WHITE PAPER
ON
ARBITRATION

The purpose of this white paper on arbitration is to provide data with cited sources that present information about arbitration as a recognized alternative dispute resolution method. There is no attempt in this white paper to advocate positions or interests. The white paper's sole purpose is to provide additional information about arbitration.

BACKGROUND

1. "Arbitration has been an alternative to litigation for hundreds of years. It was used as early as the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs (the law merchant) rather than by public law. Commercial arbitration in the United States antedated the American Revolution in New York and several other colonies and is widely used today. Labor arbitration became widespread during the 1940s, and now more than 95 percent of all collective bargaining contracts contain a provision for final and binding arbitration. Additionally, arbitration is used to resolve disputes in the construction industry, disputes between consumers and manufacturers, family disputes, medical malpractice claims, securities disputes, attorneys' fee disputes, disputes between non-unionized employees and their employers, community disputes, and civil rights disputes. It is even used to resolve disputes about salaries to be paid to major league baseball players."[1]

2. "Arbitration originated in Roman and Canon law and was revived in the Middle Ages in European civil law systems. In the common law, arbitration has been a feature of dispute-resolution since the 14th century, if not before. Early forms of arbitration were dispute resolution procedures created and administerd by trade groups - merchant or producer communities."[2]

3. "In England from the 17th century onward, many mercantile disputes were resolved by arbitration conducted by the merchant and craft guilds."[3]

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[1] S. B. Goldberg, F. E. A. Sander, and N. H. Rogers, *Arbitration*, Dispute Resolution: Negotiation, Mediation, and Other Processes, 1999 (3rd ed.), page 233.

[2] Katherine V. W. Stone, *Arbitration - National*, U. of California, Los Angeles School of Law, Public Law & Legal Theory Research Paper Series (Research Paper No. 05-18), page 2; *see also* Katherine V. W. Stone, *Private Justice: Alternative Dispute Resolution and the Law* (Foundation Press, N.Y. 2000).

[3] Stone, *Arbitration-National*, page 2.

4. "In 19th century Germany, courts of arbitration were established by the stock exchanges of the city-states, the chambers of commerce, and the local Associations of Dealers in Coffee, Colonial Products and other items."[4]

5. "The New York Chamber of Commerce set up an arbitration system in 1768 in order to 'settl[e] business disputes according to trade practice rather than legal principles.'"[5]

6. "In 1927, the American Arbitration Associations' Yearbook of Commercial Arbitration listed over 1,000 trade associations that had systems of arbitration."[6]

7. In an attempt to overcome the U.S. common law courts' hostility to arbitration by allowing a party to a pre-dispute arbitration agreement to revoke it at any time, twelve states by 1933 had adopted state arbitration acts that enforced pre-dispute arbitration agreements. Only Illinois in its state arbitration act continued to permit parties to revoke arbitration agreements so that the practice effect was the enforcement only of post-dispute arbitration agreements.[7] The American Bar Association selected the enforceability of pre-dispute arbitration agreements approach adopted by the New York legislature and other states, except Illinois, and drafted a proposed federal statute and submitted it to Congress for consideration. This draft federal statute, permitting enforcement of pre-dispute arbitration agreements became what we know today as the Federal Arbitration Act.[8]

THE LAW OF ARBITRATION.

8. Under the Federal Arbitration Act.

   a. *Preston v. Ferrer*, 128 S.Ct. 978, 981 (2008) ("As this Court recognized in *Southland Corp. V. Keating*, [omitting citation] the Federal Arbitration Act ...establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.").

   b. *Hall Street Associations, LLC v. Mattel, Inc.*, 128 S.Ct. 1396, 1405 (2008) (FAA §§ 9-11 substantiate "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

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[4] *Id.*, page 3.
[5] *Id.*
[6] *Id.*
[7] *See* Stone, *Arbitration-National*, at pages 3 and 4.
[8] 9 U.S.C. §§1 *et seq.*

c. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (holding that the court decides whether arbitration clause actually agreed by the parties applying state contact law principles).

d. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (holding that arbitrator decides if statute of limitations applies to dispute).

e. *Gilmer v. Johnson/Interstate Lane Corp.*, 500 U.S. 20 (1991) (holding that federal statutory employment claims are subject to arbitration if parties have agreed to arbitrate).

f. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that FAA preempted Montana statute requiring that arbitration clause be "typed in underlined capital letters on the first page of the contract").

g. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The legislative history of the Act established that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.").

h. *Mitsubishi Motors Corp. V. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (Congressional policy manifested in the Federal Arbitration Act requires courts liberally to construe the scope of arbitration agreements covered by the FAA.).

i. Southland Corp. V. Keating, 465 U.S. 1 (1984) (With the enactment of the Federal Arbitration 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 agree to resolve by arbitration.).

