



THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS

*Effective and Affordable Access to Justice for Consumers
Empirical Studies & Survey Results (2004)*

EXECUTIVE SUMMARY

Individuals fare at least as well in arbitration than in the lawsuit system, if not better, according to all of the reliable evidence on the use of pre-dispute agreements to arbitrate.

Survey results reveal that consumers and attorneys favor arbitration over the lawsuit system by wide margins in terms of timeliness and cost.

Many independent studies, including those conducted by the Litigation Section of the American Bar Association, have confirmed the comparative benefits of arbitration (versus lawsuits) for both businesses and consumers.

Yet experts have concluded that the benefits of arbitration for consumers are completely lost when parties may only agree to arbitration after a legal dispute arises (e.g., “post-dispute arbitration”). Attorneys for both businesses and consumers will rarely agree to utilize fast and inexpensive arbitration after a dispute arises because one party or the other will perceive a strategic advantage in leveraging the war of attrition provided by the existing lawsuit system. Accordingly, pre-dispute arbitration provides the only real avenue for parties to gain access to affordable and timely justice.

Here is a synopsis of results illustrating the benefits of pre-dispute arbitration:

- Seventy-eight percent of trial attorneys find arbitration faster than lawsuits (ABA, 2003)
- Eighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits (ABA, 2003)
- Seventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits (*Corporate Legal Times*, 2004)
- Eighty-three percent of business attorneys find arbitration to be equally or more fair than lawsuits (*Corporate Legal Times*, 2004)
- Individuals prevail at least slightly more often in arbitration than through lawsuits (Delikat & Kleiner, 2003)
- Monetary relief for individuals is slightly higher in arbitration than in lawsuits (Delikat & Kleiner, 2003)
- Arbitration is approximately 36% faster than a lawsuit (Delikat & Kleiner, 2003)
- Individuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits (Maltby, 1999)
- Ninety-three percent of consumers using arbitration find it to be fair (Perino, 2003)
- Consumers prevail 20% more often in arbitration than in court (Perino, 2003)
- In securities actions, consumers prevail in arbitration 16% more than they do in court (U.S. General Accounting Office, 1992)
- Sixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages (Roper survey, 2003)

EMPIRICAL STUDIES AND SURVEYS ON PRE-DISPUTE ARBITRATION

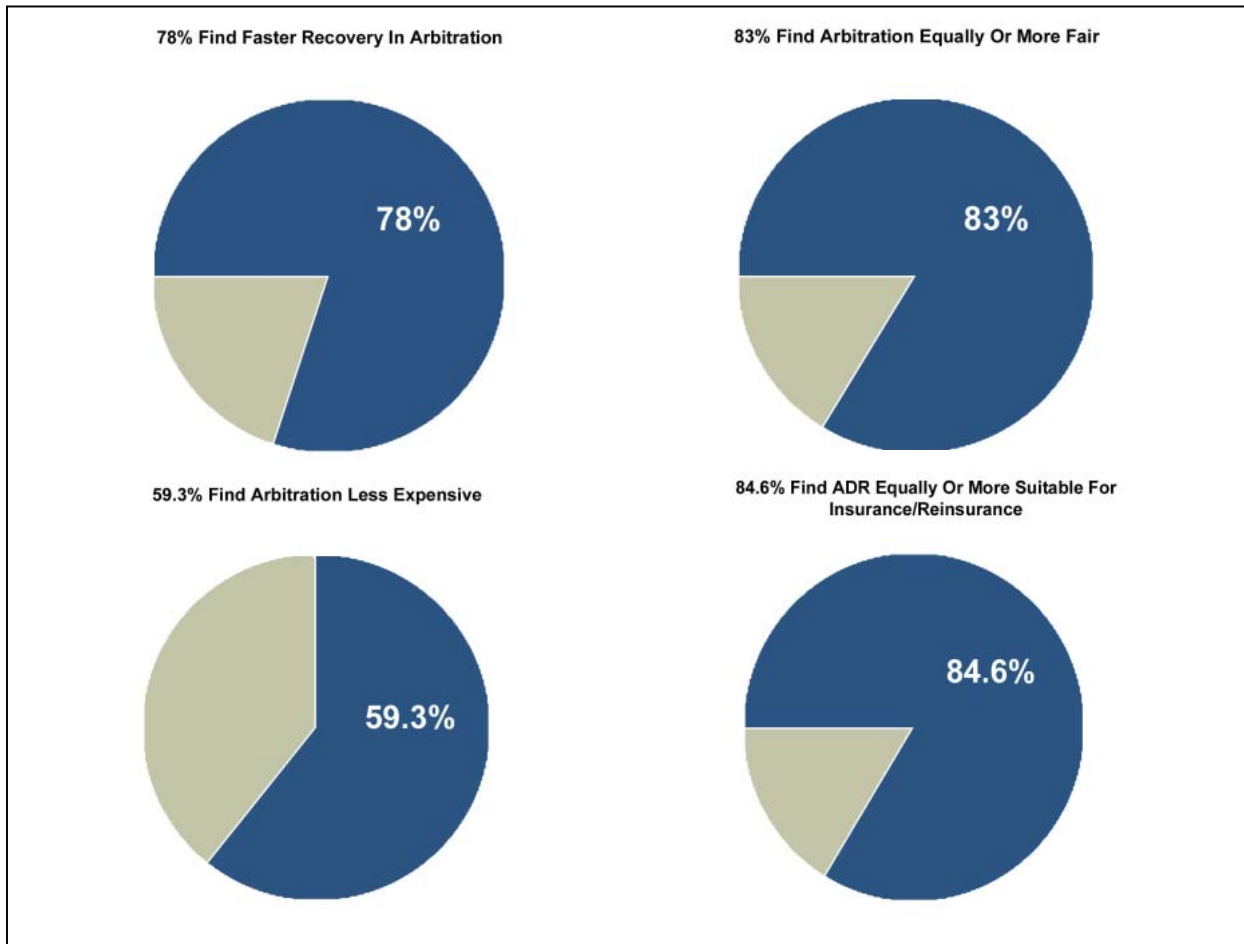
The Truth About ADR: Do Arbitration And Mediation Really Work?

