Chapter 8

EMPLOYMENT ARBITRATION

I. The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes

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Introduction[2]

A major development in systems for the enforcement of individual employment rights is the use of alternative dispute resolution (ADR) procedures to resolve claims by employees. At their best, ADR procedures hold the potential for greater accessibility by employees to enforcement of substantive employment rights while avoiding excessive costs for the public and employers in processing claims. On the other hand, ADR procedures, particularly mandatory employment arbitration procedures, have been criticized as privatizing justice and denying effective enforcement of employee rights.

This paper presents the results of a new empirical study of employment arbitration. Despite the growing importance of employment arbitration in the workplace, empirical research on this phenomenon remains in its infancy, and views on arbitration are often characterized by assumptions, impressions, and anecdotal reports. The analysis presented here attempts to systematically examine some of the common assumptions about the decision making of employment arbitrators. In particular, we examine three propositions that are often injected into discussions of arbitral decision making: (1) arbitrators favor compromise

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decisions, proverbially "splitting the baby" between the two parties; (2) arbitrators are less inclined to award very large damage claims of the type sometimes seen in jury decisions; and (3) arbitrators prefer to award at least some token amount of damages to a party bringing a case rather than deny any recovery. We analyze these propositions using a unique dataset developed from analysis of employment arbitration case files of the American Arbitration Association (AAA), arguably the leading provider of employment arbitration services in the country.

The Rise of Employment Arbitration

Two trends lie behind the rise of employment arbitration in American employment relations. The first is the growth of statutory employment rights and resulting litigation. The basic rule of employment law in all states apart from Montana continues to be employment-at-will, a common law rule that an employer may dismiss an employee for good reason, bad reason, or no reason at all, with no requirement to supply any notice before dismissal or provide any severance pay. Given the continued adherence by the courts to this principle, employment law in the United States has developed around a series of specific exceptions to the general rule. These include prohibitions on dismissals for union organizing activity contained in the National Labor Relations Act[3] and protections for whistleblowers in some limited circumstances involving strong public interests. The broadest exceptions to employment-at-will are in the statutory prohibitions against employment discrimination. The initial expansion of individual employment rights came with the enactment of Title VII of the Civil Rights Act of 1964,[4] which prohibits discrimination in employment based on race, color, sex, religion, or national origin. This was followed by the Age Discrimination in Employment Act of 1967,[5] which prohibits discrimination against workers older than the age of 40, and later the Americans with Disabilities Act of 1990,[6] which prohibits discrimination against employees with disabilities. In addition to these federal laws, states enacted parallel laws that prohibit employment discrimination, some of which

[3]Pub. L. No. 74-198, 49 Stat. 449 (1935).
[4]Pub. L. No. 88-352, 78 Stat. 241 (1964).
[5]Pub. L. No. 90-202, 81 Stat. 602 (1967).
[6]Pub. L. No. 101-336, 104 Stat. 327 (1990).

expand the prohibited grounds of discrimination to include things like family status and sexual orientation.[7]

These prohibitions against discrimination are enforced through the distinctive American litigation system. Initially, Title VII provided for trials by judge alone and limited damages to compensation for lost income. However, the 1991 Civil Rights Act amendments[8] added provisions for the recovery of damages for pain and suffering as well as punitive damages and allowed for jury trials. These changes increased the potential for larger damage awards for employment discrimination and helped spur an increase in litigation. The relatively large damage awards in U.S. employment litigation are illustrated by a study of federal court cases from 1999 to 2000 that found an average employee win rate of 36.4 percent, a median damage award for successful plaintiffs of $150,500, and a mean damage award of $336,291.[9] Similarly, a study of California state court decisions found an employee win rate of 59 percent and a median damage award of $296,991.[10] By international standards, these represent very large damage awards, which have served to focus U.S. employers on the dangers of litigation despite the relative limitations of substantive protection for employees.[11]

The second trend that led to the rise of mandatory employment arbitration was a shift by the U.S. courts in favor of deferral to alternative dispute resolution (ADR) procedures. Beginning in the 1970s and 1980s, the U.S. courts took an increasingly favorable view of ADR as a mechanism for reducing litigation and clearing up overloaded court dockets. In a series of decisions in the 1980s, the U.S. Supreme Court reinterpreted the Federal Arbitration Act of 1925[12] to permit the arbitration of claims based on statutes, not just the contractual claims that had previously been seen

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[7]The National Conference of State Legislatures provides a current list of these laws at http://www.ncsl.org/issues-research/labor/discrimination-employment.aspx (last visited Aug. 17, 2012).