9. Under the Texas General Arbitration Act.[9]

a. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977) ("In addition to alleviating some measure of the burden on the courts, arbitration in a commercial context is a valuable tool which provides business people, and all citizens, with greater flexibility, efficiency, and privacy.").

b. *Anglin v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) ("Arbitration has been sanctioned in Texas since at least the time of our first state constitution in 1845. [omitting cites] The public policy of both our state and federal governments favors agreements to resolve legal disputes through such voluntary settlement

[9] TEX. CIV. PRAC. & REM. CODE ch. 171.

procedures. [omitting cites] Efficiency and lower costs are frequently cited as the main benefits of arbitration.").

c. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) ("Subjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes.").

GENERAL ARBITRATION RESEARCH

10. The 2008 Fulbright & Jaworski *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*,[10] a survey of "senior corporate counsel on their experiences and opinions regarding various aspects of litigation and related matters," found the following:

a. Respondents in all three size-of-company categories report that Texas is their most active jurisdiction (47%), followed by California (36%). Fulbright & Jaworski (19).

b. "The United States remains the predominant jurisdiction for significant cases pending with 80% of the total sample listing it among their top three. Fulbright & Jaworski (20).

c. Respondents expect an increase in the number of disputes that their companies will face in the coming year.

i. Almost "one-third of the total sample...expect disputes to increase in the coming year." Fulbright & Jaworski (3).

ii. "43% of respondents from the largest companies surveyed expect disputes to increase in the coming year"– higher than 2007 (34%) and 2006 (35%). Fulbright & Jaworski (9).

iii. Smaller companies' expectations of an increase in disputes rose to 22% from just 5% in 2–7 and 13% in 2006. Fulbright & Jaworski (9).

d. "Labor/Employment, Contracts and Personal Injury have remained the most active areas [in litigation] over the past 12 months." In fact, "Contracts and Labor/Employment cases dominate across most industries, except manufacturing where Product Liability is the most common type of litigation." "Half of the 2008

[10] *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*, Fulbright & Jaworski LLP (2008), *available at* www.fulbright.com/litigationtrends. Cited hereinafter as "Fulbright & Jaworski" followed by page number.

U.S. [respondents] put Labor/Employment on [their] list [of litigation areas of greatest concern], followed by Contracts (47%) and Personal Injury (29%)." Fulbright & Jaworski (10).

e. Currently, "[t]he greatest increases in multi-plaintiff cases in the U.S. are in wage & hour [32%], discrimination [23%] and privacy issues [15%]." Fulbright & Jaworski (3).

f. When asked their level of satisfaction with outside counsel in various litigation areas, respondents reported that they were least satisfied (a 63% level of satisfaction) with cost management. Moreover, 47% of all respondents reported that cost management is their area of greatest concern. Fulbright & Jaworski (13).

g. "One in five of the largest companies spend more than $10 million [in litigation expenditures], compared with just 6% of privately held companies." Fulbright & Jaworski (22).

h. "The effects of the subprime credit crisis are starting to riple through the legal system and are being felt in some sectors. When asked if they have engaged outside counsel for subprime-related matters, those answering 'Yes' represent: 12% of the insurance sector; 11% of financial services companies; 4% of the companies under $100 million in revenues; 4% of the companies with $1 billion or more in revenues; [and] 4% of the public companies."

11. Harris Interactive Survey, the Harris Poll people, did market research for the U.S. Chamber [of Commerce] Institute for Legal Reform which was released in April 2005.[11]

a. The Harris Interactive survey, called "The Binding Arbitration Survey," conducted online interviews between February 28 and March 14, 2005, with 609 adult arbitration participants, a sub-sample of a national cross-section of 31,045 adults, regarding arbitration procedures and outcomes and tested participants' assessments of arbitration. Harris (3-4, 35-38).

b. These participants must have been a participant in a binding arbitration case that reached a decision, and must have been in the binding arbitration either voluntarily due to contract language or because of strong urging by a court, but not because of court order. Harris (4).

c. The disputes arbitrated for these participants included:

i. Contract disputes - 34%;