Michael T. Burr

Corporate Legal Times - February 2004

This article provides the results of a survey of general counsel and other high-ranking in-house counsel from both public and private companies in October and November of 2003.

When comparing arbitration to the traditional adjudication process, 59.3% surveyed indicated arbitration was less expensive, 78% indicated arbitration led to a faster recovery, and 83% indicated arbitration was either equally fair or more fair than the traditional adjudication process. In addition, when comparing ADR processes to traditional adjudication processes in terms of suitability for Insurance/Reinsurance, 84.6% of those surveyed indicated ADR was equally suitable or more suitable than the traditional adjudication process.

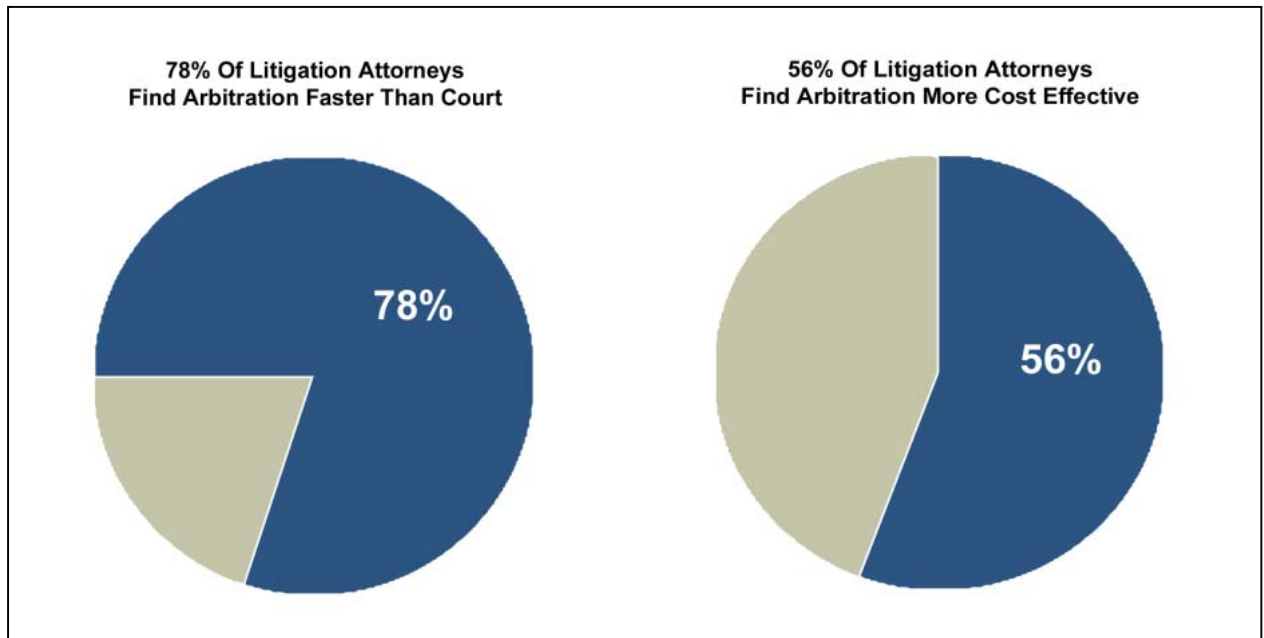


Survey On Arbitration

ABA Section of Litigation Task Force on ADR Effectiveness

American Bar Association - August 2003

The ABA Section of Litigation Task Force was formed in August of 2002 with the mission of surveying trial lawyers regarding various ADR processes. Several of the survey questions were aimed at determining the trial lawyers' opinions in comparing ADR to the litigation process. When comparing arbitration to litigation, 78% of those surveyed said that arbitration was timelier than litigation, and 56% said that arbitration was more cost effective than litigation.