[8]Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[9]Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) Disp. Resol. J. 44 (Nov. 2003–Jan. 2004).

[10]David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. Davis L. Rev. 511 (2003).

[11]Alexander J.S. Colvin, *Flexibility and Fairness in Liberal Market Economies: The Comparative Impact of the Legal Environment and High Performance Work Systems*, 44(1) Brit. J. Indus. Rel. 73–97 (2006).

[12]Pub. L. No. 68-401, 43 Stat. 883 (1925).

as the province of arbitrators.[13] These decisions initially dealt with areas such as securities, antitrust, and antiracketeering law. However, in the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*,[14] the Supreme Court for the first time held that a claim based on an employment discrimination statute could be subject to arbitration. This decision set off a wave of adoption of mandatory arbitration procedures by employers seeking to escape the dangers of the litigation system.[15] The key feature of these mandatory arbitration procedures is that employees were required to agree to them as a term and condition of employment. Once entered into, they required that all legal claims by the employee against the employer be brought through arbitration and that the employee would no longer be able to initiate or appeal claims in the courts.

Although some uncertainty remained as to the scope of the *Gilmer* decision, the new model of mandatory employment arbitration received the imprimatur of the Supreme Court in its 2001 decision in *Circuit City v. Adams,*[16] which upheld the enforceability of a mandatory arbitration procedure. Although there is no definitive accounting of the number of mandatory arbitration procedures, the best survey evidence suggests that around a quarter to a third of all nonunion employees in the United States are now covered by mandatory arbitration procedures.[17] With union membership now down to 11.3 percent of employees in the United States,[18] this suggests that mandatory employment arbitration has already become a significantly more widespread institution governing employment relations than collective bargaining and labor arbitration.

The rise of mandatory arbitration has sparked vociferous debates between its advocates and critics. Advocates of mandatory arbitration argue that it provides a faster, more efficient, and fairer alternative to the complex and unwieldy system of employ-

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[13]For a discussion of these decisions, see, e.g., Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s,* 73 DENVER L. REV. 1017, 1030 (1996).

[14]500 U.S. 20 (1991).

[15]Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies and the Rise of Nonunion Dispute Resolution Procedures,* 56(3) INDUS. & LAB. REL. REV. 375–92 (2003).

[16]532 U.S. 105 (2001).

[17]Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?,* 11(2) EMP. RTS. & EMP. POL'Y J. 405 (2008); David Lewin, *Employee Voice and Mutual Gains,* Labor and Employment Relations Association (LERA) Proceedings (2008).

[18]Press Release, Bureau of Labor Statistics, Union Members in 2012, USDL-13-0105 (Jan. 23, 2013).

ment litigation.[19] They note that the high costs and slow speed of the litigation system mean that few employees will in practice be able to benefit from the large damage awards at the end of successful trials, whereas more employees could have access to justice under simpler, more accessible arbitration procedures.[20] By contrast, critics argue that the ability of the employer to design and promulgate mandatory arbitration procedures will result in a system that favors the interests of the employer over the employee and avoids the public scrutiny provided by the court system.[21] They suggest that the supposed benefits of efficiency and accessibility of arbitration will prove illusory as employees must grapple with a system over which they lack control and that produces outcomes tending to favor employers.[22] Empirical research on these issues has been relatively limited, in part due to the difficulties in gathering data on what are essentially private dispute resolution procedures.[23]

Arbitral Decision-Making Tendencies

What processes are involved in arbitrator decision making? Arbitration as a private process is a creation of the agreement of the two parties. The arbitrator decides the case because he or she has been selected jointly by the two parties to serve as the decision maker. To the degree that the arbitrator wishes to achieve selection for future cases as an arbitrator, this creates an incentive for the arbitrator to attempt to satisfy both parties in the decision-making process. As a result, arbitrators are sometimes accused of issuing compromise decisions. This criticism also has been leveled at international arbitral decisions.[24] By contrast, others have disputed this assumption and argued that arbitrators do not

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[19]David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Direction for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

[20]Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559 (2001).

