



Alternative Dispute Resolution

by Roni Adil Radi Elias

Assuring Fairness in Employment Arbitration: Do Employees Really Need the Arbitration Fairness Act?

As litigation in courts has become more costly and time-consuming, arbitration has become an increasingly popular means of dispute resolution. This is true in employment disputes, where, over the last 20 years, more employers have required their employees to arbitrate disputes arising from the employment relationship. Some have questioned the fairness of this trend toward privatizing justice, arguing that arbitration provides procedural advantages to employers and improperly hides unlawful employment practices from the public eye. Despite these complaints, mandatory employment arbitration keeps gaining momentum, raising questions about how best to protect employees' rights. One persistent approach to providing such protection is to enact legislation that limits mandatory employment arbitration, but, even after 20 years of trying, such legislation has not made its way through Congress. This essay considers whether such proposed legislation is necessary to protect employees and assure that their rights are protected.

The Expanding Use of Arbitration in Employment Disputes

During the 1980s and 1990s, judicial decisions in numerous states eroded the power of the traditional "employment at will" doctrine and made it easier for employees to assert legal challenges to the termination of their employment.¹ A resultant surge of employment litigation prompted employers to seek alternatives to costly litigation.² More and more employers required employees to contract to arbitrate all future employment disputes, including disputes that arose from statutory rights.³ Often, these pre-dispute arbitration agreements were a condition of employment.⁴

Criticism of Mandatory, Pre-Dispute Arbitration

The rise of mandatory arbitration in employment led to substantial criticism by proponents of employee rights. Some critics contended that requiring employees to arbitrate claims arising from statutory employment rights undermined both the employees' individual interests and the public interest. When a significant civil rights claim is resolved in a private forum, the individual employee loses access to the procedural rights available in a judicial forum; often, these procedural rights can be as important as the substantive ones.⁵

Some pointed out that employers might have an unfair advantage over individual employees in an arbitral forum because the employer was a "repeat player" whom arbitrators might favor—consciously or unconsciously—as a source of future business.⁶ In addition, the privatization of employment dispute resolution means that a decision made in an arbitral forum does not make binding case law.⁷ This is a particular problem where the employment dispute involves a civil rights claim.⁸ There were numerous calls for the outright prohibition of pre-dispute arbitration agreements in the employment context.⁹

The Arbitration Fairness Act and Persistent Efforts at Legislative Reform

These calls for reform inspired numerous legislative initiatives in Congress. Between 1995 and 2010, members of Congress introduced 139 bills that would have prohibited mandatory arbitration entirely or sharply restricted the circumstances under which it could be used in the employment context, the consumer context, and other areas.¹⁰ In 2007, 110 representatives and senators supported a proposed Arbitration Fairness Act, which would have limited the statutory rights that could be subject to mandatory arbitration.¹¹ It never got out of committee, however.¹² Similar legislation proposed two years later attracted 127 co-sponsors in both houses, but it failed to get beyond committee consideration as well.¹³ After the election of President Barack Obama in 2008, some reform advocates became optimistic about the process for passing such legislation, but that optimism was not realized.¹⁴

Despite these unrealized efforts at reform, a version of the Arbitration Fairness Act is still garnering at least some support in Congress. In 2013, Sen. Al Franken of Minnesota proposed yet another Arbitration Fairness Act.¹⁵ Under this proposed legislation, any pre-dispute agreement to arbitrate employment or civil rights claims, and other kinds of claims, would be presumptively unenforceable.¹⁶

Alternative Approaches to Reforming Mandatory Employment Arbitration

On a theoretical level, the criticisms of mandatory arbitration are persuasive, and it is therefore easy to understand the legislative ef-

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forts aiming to control the abuse of mandatory arbitration. But there is a difference between theory and practice; the extensive history of mandatory employment arbitration over the last two decades begs whether the practice of mandatory arbitration in employment disputes is necessarily unfair to employees. Substantial evidence suggests that it is not. According to a study by the U.S. General Accounting Office, in the securities trading industry, in which all brokerage houses uniformly require pre-dispute arbitration agreements with the employees (plus their customers), employees prevailed in arbitrations 55 percent of the time.¹⁷ By comparison, in employment litigation in courts, employees prevailed less than 20 percent of the time.¹⁸ Other studies have shown less favorable results for employees in arbitration as compared to litigation, and nuanced studies suggest that the success rate for employees depends upon the issues raised and whether the employee is a highly paid executive or an hourly wage worker.¹⁹ But no studies show that employees are at a significant disadvantage in arbitrations or that arbitral forums are not effective in vindicating statutory rights.²⁰

The most effective means of making employment arbitration fairer for employees is to reform it, not to prohibit it. During the 1990s, as the arbitration wave was gathering, various groups suggested principles that should be adopted by all employment arbitration tribunals to assure fairness to employees.²¹ These recommended procedural guarantees include: (1) an arbitrator jointly selected by the parties and who is familiar with legal issues in the field; (2) simple, adequate discovery; (3) cost-sharing to assure arbitrator neutrality; (4) assuring that the employee can be represented by a person of his or her choice; (5) remedies equivalent to those provided in judicial forum; (6) a written opinion by the arbitrator; and (7) meaningful judicial review that focuses on legal issues.²² When such procedural protections are in place, an arbitration can provide a fair forum in which employees can adjudicate their rights, including those arising from statutes and those arising from the terms and conditions of employment.

Conclusion

Two decades of legislative action have failed to produce a statute that will restrict mandatory arbitration in employment disputes. Those who question the fairness of such arbitration may be better served by focusing their efforts on the promulgation of uniform procedural standards for arbitration. Empirical evidence shows that arbitration is not necessarily a hostile forum for employees, and, with the right procedural safeguards, it can provide the same protection for employees' rights as a judicial forum, with a lower cost and speedier results. ☺

Endnotes

¹Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 631-32 (2010).

²*Id.*

³*Id.* at 633.

⁴*Id.*; see, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that a pre-dispute agreement to arbitrate was enforceable because it did not involve a waiver of any substantive rights and only involved an agreement on the forum in which those rights would be adjudicated); *Rembert v. Ryan's Family Steak Houses Inc.*, 235 Mich. App. 118; 596 N.W.2d 298 (1999) (holding that a pre-dispute arbitration agreement was enforceable

when it was executed as part of an employment application and when it applied to all disputes, including those arising from federal and state civil rights statutes).

⁵St. Antoine, *supra* note 1, at 633.

⁶*Id.* at 633-34; see also Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

⁷Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L. J. 381, 429-31 (1996).

⁸*Id.*

⁹See, e.g., Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 2 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996).

¹⁰Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1332-37.

¹¹Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007).

¹²Burch, *supra* note 10, at 1334.

¹³Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3 (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009); see also Burch, *supra* note 10, at 1334.

¹⁴St. Antoine, *supra* note 1, at 629-30.

¹⁵S.878, Arbitration Fairness Act of 2013, available at: <https://www.congress.gov/bill/113th-congress/senate-bill/878/text> (last visited Jul. 30, 2015).

¹⁶*Id.*

¹⁷Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998); Hoyt N. Wheeler et al., *Workplace Justice Without Unions* 48 (2004)

¹⁸Maltby, *supra* note 17, at 46.

¹⁹St. Antoine, *supra* note 1 at 637-40 (discussing numerous studies that analyze the results of employment arbitrations).

²⁰*Id.*

²¹*Id.* at 641-43.

²²*Id.*

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