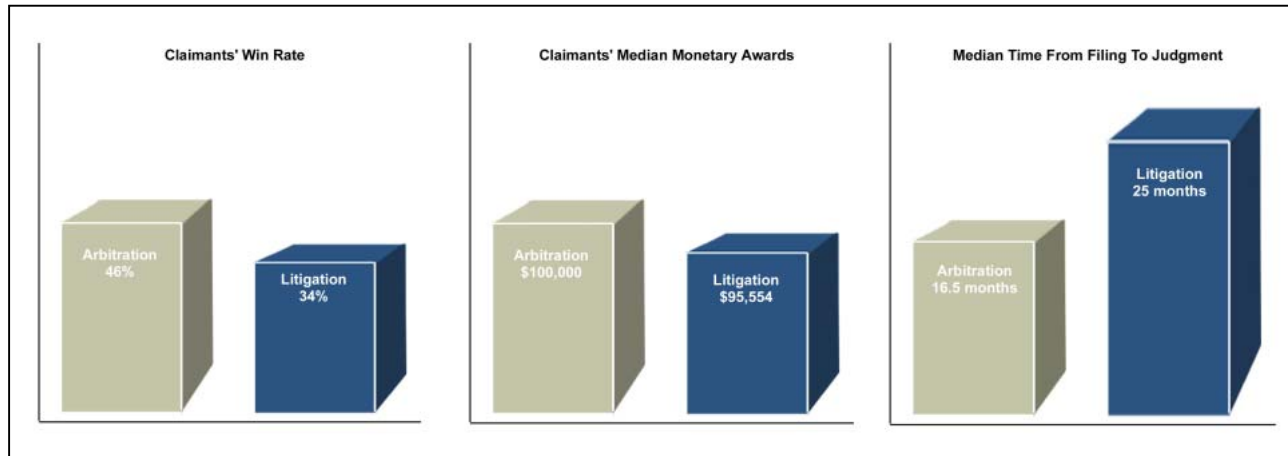


Comparing Litigation And Arbitration Of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights In Litigation?

Michael Delikat & Morris M. Kleiner

American Bar Association Litigation Section Conflict Management Vol. 6, Issue 3 – Winter, 2003

This study compares various outcomes and timing factors involved in 125 employment discrimination cases filed in the Southern District of New York with 186 arbitrations involving employment disputes in the securities industry.



Claimants prevailed 46 percent of the time in an arbitral forum versus 34 percent in court. The outcomes involving arbitration generated higher median monetary awards for successful claimants--\$100,000 for arbitration compared to \$95,554 in court. Furthermore, arbitrations were significantly more efficient than litigation, as the median time from filing to judgment was 16 ½ months for arbitrations and 25 months for claims subject to litigation.

The study concludes that plaintiffs are better served by arbitration relative to the federal courts, in terms of speedy justice and the likelihood of positive outcomes, and that arbitration provides the benefit of faster dispute resolution and lower transactional costs than the courtroom can offer.