[21]Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

[22]David Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. 1247 (2009).

[23]Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11(2) Emp. Rts. & Emp. Pol'y J. 405 (2008).

[24]Kenneth I. Juster, *The* Santa Elena *Case: Two Steps Forward, Three Steps Back*, 10 Am. Rev. Int'l Arb. 371–81 (1999).

engage in such proverbial "splitting the baby."[25] In this paper we test empirically whether employment arbitrators in fact engage in splitting the baby.

A tendency to engage in the splitting-the-baby approach to arbitral decision making could manifest itself in two respects. One is to balance, over time, who wins each case, so that each side (e.g., employers and employees in employment arbitration) will win roughly half of the total number of cases.[26] Here the argument is that because arbitrators depend on selection by both parties for future business, arbitrators will consider the proportion of decisions that favor each party. That is not to say that the arbitrator will make rulings that clearly depart from the merits of the dispute in question; however, in marginal cases this argument suggests that the arbitrator may tend to balance out who is favored in decisions over a period of time.

A second manifestation of splitting the baby in decision making could occur in situations where some amount of damages is awarded. A tendency to favor compromise decisions could be seen here in the awarding of some, but not all, of the damages claimed.[27] For example, an exact splitting might be manifested in an award of half the amount claimed. Such compromise awards may be justified by the facts of the case, but the criticism is that arbitrators too often make compromise awards in an attempt to keep both parties reasonably satisfied.

The first proposition about employment arbitration decision making is:

Proposition 1: Employment arbitrators favor decisions that compromise between the parties.

A second starting point is to consider whether there is likely to be a difference in how arbitrators respond to particular kinds of claims as compared to litigation decision makers. A common complaint against litigation, particularly cited by business in justifying adoption of arbitration, is that juries are unpredictable, more sympathetic to consumers and employees than to businesses, and subject to emotional appeals that lead to extremely large damage

[25]Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663–76 (2008); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001).

[26]For a good review and critique of the premises of the splitting-the-baby criticisms of arbitration, see Drahozal, *supra* note 25.

[27]*Id.*; Keer & Naimark, *supra* note 25.

awards not justified by the facts of the case.[28] By contrast, arbitrators are professional neutrals who are less likely to be swayed by rhetoric or emotional appeals. Instead, as experts in the area, arbitrators may be offended by advocates who inflate damage claims. If this is the case, then we would expect to see a process in which arbitrators are much less likely to award most of the amount claimed if there was a large initial claim. If accurate, this phenomenon could provide an important incentive for employers concerned about large damage awards from juries to adopt employer-promulgated arbitration procedures. Conversely, the assumption that employment arbitrators are less likely to make very large damage awards may underlie some of the opposition to employment arbitration from plaintiff advocates. It suggests the following proposition:

Proposition 2: Employment arbitrators disfavor awarding the full amount of very large damage claims, even where liability is found.

An alternative tendency sometimes claimed for arbitrators relative to the courts is that they are more likely to award some small amount of damages even when liability might not be supported under the relevant legal standard. Litigation in the courts is designed to be an all-or-nothing decision-making process on the issue of liability. For example, absent proof of discrimination, a court should deny any liability to an employee on a claim of employment discrimination, regardless of how the judge or jury may feel about the fairness of the employer's conduct. Arbitrators are not bound by the same rules of evidence as courts and may not be as narrowly constrained in the factors they consider in their decision making. To the degree that fairness norms are incorporated into arbitral decision making in addition to strict legal standards, employment arbitrators may tend to award at least some damages to an employee claimant in cases where there has been unfairness in the employer's action, even if it does not rise to the level of a statutory or contractual violation. If there is a tendency of employment arbitrators to award employee complaints some degree of recovery based on fairness norms, then this would make arbitration a more attractive process for employees and their representatives. Conversely, if there is a fear that arbitrators

[28]Christopher R. Drahozal, *Mandatory Arbitration: A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105–32 (2004); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996).

incorporate fairness norms into their decision making and award claimants at least some amount even in the absence of liability, then this may lead some employers to disfavor arbitration.[29] Put alternatively, if litigation can provide employers with more of a full shield against liability than arbitration, then the incentive to use arbitration is lower. To investigate whether this is true, we test the following proposition:

Proposition 3: Employment arbitrators make small awards in favor of employee claimants rather than fully denying their claims.