[11] *See Arbitration: Simpler, Cheaper, and Faster Than Litigation*, Harris Interactive Survey, Conducted for U.S. Chamber Institute for Legal Reform (April 2005). Cited hereinafter as "Harris" followed by page number of published report.

ii. Personal injury - 27%;

iii. Divorce issues - 4%;

iv. Unpaid bills/loans - 4%;

v. Child custody issues - 3%;

vi. Auto accident/damage - 3%; and

vii. Other - 25%. Harris (12).

d. These participants said that arbitration is faster (74%), simpler (63%), and cheaper (51%) than going to court, and 66% said they would likely use arbitration again. Harris (5, 19-21, 30).

e. Losers in arbitration believed the process was fair and were satisfied with the outcome (40% of losers were highly satisfied and 21% of losers were moderately to highly satisfied). Harris (6, 26).

f. Participants were satisfied with the arbitrator's attentiveness (81%), impartiality (75%), and competence (78%). Harris (23).

g. Participants believed that arbitration was a fair process (75%) and that it resulted in a fair outcome (72%). Harris (24).

h. Eighty-four percent (84%) were satisfied with the length of their arbitration. Harris (28).

i. Most of the participants interviewed had participated in binding arbitration as individuals (83%) as opposed to employees of a business or organization (17%). Harris (32).

12. A survey, published in 2006, of the entire membership of the General Practice Solo and Small Firm Division of the American Bar Association ("ABA"),[12] which was administered by the independent survey company Surveys and Ballots, Inc. and reviewed and finalized by the GPSolo Division of the ABA and the National Arbitration Forum ("NAF"), made the following observations:

[12] Cited hereinafter as "GPSolo" followed by page number of the NAF copyrighted report published in 2006. *See* GPSolo (29) for description of sample and instrument employed in the survey.

a. Approximately 40% of the GPSolo respondents have more than 25 cases "open" and at some stage of litigation or alternative dispute resolution. GPSolo (5).

b. Approximately 86.2% of the GPSolo respondents believe that their clients' interests are best served by offering ADR solutions. GPSolo (7).

c. Approximately 34.6% of the GPSolo respondents resolved more than 5 cases through ADR the previous year and 3.6% of the respondents resolved more than 25 cases through ADR. GPSolo (2).

d. Approximately 6.3% of the GPSolo respondents resolved more than 5 cases by arbitration in the previous year. GPSolo (3).

e. Approximately 68.6% of the GPSolo respondents would use arbitration more often if arbitrators were required to follow the law and 55.4% would use arbitration more often if arbitrators were lawyers or judges. GPSolo (3, 20).

f. Approximately 72.9% of the GPSolo respondents value arbitrators who are lawyers and former judges as opposed to lay arbitrators, but that number goes up to 85.7% for respondents who practice Consumer Law and 90.9% for respondents who practice Insurance Defense. GPSolo (17).

g. Nearly 40% of the GPSolo respondents initiate settlement immediately after becoming aware of a dispute. GPSolo (23).

13. The ABA Section of Litigation, while Scott J. Atlas, was its chair in 2002-2003, formed a Task Force on ADR Effectiveness to analyze the arbitration process and to determine what litigants and counsel thought about arbitration. The Task Force worked with "a recognized authority in the field of public opinion survey work" and designed a survey that was distributed to "an excess of 7,000 Section [of Litigation] members" involved in areas including "Construction Litigation, Securities, Business Tort, Insurance Practice, Employment & Labor, International Law, and Trial Practice...."[13]

a. Approximately 78% of the respondents believe that arbitration takes less time than litigation. ABA Survey (4).

b. Approximately 56% of the respondents believe that arbitration is more cost effective than litigation. ABA Survey (4).

c. Approximately 28% of the respondents believe that outcome quality (with regard to fairness, validity, and client satisfaction with final awards) in arbitration "is better than litigation verdicts or judgments"; 25% of the respondents believe that

[13] *Survey on Arbitration*, ABA Section of Litigation Task Force on ADR Effectiveness, August 2003, at 2-3. Cited hereinafter as "ABA Survey" with page number following.

outcome quality in arbitration "is not as good as litigation verdicts or judgments"; and 46% of the respondents believe that outcome quality in arbitration "is about the same as litigation verdicts or judgments." ABA Survey (24).

d. The respondents to this survey described steps that they have most frequently taken or have attempted to take to improve voluntary arbitrations:

i. Thirty-eight percent (38%) have incorporated or have attempted to incorporate discovery into arbitration;

ii. Thirty-five percent (35%) have required or have attempted to require arbitrators to apply governing substantive law; and

iii. Twenty-nine percent (29%) have required or have attempted to require arbitrators to provide opinions explaining awards. ABA Survey (28).