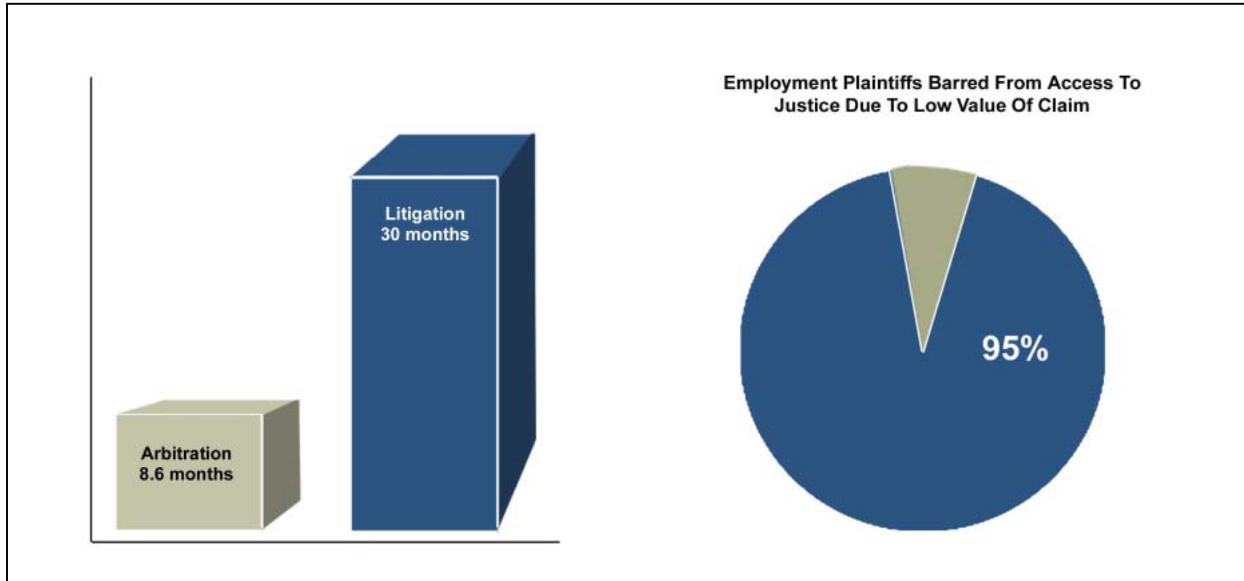
Private Justice: Employment Arbitration And Civil Rights

Lewis L. Maltby

Columbia Human Rights Law Review – Fall, 1998

(30 Colum. Hum. Rts. L. Rev. 29)

Combining the results of several studies comparing numerous factors involved in the resolution of employment disputes brought in arbitration and in court, this article presents results that further establish that employees are more successful when their case is brought in an arbitral forum.



Relying on a study of employment arbitrations that took place between 1993 and 1995 and federal district court cases in 1994, employees were found to be successful 63 percent of the time in arbitration, compared with only 15 percent in federal court. The article notes that the average case resolved in an arbitral forum took 8.6 months, compared to two and a half years in the courts. Lastly, a discussion of barriers to an individual plaintiff's access to justice concludes that as many as 95 percent of those who seek help from the private bar with an employment matter do not obtain counsel primarily because the costs associated with resolving an employment dispute in a court can begin at \$10,000, even if the case is resolved without trial.

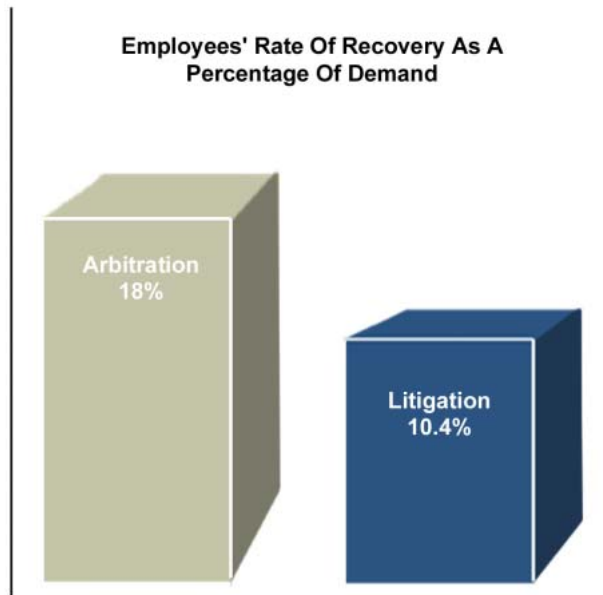
Employment Arbitration: Is It Really Second Class Justice?

Lewis L. Maltby

Dispute Resolution Magazine – Fall, 1999

(6 No. 1 Disp. Resol. Mag. 23)

Using data from employment arbitrations taking place between 1993 and 1995, employees were found to have won 63 percent of the time. By contrast, employees were only successful 15 percent of the time when their employment claims were taken to federal district court in 1994. Data are also presented which demonstrate that some 60 percent of the cases brought in court are resolved by summary judgment, where employers prevail on motion 98 percent of the time. Furthermore, the entire class of employees who took their disputes to arbitration received 18 percent of their total demand, compared with only 10.4 percent in court.