The Data

For this study, we analyzed employment arbitration case files for the year 2008, made available to us by the AAA. The AAA is the largest arbitration service provider in the employment arbitration field. Many employers explicitly designate the AAA as the service provider in their standard arbitration agreements with employees and incorporate the AAA's employment arbitration rules into their procedures by reference. Use of AAA employment arbitration case files has the advantage of providing a reasonably large data source for analysis. Given its size and prominence in the employment arbitration field, the AAA's cases can be taken as representative of a significant segment of employment arbitration activity.

At the same time, there may be some limitations on generalizing this data to the whole universe of employment arbitration. The AAA has played a prominent role in debates about employment arbitration and was represented in the task force that developed the Due Process Protocol to establish basic fairness standards for employment arbitration.[30] The AAA's own rules for administration of employment arbitration cases reflect features of the Due Process Protocol. As an organization, the AAA has indicated that it will not administer arbitration cases under procedures that violate its own rules. However, employers are also free to craft procedures that designate their own arbitrators and rules and do not make use of any third-party arbitration service provider—what are

[29]Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 115 (2008).

[30]*Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 9A Lab. Rel. Rep. (BNA) No. 142, at 534:401 (May 9, 1995).

commonly known as ad hoc arbitrations. It is unknown to what degree these ad hoc arbitrations do or do not operate under procedures incorporating due process protections similar to those provided by the AAA rules. As a result, it is certainly possible that our analysis is examining a segment of the employment arbitration field operating under relatively higher fairness protections.

We obtained basic data on all 440 employment arbitration cases administered by the AAA that were awarded and closed during the 2008 calendar year. This included information on claim and award amounts. We also coded additional information from a subset of 286 arbitration case files. This allowed us to gather more detailed data on these cases, such as the type of legal claim being made and characteristics of the employee involved.

Case Characteristics

Agreement Type and Plaintiff Category

In analyzing data on employment arbitration cases, it is important to recognize that there are a number of different categories of cases involved. The first distinction to draw is between cases deriving from employer-promulgated procedures and cases deriving from individually negotiated agreements. Under employer-promulgated procedures, the employer presents the arbitration agreement to the employee, usually at the time of hiring, as a term and condition of employment. In this context, standard procedures are designed to cover employees as a group, similar to general work rules or benefit plans. This type of arbitration agreement is a classic adhesion contract. By contrast, under individually negotiated agreements, arbitration is included as a provision in an individual employment contract whose terms are subject to bargaining between the parties. Whereas most employees may be employed under the standard policies of the employer, individually negotiated contracts are more common among executives and employees with highly valued skills and knowledge that give them enhanced individual bargaining power. For these employees, arbitration may have attractions for resolving contractual disputes due to its greater speed and confidentiality.

The AAA administers employment arbitration cases deriving from both employer-promulgated procedures and individually negotiated agreements. Some early studies of employment arbitration aggregated cases from both categories together in their

analyses.[31] However, subsequent research has indicated that there may be substantial differences between these two categories of cases, producing differences in case outcomes.[32] In particular, whereas relatively high employee win rates of 50–60 percent were found in samples including cases based on individually negotiated agreements, employee win rates appear to be much lower under employer-promulgated procedures.[33] One obvious difference is that employees able to negotiate their own employment contracts are likely to have greater financial resources and sophistication, including better legal representation, in the event that they become involved in a legal conflict with their employers. In addition, they will often be able to bring claims based on the provisions of their individual employment contracts, whereas most employers in the United States are careful to draft standard employment handbooks and policies so that they do not alter the default American rule of employment-at-will. Given all of these differences, in our analysis we examine cases based on employer-promulgated procedures and individually negotiated agreements separately.