EMPLOYMENT ARBITRATION

14. The 2008 Fulbright & Jaworski study[14] found the following with regard to arbitration in employment disputes:

a. In non-union settings, 75% of all respondents report that their companies require arbitration in employment disputes. Fulbright & Jaworski (44).

b. With regard to the average cost of arbitrating employment disputes:

i. "[A]lmost one-third [of smaller companies] spend $50,000 to $100,000 per dispute, and a quarter of them spend more than $100,000";

ii. "A quarter of the mid-sized companies spend $50 to $100,000 [per dispute], and 12% average $100,000 or more per dispute"; and

iii. "[A]mong the largest companies, 23% [spend] $50 to $100,000 [per dispute], and 19% spend $100,000 or more per dispute." Fulbright & Jaworski (45).

15. The percentage of employers in the private sector using employment arbitration increased from 3.6% in 1991 to 19% in 1997.[15]

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[14] *Fifth Annual Litigation Trends Survey Findings: Direction and Dynamics*, Fulbright & Jaworski LLP (2008), *available at* www.fulbright.com/litigationtrends.

[15] Demaine and Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law and Contemporary Problems 55 (Winter/Spring 2004). Cited hereinafter as "Demaine and Hensler" with page number following.

a. Studies indicate that by 1998, 62% of large corporations in the U.S. had used employment arbitration on at least one occasion.[16]

b. Between 1997 and 2001, the number of employees covered by employment arbitration plans administered by AAA grew from 3 to 6 million.[17]

c. Studies indicate that the majority of employees litigating employment discrimination claims in the courts are professional or managerial employees from the higher income scale and that lower-income employees are excluded from the courts because of the small amounts of provable damages and lawyers' reluctance to take these smaller claim cases.[18]

16. One of the most highly developed employment dispute resolution programs is the one developed and used by Halliburton and Brown & Root.[19]

a. Beginning in 1990, Halliburton had "a binding arbitration program" for some of its employment disputes. Bedman (55).

b. In 1992 Halliburton conducted an extensive study involving all levels of its employees and task forces, which resulted in final approval of a comprehensive employment dispute resolution program in February 1993, with formal implementation in June 1993 for both Halliburton and Brown & Root. Bedman (55).

c. Halliburton found that "litigation, as a system of employment dispute resolution, is highly inefficient, both economically and morally. It wastes time, money and careers. This is true even if, as assumed here, the end result is always correct. To

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[16] *See* David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, U. of Pennsylvania Journal of Labor & Employment Law, Vol. 1, No. 1 (1998), pages 133-159; cited by Elisabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Dispute Resolution Journal 8, 10 (2008).

[17] *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Dispute Resolution Journal 8, 10 (2008).

[18] *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Dispute Resolution Journal 8, 10, 11 (2003) ("Thus, these studies substantiate the belief that lower-income employees generally do not have access to the courts. During my research, I discovered, however, that more than three-quarters of the employees arbitrating claims pursuant to mandatory arbitration agreements earned less than $60,000 per year, *i.e.*, were of lower-income by the standard applied above.").

[19] *See* William L. Bedman, *Alternative Dispute Resolution: The Halliburton Experience*, The Advocate (Vol. 25, Winter 2003), published by the Texas State Bar Litigation Section. Cited hereinafter as "Bedman" followed by page number from The Advocate.

the extent that the results through litigation are wrong, the social loss can only be greater." Bedman (57).

d. Halliburton's initial experience revealed that "the annual expense for this type of program is substantially less than what a large, litigated employment case can cost both the company and the employee in legal expenses, while doing a much better job of delivering justice in the workplace to the average employee." Bedman (59).