Maltby concludes that far more employees win in arbitration than in court and that their awards are almost twice as high, over the entire class of employees who bring their disputes in arbitration, than those who choose the courthouse.

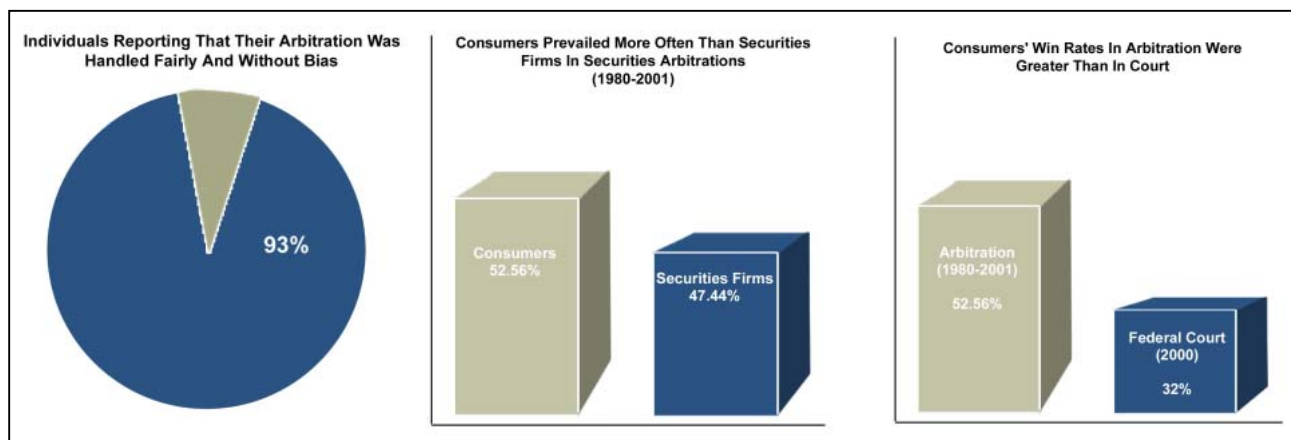
Report To The Securities And Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements In NASD And NYSE Securities Arbitrations

Michael Perino, Visiting Professor Columbia Law School, Associate Professor St. John's University School of Law

(Report contained at <http://www.nyse.com>)

This report, commissioned by the Securities and Exchange Commission (SEC), examines and evaluates the requirements governing the disclosure of arbitrator conflicts for self-regulatory organizations (SROs) subject to SEC oversight.

In a November 2002 report on arbitral fairness in securities arbitrations involving consumers, Professor Michael Perino from St. John's University School of Law found no evidence of favoritism toward one party or another in more than 30,000 arbitrations.



The data were derived from securities arbitrations involving consumers over a 21-year period (1980-2001). During those years securities industry arbitrators decided 31,001 public customer cases, and 16,294 of those cases (52.56%) resulted in awards for consumers. (Note: Federal court data from the Administrative Office of the United States Courts shows that in 2000, plaintiffs in "Stockholders Suites" prevailed only 32% of the time).

Furthermore, in a study surveying the responses of NASD investor-participants regarding their perceptions of fairness of SRO arbitrations, the results showed that an overwhelming 93 percent of the respondents believed their cases were handled fairly and without bias. Also, over 91 percent of respondents said their arbitrators demonstrated a level of fairness that was classified as excellent or good.

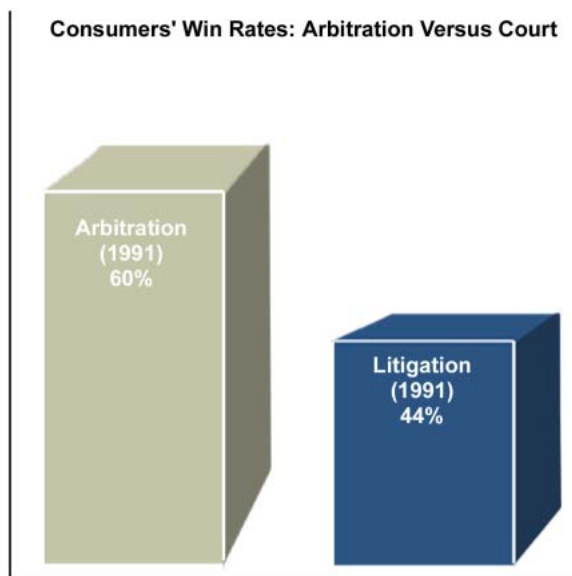
Securities Arbitration: How Investors Fare

