. Drahozal, 67 *Law & Contemp. Probs.* 105, 114-118 (2004).

⁶⁰ Alan Scott Rau, *Integrity In Private Judging*, 38 *S. Tex. L. Rev.* 485, 523 (1997).

⁶¹ Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, *supra* note 6, at 25. Employees are often unable to bear the cost of litigation. Arbitration is supposed to address this problem "by providing a final decision in an affordable tribunal." *Id.* However, "[t]his solution is diluted if the wealthier party can afford to initiate expensive judicial review." *Id.*

⁶² See *Local Union 59, Int'l Brotherhood of Electrical Workers, AFL-CIO v. Green Corp.*, 725 F.2d 264, 268 (5th Cir. 1984). "The promotion of the national policy favoring the resolution of labor disputes by arbitration eliminates searching judicial review of the factual and legal accuracy of arbitrators' findings." *Id.*

⁶³ See *supra* notes 41-48 and accompanying text for a discussion on the appealability of an arbitration decision.

⁶⁴ 9 U.S.C. § 10.

Section 10. Same; vacation; grounds; rehearing

a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
5. Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id. For enforcement under international law, reference the requirements of New York Convention. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V (1958).

Parties have begun to include provisions in their arbitration agreements that provide for expanded judicial review of an arbitrator's award. Both the courts and commentators are divided on whether such a provision is valid. See Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 *HARV. NEGOT. L. REV.* 171, 174 (2003). Proponents of expanded review argue that since arbitration is a creature of contract, parties should be able to contract for more expansive grounds for review. *Id.* at 175.

contract, and his award will not be reviewed or set aside for mistake of either law or fact in absence of fraud, mistake in applying his own theory, misconduct or other disregard of duty.”⁶⁵

L. Is the Process of Arbitration to Achieve a Final Decision or to Seek Truth and Find Justice?

Justice Marshall proposed that, "the governing principle of a humane society and a good legal system . . . is to recognize the worth and importance of every person . . . and be perceived by all the people as providing equal justice."⁶⁶ Ultimately, what should an arbitrator do? Is an arbitrator only to interpret the four corners of the contract? Or, is the arbitrator's role to find truth and justice? Is the process of arbitration simply a process to lead to a final decision; or is it a process to seek truth and find justice?

⁶⁵ Ehlert v. W. Nat'l Mut. Ins. Co., 207 N.W.2d 334, 336 (1973) (quoting Cournoyer v. Am. Television & Radio Co., 83 N.W.2d 409, 411 (1957)).

⁶⁶ Michael Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Tray for the Unwary Consumer*, 5 L.YCLR 112 (1993) (citing Mr. Justice Marshall Lives on in His Words, Nat'l L.J., Feb. 8, 1993, at 8 (Statements by Justice Thurgood Marshall at the Eighth Conference on the Law of the World, (1977) .