17. A study published in 2003 by Michael Delikat and Morris Kleiner, Professor at the University of Minnesota, compared two sets of employment cases: (1) 125 employment discrimination cases filed between April 1, 1997 and July 31, 2001, in the Southern District of New York federal court, that concluded in trial, and (2) 186 employment arbitration cases in the securities industries, administered by the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE), in which awards were issued between April 1, 1997 and July 31, 2001.[20]

a. The study reflects trial results, not actual final case results. Delikat and Kleiner (1).

b. The study concluded that there was no statistical support for bias against individual claimants in arbitration outcomes compared to federal court outcomes: "[The] findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court. These results are sufficiently robust that adding statistical covariates are not likely to turn the estimates around in the other direction for this sample of cases." Delikat and Kleiner (2).

c. Claimants prevailed in 46% of cases in arbitration versus 34% of the cases in court. Delikat and Kleiner (2).

d. Claimants received median monetary awards of $100,000 in arbitration versus $95,554 in federal court. Delikat and Kleiner (1-2).

e. In the cases in which the plaintiffs prevailed, the median attorney's fees awarded was $69,388 and the average attorney's fees awarded was $149,756. Delikat and Kleiner (1-2).

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[20] *See* Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* 58 Dispute Resolution Journal 56 (November 2003, No. 4), *available at* http://findarticles.com/p/articles/mi_qa3923/is_200311/ai_n9463700. Cited herein as "Delikat and Kleiner" with page number following.

f. Arbitrations were 33% faster than federal court claims. In arbitration, the median time from filing to judgment was 16, whereas in federal court cases the median time was 25 months. Delikat and Kleiner (2).

g. While the study focused on 125 federal court claims that were filed between April 1, 1997 and July 31, 2001 and that concluded in trial, approximately 3000 discrimination cases were actually filed during this period. Thus, only 3.8% of the discrimination cases that were filed concluded with a jury trial–refuting the complaint that arbitration prevents an employee's right to a jury trial.[21] Delikat and Kleiner (1).

18. The National Workrights Institute published a paper entitled, *What Does the Data Show?*, in an attempt "to summarize the currently available data to provide a more informed basis for policy making," as opposed to relying on the opinions of the National Employment Lawyers' Association (an employee group) and the Equal Employment Advisory Council (an employer group).[22]

a. In several empirical studies, the rate at which employees prevailed in arbitration was:

i. Bingham I - 73%;

ii. Maltby - 66%;

iii. Eisenberg - 43%;

iv. Bingham II - 63%; and

v. Overall - 62%. NWI (1).

b. In their 2003 study, Eisenberg and Hill found that employees prevailed in court in 57% of cases, but when including the employee cases dismissed by summary judgment, the employee rate of success in court fell to 43%. NWI (2).

c. Eisenberg and Hill's 2003 study also raised a question about the size of employment judgments in arbitration versus litigation.

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[21] U.S. District Courts statistics reveal the following percentages of total cases filed that went to trial (1990 - 4.3%); (1995 - 3.2%); (2000 - 2.2%); (2002 - 1.8%); (2003 - 1.7%); (2004 - 1.6%); (2005 - 1.4%); (2006 - 1.3%). Each year represents a twelve month period ended June 30 and is known as "Table r.10 "U.S. District Courts. Civil Cases Terminated by Action Taken" (Land Condemnation cases omitted.). Available at http://www.uscourts.gov/judicialfactsfigures/2006/Table410.pdf.

[22] *See* www.workrights.org/current/ed_arbitration.html for copy of report with citations to its sources. The report is cited hereinafter as "NWI" followed by page number of report.

i. Median awards for employees were $63,120 in arbitration versus $68,737 in court (not statistically significant). NWI (3).

ii. Mean awards for employees were $153,000 in arbitration versus $462,000 in court. NWI (4).

iii. However, the NWI study suggests that the figures for mean and median awards in arbitration and litigation are misleading for two reasons:

(1) First, in litigation, successful employese often do not receive the amount actually awarded by the jury. "In litigation, an employer who loses has the right to appeal. The risk of losing the appeal, plus the additional time and expense, leads many employees who have prevailed at trial to settle their case for much less than the jury awarded. The best available estimate is that the amount ultimately received by successful employees is about half of the jury award, or $231,000. Because it is extremely difficult to appeal an arbitration award, this dynamic is largely absent in arbitration." NWI (4).

(2) Second, cases in which employees seek high damage amounts are more likely to be brought in court as opposed to arbitration. "[F]inancial hurdles to bringing a case are lower in arbitration than in court.... This results in cases being brought in arbitration with damages lower than the cases that go to court.... [E]xamining [only] the results of arbitration cases where the damages were large enough to justify litigation produces mean damages in arbitration... [that are] slightly larger than mean damages in litigation." NWI (4).

iv. Thus, the NWI study suggests that mean awards of $292,000 in arbitration versus $231,000 in litigation are more representative of awards received by successful employees when considering (1) the award amount that a successful employee is likely to actually receive, and (2) the cases that are brought to arbitration where the damages sought are large enough to justify litigation. NWI (4).

v. The NWI study also comments on the minimum jurisdictional amount required to file an employment discrimination claim in federal court ($75,000) versus no threshold for filing an employment discrimination claim in arbitration. NWI (5).

vi. "Research to date indicates that more employees are able to gain access to justice through arbitration than through litigation, and that they are more likely to win their cases in arbitration (if they use a qualified arbitration provider)." NWI (5).