The second major distinction in types of cases in employment arbitration is between those involving claims by the employee and those involving claims by the employer. As in other contexts, such as labor arbitration, the typical employment law case is one in which the employee is making some claim of improper treatment by the employer. Common examples are claims such as wrongful dismissal, sexual harassment in the workplace, and violation of wage and hour laws. However, there are also occasional cases in which the employer is making a claim against the employee. Examples of these cases include situations where the employer is attempting to recover wages or other payments advanced to the employee or where the employer alleges that the employee has appropriated intellectual property or trade secrets belonging to the employer. Although less common, cases where the employer is the plaintiff may have different characteristics from those where

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[31]Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23(2) NEW ZEALAND J. OF INDUS. REL. 5 (1998); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

[32]Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) DISP. RESOL. J. 44 (Nov. 2003–Jan. 2004).

[33]Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11(2) EMP. RTS. & EMP. POL'Y J. 405 (2008); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8(1) J. EMPIRICAL LEGAL STUD. 1–23 (2011).

the employee is the plaintiff, so we examine them separately in our analysis.

Overall in our dataset there were 322 cases deriving from employer-promulgated procedures, 294 in which the employee was the plaintiff and 28 in which the employer was the plaintiff. There were 118 cases deriving from individually negotiated agreements, 99 in which the employee was the plaintiff and 19 in which the employer was the plaintiff. Summary statistics for our sample are presented in Table 1.

Sample Characteristics

We begin by examining the characteristics of the employees involved in the cases in our sample. In cases based on employer-promulgated procedures, 56.7 percent of the employees were male, 31 percent were managers, and 35.7 percent were professionals; there is some overlap in these last two categories. Of these cases 81.5 percent involved employees whose salary levels were under $100,000 per year. By contrast, employees in cases deriving from individually negotiated agreement were much more likely to be male (86.3%) and managers (66.7%) or professionals (69.8%). These employees also tended to be more highly paid, with 58.7 percent of them making between $100,000 and $250,000, and 18.7 percent making more than $250,000.

Another difference between cases in the two categories is that AAA rules provide that the employer must pay the arbitrator and administrative fees under employer-promulgated procedures, whereas in cases deriving from individually negotiated agreements, the agreement can specify how fees are to be split. Reflecting this difference in the rules, in 95 percent of the cases deriving from employer-promulgated procedures, the employer paid 100 percent of the arbitrator and administrative fees, apart from small employee filing fees equal to standard court filing fees ($150 or less). By contrast, although in 58 percent of the cases deriving from individually negotiated agreements the employer paid the full arbitrator and administrator fees, in 35 percent of these cases the fees were split equally between the employer and employee. Beyond the rule difference, the number of fee-splitting arrangements in the individually negotiated agreement cases likely reflects the greater ability of these higher-salaried employees to pay. (Some other arrangement was used in the remaining 7 percent of cases.)

Table 1. Summary Statistics for Full Sample and by Plaintiff and Agreement Type

	Full Sample	Employer-Promulgated: Employee Plaintiff	Individually Negotiated: Employee Plaintiff	Employer-Promulgated: Employer Plaintiff	Individually Negotiated: Employer Plaintiff
# of Cases	440	294	99	28	19
Claim Amount (Mean)	$1,201,640	$833,884	$1,775,970	$198,800	$3,037,819
Claim Amount (Median)	$190,000	$167,880	$233,427	$10,521	$833,433
Plaintiff Win	37.5%	24.7%	64.6%	57.1%	66.7%
Award Amount (Mean, wins only)	$137,869	$81,835	$220,376	$39,002	$152,947
Award Amount (Median, wins only)	$47,384	$36,609	$75,000	$10,000	$36,014
Award Amount (Mean, all cases)	$51,344	$19,967	$142,465	$21,668	$101,964
Partial Award (20–80% of claim)	15.6%	7.9%	26.0%	16.7%	40%
Arbitrator Fee (Mean)	$14,875	$12,657	$19,375	$7,658	$36,406
Discrimination Claims	34.1%	48.9%	6.9%	11.1%	0%

Employment Standards	5.2%	6.1%	2.2%	7.7%	0%
NAA Arbitrator	13.2%	13.6%	12.2%	7.1%	21.1%
Female Arbitrator	37.7%	37.1%	32.7%	50%	42.1%
Female Plaintiff	35.7%	43.9%	17.2%	32.1%	10.5%
Female Plaintiff's Attorney	19.8%	23.2%	10.1%	21.4%	15.8%
Employee Self-Represented	25.5%	30.6%	10.1%	42.8%	0%