United States General Accounting Office

Rep. No. GAO/GGD-92-74 – May 11, 1992

(Available at <http://www.gao.gov>)

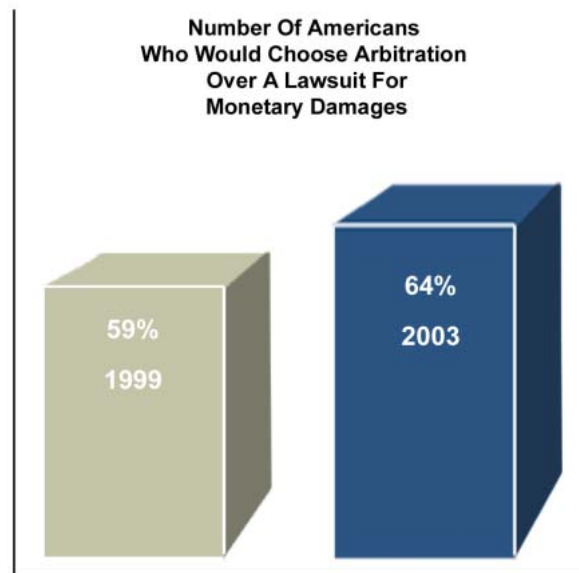
At the request of Congress, the U.S. General Accounting Office (GAO) compared the results of over 6,600 awards issued during a six-month period from both industry-sponsored self-regulatory organizations (SROs) and independent dispute resolution providers to analyze the differences in awards between the two types of forums for resolution of securities arbitration disputes. The GAO concluded that the arbitration forum did not affect investors' chances of receiving an award. For most securities arbitrations, an average of 60 percent of investors received an award, and the amount awarded averaged about 60 percent of the amount claimed. The GAO also determined that the results of decisions in arbitration cases at both industry-sponsored and independent forums showed no indication of a pro-industry bias in decisions. Federal Court data from the Administrative Office of the United States Courts shows that in 1991 plaintiffs in "Stockholders Suits" prevailed only 44% of the time.



Legal Dispute Study

RoperASW: Survey for the Institute for Advanced Dispute Resolution
April, 2003

Updating a study conducted in 1999, this study revisits Americans' awareness, knowledge, attitudes and experiences regarding arbitration as an option for resolving disputes. Most notably, the study found that sixty-four percent of respondents said they would choose arbitration over a lawsuit in disputes involving monetary relief. This figure represents an increase of five percent from the 1999 study.



Also, the number of Americans that believe it is usually worthwhile to initiate a lawsuit dropped significantly since 1999: fifty percent in 1999 compared with thirty-four percent in 2003. Furthermore, two-thirds or some sixty-seven percent of respondents feel that lawsuits take too long, while one-third or some thirty-two percent say that lawsuits cost too much.

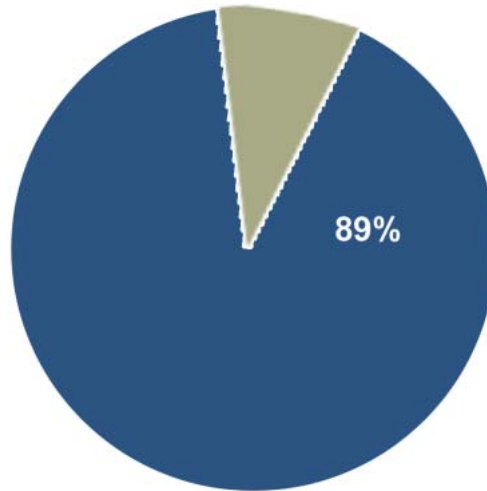
Costs And Value Of Arbitration

Lisa Brener

World Arbitration & Mediation Report – April 2003
(14 No. 4 *World Arbitration & Mediation Report 111*)

Using the rules of procedure from a major North American dispute resolution provider, this article examines the nature and scope of arbitration costs as well as the overall value of arbitration in contrast to litigation. In a 1990 survey, 100 percent of respondents found arbitration to be quicker than litigation. Furthermore, 89 percent found that arbitration was less expensive than litigation. Also noteworthy in the survey was that only 17 percent of attorneys' time was spent on discovery in an arbitral setting, compared to 45 percent in court, and over half of the respondents believed arbitral awards were more equitable than the outcomes in litigation.