19. Professor Alexander J. S. Colvin, Department of Labor Studies and Employment Relations, Pennsylvania State University, prepared a report which analyzed a sample of 2,763 employment arbitration cases administered by the AAA from January 1, 2003 to September 30, 2006, that had produced 836 employment arbitration awards (referred to by Professor Colvin as the "AAA C-filings data").[23]

a. Among the 836 employment arbitration awards in the AAA C-filings data, the employee win rate was 19.7%. Colvin (418).

b. The AAA C-filings included only cases based on employer-promulgated agreements, not individually-negotiated employment agreements. Colvin (419).

c. The large majority of these AAA C-filings (approximately 83 %) involved employees who earned $100,000 or less per year. Colvin (419).

d. Of the employees who won awards, the median damage awarded in the AAA C-filings was $40,624 and the mean damage award was $117,715. Colvin (423-24).

e. Of the employees who won awards, 77.4% earned less than $100,000 per year. Colvin (423-24).

f. In the AAA C-filings, the employer paid 100% of the arbitrator fees in 96.6% of the cases in the sample. Colvin (424).

g. The mean time to a decision in the AAA C-filings that resulted in an award for the employee was 332.2 days, a much shorter time than comparable studies of employee claim litigation.[24] Colvin (426).

CONSUMER ARBITRATION

20. A study regarding consumer arbitration funded by the Hewlett Foundation found that "Private arbitration, enabled by predispute agreements whereby parties waive their rights

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[23] *See Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Employee Rights and Employment Policy Journal 405 (2007). Cited hereinafter as "Colvin" followed by page number of the published report.

[24] "[The AAA C-filings]...confirm the relative speed of employment arbitration for obtaining a hearing compared to the litigation system." Colvin (426).

to resolve future disputes in a public courtroom, has a long history in the United States."[25]

a. Demaine and Hensler (58) built "a statistical profile of the average U.S. consumer" from the 1999 Annual Demographic Survey published by the Bureau of Labor Statistics and the Bureau of the Census. Based on data of the average consumer in Los Angeles, California, consumers' most likely purchases were studied for the use of arbitration in relation to those purchases. Demaine and Hensler (58).

b. The study shows that the average person in Los Angeles would be covered by mandatory arbitration clauses with respect to over a third of the major consumer transactions in his/her life. Demaine and Hensler (62).[26]

c. Fifty-seven (57) of the one hundred sixty-one (161) sampled businesses with whom the average consumer was projected to do business used arbitration clauses in their consumer contracts. Demaine and Hensler (62, Table 2, n.2).

d. Demaine and Hensler's study revealed that "the prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking, investment, and accounting/tax consulting) and lowest (0%) in the food and entertainment category (grocery stores, restaurants, theme parks, and cultural/sports events)." Demaine and Hensler (62).

e. Demaine and Hensler cite a Brookings Institution study to support their observation that "many plaintiffs who are not formally barred from the courthouse find it virtually impossible to get through its doors" and so "for claims involving modest amounts of money, arbitration may have no greater tendency than court litigation to preclude access to justice." Demaine and Hensler (69 n.37).

f. Demaine and Hensler's study concludes that "it is likely that most consumers only become aware of what rights they retain and what rights they have waived after disputes arise." Demaine and Hensler (73-74 n.43).

21. The Institute for Legal Reform, Public Opinion Strategies, and the Benenson Strategy

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[25] Demaine and Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law and Contemporary Problems 55 (Winter/Spring 2004). Cited hereinafter as "Demaine and Hensler" with page number following.

[26] *See also* Jean R. Sternlight, *The Ultimate Arbitration Update: Examining Recent Trends in Labor and Employment Arbitration in the Context of Broader Trends With Respect to Arbitration*, 2003 ABA Annual Meeting (August 10, 2003) (discussing the Demaine and Hensler study).