An interesting characteristic of employment arbitration cases is the degree to which the claims are based on employment discrimination statutes as opposed to contractual or common law claims. This is an important issue in the debates around mandatory arbitration in the United States, because the key cases such as *Gilmer* and *Circuit City* focused on the issue of the arbitrability of claims based on employment statutes. Many of the critiques of mandatory arbitration have focused on the question of whether it is appropriate to allow private arbitrators deriving their authority from an employer-promulgated procedure to have decision-making power over statutory employment rights. Some earlier research on employment arbitration suggested that most arbitration claims were not based on discrimination statutes, and so these concerns were misplaced.[34] However, that early research involved samples with large numbers of cases based on individually negotiated agreements and relatively few cases based on employer-promulgated procedures. We classified the cases in our sample based on whether or not they included an employment discrimination–based claim. Among the cases with employee plaintiffs brought under employer-promulgated procedures, 48.9 percent included a claim of employment discrimination, and 6.1 percent included an employment standards, e.g., wage and hour, claim. This result indicates that statute-based claims of employment discrimination are common in arbitration under employer-promulgated procedures. The differing earlier research results were likely influenced by the experience of arbitration under individually negotiated agreements, which is more likely to be based on claims of breach of the individual employment contract. Supporting this interpretation, we found that in our sample, among cases based on individually negotiated agreements with employee plaintiffs, only 6.9 percent included claims of employment discrimination, with breach of contract being the basis for most of the claims.

Case Outcomes

The key outcomes in an arbitration award are whether the plaintiff is successful in establishing that the defendant was at fault and, if so, what damages are awarded. On the first element, a simple definition of whether the plaintiff won the case is whether liability

[34]Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) DISP. RESOL. J. 44 (Nov. 2003–Jan. 2004).

was established and some amount of damages was awarded. It is certainly possible to use other definitions of plaintiff success, such as looking at whether the plaintiff won a substantial amount of damages in the context of the case. Indeed, we will later examine the issue of the relationship between claim and award amounts. However, as a useful starting point, we examine whether the plaintiff won in the sense of establishing some degree of liability and what the damages awarded were. In Table 1, we report these outcomes by type of case and whether the employer or employee was the plaintiff.

Situations where there is an employee plaintiff under an employer-promulgated procedure are the paradigmatic example in debates around mandatory arbitration, and the largest category of cases, so we examine these first. The employee win rate in these 294 cases was 24.7 percent. Among the cases where the employee established some degree of liability, the mean damages awarded were $81,835. This also results in a mean damage award across all cases, including those where $0 in damages was awarded (i.e., there was no liability established) of $19,967. We were also able to separate out cases that involved employment discrimination. Among these discrimination-based cases, the employee win rate was 18.8 percent, and the mean damage award, including the $0 damages cases, was $21,871, and the mean damages for successful plaintiffs in these cases were $116,335. Compared to the outcomes of litigation in the U.S. courts, these are relatively lower win rates and award amounts. For example, studies have found employee win rates ranging from 36.4 percent in federal courts to 57 percent in state courts, with mean damage awards for successful plaintiffs of $336,291 in the federal court cases and $462,307 in the state court cases.[35] However, it is also important to recognize that there may be differences in the types of cases that end up in arbitration compared to litigation, which can affect these outcomes.

Outcomes varied substantially by case and plaintiff types. In cases with employee plaintiffs under individually negotiated agreements, the employee win rate was 64.6 percent, with a mean damages award among successful plaintiffs of $220,376 and a mean award for all plaintiffs (including $0 awards) of $142,465. There are a number of reasons that may explain the greater success of employees in arbitration under individually negotiated agreements. The substantive basis for their claims may have a naturally

[35] *Id.*

stronger grounding in breach of contract arguments deriving from provisions they negotiated to protect their own interests. By contrast, employees under employer-promulgated procedures are more likely to have to frame their claims around allegations of discriminatory treatment that are harder to prove or around the limited exceptions to the employment-at-will doctrine. Employees under individually negotiated agreements are also likely to have greater personal financial resources, as supported by our findings of higher salary levels for these workers. This may allow them to retain better legal counsel, increasing their chances of success. Their greater salary levels are also likely to result in larger damage amounts for lost income. All these factors reinforce the advantages of employees under individually negotiated agreements compared to their compatriots under employer-promulgated procedures. They also indicate the importance of separating these categories in any analysis of employment arbitration.