**Dispute Resolution Users Who Found Arbitration
Less Expensive Than Litigation**



Due Process At Low Cost: An Empirical Study Of Employment Arbitration Under The Auspices Of The American Arbitration Association

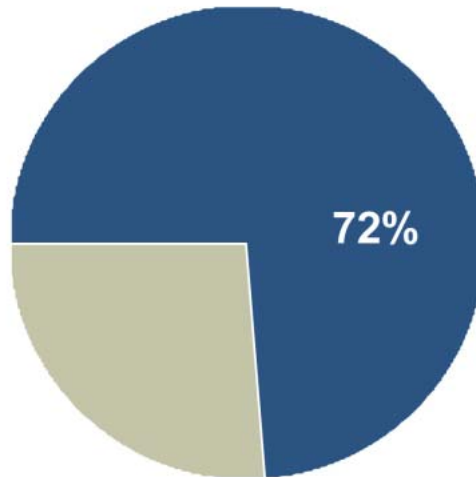
Elizabeth Hill and Theodore Eisenberg

Ohio State Journal On Dispute Resolution - 2003

(18 *Ohio St. J. Disp. Resol.* 777)

This empirical study of 200 employment arbitration awards, randomly selected from a pool of 356 awards made by arbitrators, evaluates numerous factors and refutes common criticisms of employment arbitrations. One noteworthy finding is that while 72% of the employees studied were of low to middle income (between \$14,000 and \$60,000) and did not earn enough to gain access to the courts with their employment—related claims, arbitration was affordable for those same employees. The study concludes that employment arbitration is not biased in favor of employers or highly compensated employees and that arbitration can competently resolve statutory employment discrimination claims, contrary to former criticism in this regard. Also, the study presents evidence that conclusively refutes any empirical support for the “repeat player effect,” the theory that an employer who arbitrates more than once will win more frequently than other employers. If any bias exists, the study concluded, the data suggest it is in favor of employees rather than employers.

72% Of Claimants Could Not Afford To Litigate But Could Afford Arbitration



The Availability Of Post-Dispute Arbitration Is A Theory That Fails In Real Life

Proponents of so-called “post-dispute arbitration” advocate restricting the rights of Americans to freely contract for their future legal disputes to be handled in an arbitral forum, because, they say, arbitration will still be available as an “option” later on. Put another way, to post-dispute theorists, the decision to use arbitration should only be available once parties to a legal dispute have already reached their boiling point and are actively involved in a lawsuit.

While a superficially reasonable construct in theory, post-dispute arbitration fails miserably in practice. In real life, a host of factors prevent parties from ever using post-dispute arbitration. As a result, the evidence shows that post-dispute arbitration agreements fail to provide anyone with a reasonable hope of resolving a legal dispute outside of expensive and time-consuming litigation. And worse yet, post-dispute arbitration would ensure that millions of Americans who cannot currently afford a lawyer would be further relegated to the back of the line, sentenced to a lifetime of no legal recourse at all.

All the experts have concluded that the benefits of arbitration for consumers are completely lost when parties may only agree to arbitration after a legal dispute arises. There are four major reasons why post-dispute arbitration will not work, leaving pre-dispute arbitration the only real avenue for parties to gain access to affordable and timely justice.

**Reason 1:
Parties in real-life disputes don't use post-dispute agreements to arbitrate, so they do not solve the problem presented by costly and time-consuming lawsuits.**

Statistics show that, in reality, parties rarely agree to post-dispute arbitration. According to researchers at the University of California at Berkeley:

*[T]he one overriding problem with post-dispute voluntary arbitration is that, according to the evidence carefully examined herein and a logical analysis of the economic, political, and legal incentives of the parties and their lawyers, it is extremely rare for both the plaintiff's and defense's attorneys in a case to select arbitration after the dispute has arisen. Accordingly, because parties do not choose to arbitrate when a case is ripe, voluntary arbitration fails to address any of the problems inherent in the current system.*¹

The Berkeley researchers conclude that the benefits of pre-dispute arbitration are not present in post-dispute arbitration and that both businesses and individuals are hurt by post-dispute arbitration.²

In 2003, the ABA Section of Litigation Task Force of ADR Effectiveness produced a survey of trial attorneys showing that parties do not subscribe to the “post-dispute arbitration” theory. According to that survey, only 4.2% of litigators always recommend post-dispute arbitration to their clients.