Group conducted a national telephone survey, regarding consumer disputes, of 800 registered voters who indicated they were likely to vote in the 2008 national election.[27]

a. The survey was conducted between December 17-20, 2007 and had a margin of error of ± 3.5%.

b. "Four-in-ten voters believe it would be very difficult to resolve a serious dispute with a company, and a majority are not confident that a dispute would be settled fairly."[28]

c. "To resolve disputes between companies and customers, voters have a more favorable opinion of arbitration and mediation than they do of filing a lawsuit or class action lawsuits."[29]

d. "Given the choice, voters strongly prefer [82%] arbitration over litigation to resolve any serous [sic] dispute with a company."[30]

e. "Voters clearly believe [71%] arbitration agreements should not be removed from the contracts consumers sign with companies providing goods and services."[31]

f. Voters identified the following possible outcomes from the legislative removal of consumer disputes from mandatory arbitration.

    i. "Consumers who may not be able to afford the cost of a trial would never be represented in a dispute."

        (1) 64% surveyed said this was the worst thing that could happen.

        (2) 60% surveyed said this was almost certain or a very likely outcome.

    ii. "Companies will raise their prices and we will all end up paying higher prices for everyday goods and services."

        (1) 56% surveyed said this was the worst thing that could happen.

        (2) 50% surveyed said this was almost certain or a very likely outcome.

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[27] *See* U.S. Chamber Institute for Legal Reform, *Key Findings From a National Survey of Likely Voters* (April 2008).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

iii. "Consumers will end up either having to file a lawsuit, or just dropping their complaint because companies will not agree to arbitration after a dispute arises."

(1) 51% surveyed said this was the worst thing that could happen.

(2) 57% surveyed said this was almost certain or a very likely outcome.

iv. "Lawyers will benefit financially because they will file more lawsuits."

(1) 49% surveyed said this was the worst thing that could happen.

(2) 74% surveyed said this was almost certain or a very likely outcome.

v. "Fewer consumers will have their dispute heard through an arbitration proceeding so there will be more lawsuits filed through our courts."

(1) 45% surveyed said this was the worst thing that could happen.

(2) 59% surveyed said this was almost certain or a very likely outcome.

22. In July 2008, the U.S. Chamber Institute for Legal Reform released a comprehensive and independent new study performed by Navigant Consulting[32] on behalf of the U.S. Chamber Institute for Legal Reform. This study of 34,000 consumer arbitration cases from 2003 to 2007,[33] involving California consumers,[34] resulted in the following findings:

a. Consumers were successful in 32.1% of these arbitration cases, the same or higher rate than consumers prevailed in debt collection lawsuits.

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[32] *See National Arbitration Forum: California Consumer Arbitration Data*, memo dated July 11, 2008, based on data disclosed pursuant to California Code of Civil Procedure 1281.96 which requires private arbitration companies to collect and publish data pertaining to consumer arbitrations heard in California. Consumer arbitration, according to California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, involves "a consumer or employee who was required to accept an arbitration provision in a contract drafted by a non-consumer or its representative." Cited hereinafter as "Navigant" followed by page number.

[33] NAF data from 2003 through the first quarter of 2007 obtained in spreadsheet from the Public Citizen website (http://www.citizen.org/congress/civjus/arbitration/).

[34] NAF data from 2003 through the first quarter of 2007 obtained in spreadsheet from the Public Citizen website (http://www.citizen.org/congress/civjus/arbitration/).

b. Claim amounts against consumers in the arbitrations studied were reduced in an additional 16.4% of cases; claim amounts against consumers that went to arbitration hearing where the consumer did not prevail were reduced in 37.4% of cases with a median reduction for consumers of $824.

c. In 33,935 cases where an arbitration fee was paid, the consumer did not pay any fee in 99.3% of the cases; in the 0.7% of cases where consumers paid a fee, the median fee was $75.

d. In cases in which the consumer did not appear, actual damages awarded to the claimant were 22.6% less than the damages sought by the claimant.

e. *See* the full report by U.S. Chamber Institute for Legal Reform at http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212.

23. An earlier analysis by Public Citizen in September 2007 of the same data used in the July 2008 U.S. Chamber Institute for Legal Reform study[35] only utilized a subset of the same arbitration data.[36]

a. The Public Citizen report did not analyze more than 8,000 cases that were dismissed in which consumers were identified as the prevailing parties.

b. The Public Citizen report did not consider the reductions in claims amounts experienced by approximately 38% of the cases in which the median reduction was $824.

c. The Public Citizen report did not consider that in 99.3% of the cases studied the consumer paid no fees.

24. Many studies and articles indicate that consumers achieve better results in arbitration as opposed to litigation.

a. *See Arbitration - A Good Deal for Consumers*, by Peter B. Rutledge, U.S. Chamber Institute for Legal Reform (April 2008) ("Whatever the measure, most research suggests that individuals as a whole achieve superior results in arbitration than litigation.").

b. *See Boston Globe* articles in 2006 on "Debtors' Hell," depicting the litigation burdens and costs on debtors sued in courts.

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[35] *See* Paragraph 22.

[36] *See* http://www.citizen.org/documents/ArbitrationTrap.pdf for copy of *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (September 2007).

c. *See Banks v. Consumers (Guess Who Wins?)*, BusinessWeek, June 6, 2008.

d. *See* NAF report, *The Benefits of Arbitration Report.*

25. Numerous court decisions recognize the cost-effectiveness of consumer arbitration.

a. *Provencher v. Dell, Inc.*, 409 F.Supp.2d 1196, 1198 (C.D.Cal. 2006).

b. *Green Tree Financial v. Randolph*, 531 U.S. 79, 95 n.2 (2000).

c. *Marsh v. First USA Bank*, 103 F.Supp.2d 909, 925 (N.D. Tex. 2000).

26. The American Arbitration Association ("AAA") administers consumer arbitrations that meet its *Consumer Due Process Protocol* and *Supplementary Procedures for Consumer-Related Disputes* requirements.

a. AAA reports that, for the period between January 2007 and August 2007, of the 310 AAA consumer cases that resulted in an award, consumers prevailed in 48% of cases in which they were the claimant and businesses prevailed in 74% of the cases in which they were the claimant.[37]

b. According to this same report, AAA administers approximately 1,500 consumer cases each year, of which approximately 60% are settled by mutual agreement of the parties or are withdrawn from administration.

c. Approximately 41% of AAA consumer arbitrations are conducted by documents only and are completed in approximately 4 months; in-person AAA consumer arbitrations are completed within approximately 6 months.

HEALTH CARE ARBITRATION

27. The Commission on Health Care Dispute Resolution, composed of four representatives from each the American Medical Association, the American Bar Association, and the American Arbitration Association, was formed in September 1997 "to evaluate and make recommendations as to how alternative dispute resolution should be used to provide a just, prompt, and economical means of resolving disputes over access to health care treatment, and coverage, in the private health plan/managed care environment."[38] The

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[37] *See Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (Based on consumer cases awarded between January and August 2007), published by AAA (no date).

[38] *See Final Report*, Commission on Health Care Dispute Resolution, dated July 27, 1998 and cited hereinafter as "CHC" followed by page number of *Final Report*.

Commission's *Final Report*, issued on July 27, 1998, makes the following recommendations and observations, among others, about alternative dispute resolution:

a. ADR can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients and private health plans/managed care organizations and between health care providers and private health plans/managed care organizations. CHC (2).

b. "Alternative dispute resolution has emerged as an accepted means of resolving disputes outside of the court system." CHC (5).

c. No study was made of the application of ADR "to medical malpractice, Medicare, specific provisions of health care insurance contracts, or general access to health care outside of the private health care relationship." CHC (7).

d. The Commission focused on "consumer v. plan," "consumer + provider v. plan," and "purchaser/plan/provider" disputes. CHC (11-12).

e. "The members of the Commission believe that mediation and arbitration of health care disputes - conducted with proper due process safeguards - should be encouraged in order to provide expeditious, accessible, inexpensive, and fair resolution of disputes." CHC (14).

f. The Commission adopted ten principles of "A Due Process Protocol for Resolution of Health Care Disputes." CHC (15-17).

g. Citing a Deloitte & Touche Litigation Services report, *1993 Survey of General and Outside Counsels: Alternative Dispute Resolution* (1993), the Commission cited the following "major benefits of arbitration":

    i. Expert Neutrals;

    ii. Speed;

    iii. Cost Savings;

    iv. Confidentiality; and

    v. Limited Discovery. CHC (30).

h. The Commission also appended to its *Final Report* "A Due Process for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" previously issued by the Task Force on Alternative Dispute

Resolution in Employment (CHC (37-41))[39] which recognized the right of employers "to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment." CHC (37).

i. The Commission also appended to its *Final Report* "A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes" issued on April 17, 1998.[40] CHC (42-46).

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[39] Which represented the individual views of its signers and not the institutions with which these signatories were affiliated. CHC (37).

[40] *Id.*