Other empirical research suggests results that are even worse for the post-dispute theorists: the

use of post-dispute arbitrations accounted for only 2.6% of employment arbitrations in 2002, a decrease from 6% in 2001.³

Reason 2:

In our litigious society, unless parties agree to arbitration before a dispute arises, one party will never opt for a solution that is faster and less expensive than a lawsuit.

As the former President of the American Bar Association, William Paul, has noted,

*If you don't take anything else away from this presentation, at least take this: You will most probably not have the arbitration opportunity unless the contract giving rise to the dispute includes a binding arbitration clause. **The odds of an agreement for binding arbitration being entered into after a dispute has arisen are not great. At that stage one party or the other will have a view that traditional litigation offers some advantage which the party does not choose to relinquish ... So if you prefer binding arbitration, put a provision for it in the contract, up front, when the deal is made, and before the dispute arises and then, and only then, will you have assured arbitration as the preferred dispute resolution mechanism.***⁴

At the point of signing a contract there is enough ambiguity for both parties to feel comfortable in agreeing to a pre-dispute arbitration agreement. Once a dispute occurs, however, one of the parties will perceive that litigation offers strategic advantages. The hostility and suspicion regarding the opposing party's motives once a dispute occurs will also work to prevent parties from agreeing to arbitration post-dispute. Once the parties are cast in adversarial roles, it is unrealistic to think that they will agree to arbitrate.

Reason 3:

Without pre-dispute agreements to arbitrate, consumers will have no access to court, much less arbitration.

Plaintiffs' attorneys often do not even consider taking a case unless the potential damages can be valued at \$75,000 or more.⁵ As a result, up to 95% of employment plaintiffs are denied access to justice due to the inability to retain an attorney who will litigate their claim.⁶ Consumer claimants need to retain access to a forum in which they can seek justice. Pre-dispute arbitration agreements will preserve that access.

Reason 4:

Calling pre-dispute arbitration agreements "mandatory" is a misnomer.

Even if a contract can be considered “take-it-or-leave-it,” due to standard industry practices, consumers still retain the right to walk away. Consumers who sign a contract that includes an arbitration clause are entering into a voluntary agreement to arbitrate. What some call mandatory arbitration should properly be called contractual arbitration.⁷

CONCLUSION

Individuals fare at least as well in arbitration than in lawsuits, if not better, according to the reliable evidence on the use of pre-dispute agreements to arbitrate. Moreover, when surveyed, consumers and attorneys view arbitration favorably to the lawsuit system by wide margins in terms of timeliness and cost.

Many independent studies, including those conducted by sections of the American Bar Association, have confirmed the comparative benefits of arbitration versus lawsuits for both businesses and consumers.

But the success of pre-dispute arbitration in providing justice to parties does not transfer over to a post-dispute-only arbitration system. Numerous experts have concluded that the benefits of arbitration for consumers are completely lost when parties may only agree to arbitration after a legal dispute arises (e.g., “post-dispute arbitration”). Attorneys for both businesses and consumers will rarely agree to utilize fast and inexpensive arbitration after a dispute arises because one party or the other will perceive a strategic advantage in leveraging the war of attrition provided by the existing lawsuit system.

Accordingly, pre-dispute arbitration provides the only real avenue for parties to gain access to affordable and timely justice outside the court system.

¹ 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, 8 (2003) (emphasis supplied).

² See Sherwyn at 67-68.

³ Lewis Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements* (May 2003) (available at http://www.workrights.org/current/cd_adr.html; last visited Feb. 16, 2004).

⁴ William G. Paul, *Arbitration vs. Litigation in Energy Cases*, First Annual Energy Litigation Program (Co-Sponsored by the Center for American and International Law and by the ABA Section of Environment, Energy and Resources) (Nov. 2002) (available at <http://www.arbitration-forum.com/articles/pdfs/Paul-pdf.pdf>; last visited Feb. 16, 2004).

⁵ Lewis L. Maltby, *Employment Arbitration And Workplace Justice*, 38 U.S.F.L. Rev. 105, 106-107 (2003).

⁶ Lewis L. Maltby, *Private Justice: Employment Arbitration And Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 58 (1998).

⁷ See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, And State Constitutional Jury-Trial Rights*, 38 U.S.F.L. Rev. 39 (2003); see also Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead The Charge*, Cato Policy Analysis, No. 433 (April, 2002) (available at <http://www.cato.org/pubs/pas/pa-433es.html>; last visited Feb. 17, 2004).