Cases in which the employer is the plaintiff also have different characteristics from the more typical case in which the employee is the plaintiff. We found that among the small group of cases under employer-promulgated procedures in which the employer was the plaintiff, the employers won 57.1 percent of their cases and were awarded mean damages of $39,002 where they were successful and mean damages of $21,668 across all cases, including those where $0 damages were awarded. One likely explanation for the greater win rate of employer than employee plaintiffs under employer-promulgated procedures is that different types of claims are involved in the two groups of cases. It may be relatively easier for an employer to establish that an employee was overpaid wages or commissions or breached an employment contract than it is for an employee plaintiff to establish that a manager had a discriminatory motive for differential treatment of the employee.

One factor that may be associated with differences in outcomes across cases is the characteristics of the arbitrator. In Table 2, we explored two arbitrator characteristics that might be associated with differences in arbitration outcome. We first looked at the effect of arbitrator membership in the National Academy of Arbitrators (NAA), the leading professional association of labor arbitrators. Membership in the NAA might be associated with differences in arbitral outcomes if NAA members tended to import into the employment arbitration setting some of the principles or decision-making tendencies from the labor arbitration setting in which its members predominantly practice. This could produce

Table 2. Case Outcomes by Arbitrator Characteristics (Employer-Promulgated/Employee-Plaintiff Cases)

	NAA Member	Non-NAA Member	Male Arbitrator	Female Arbitrator
	(N = 40)	(N = 254)	(N = 185)	(N = 109)
Claim Amount (Mean)	$1,137,885	$781,884	$824,354	$868,363
Claim Amount (Median)	$120,313	$185,333	$180,000	$136,512
Plaintiff Win	25.0%	25.2%	27.5%	20.0%
Award Amount (Mean, wins only)	$96,481	$80,234	$83,400	$78,735
Award Amount (Mean, all cases)	$18,253	$20,216	$22,588	$14,462
Partial Award (20–80% of claim)	7.7%	7.9%	8.3%	7.1%
Arbitrator Fee (Mean)	$16,641	$12,029	$12,723	$12,448

a greater likelihood to favor employees, reflecting the more typical just cause standard applied in labor arbitration dismissal cases or perhaps a lower likelihood of awarding large amounts of compensatory or punitive damages, which are not typically available in labor arbitration. We see little evidence of any effect of NAA membership on arbitral outcomes. Plaintiff win rates and award amounts are similar between NAA member and non-member arbitrators. The most noteworthy difference is that NAA members tend to command higher fees in employment arbitration, on average $16,641 compared to an average fee of $12,029 for non-NAA members.

We also investigated whether arbitrator gender had any impact on arbitral outcomes. There is a long tradition of research on decision-maker gender effects on dispute resolution outcome that

has looked at both judicial and labor arbitration forums and has produced mixed findings.[36] We observed that female arbitrators were less likely to find in favor of employees than male arbitrators, with a plaintiff win rate of only 20.0 percent for female arbitrators, compared to 27.5 percent for male arbitrators. This is a surprising finding that was not suggested by the prior literature. Our sample included a relatively high proportion of female arbitrators (37.1%) compared to past research, which included relatively few female judges or female labor arbitrators. One possibility that needs to be investigated further is whether there are systematic differences in the professional backgrounds of female arbitrators. For example, are female employment arbitrators more likely to come from backgrounds representing management? Do they differ in experience levels from their male counterparts? Given the intriguing findings in this study, further investigation of these questions is warranted.

Arbitral Decision-Making Process Results

The first arbitral decision-making proposition we examine is whether arbitrators are splitting the baby in employment arbitration. There are a number of potential indicators of such a tendency that we can test. First, we can look at whether plaintiff win rates suggest an attempt to approximate a 50/50 split between the parties over time. So, for example, an arbitrator hoping for future selection by both sides might tend to balance out over time how many cases are won by each side. However, if we examine the plaintiff win rates reported in Table 1, we see little evidence of this type of a split-the-baby approach by employment arbitrators. In cases under employer-promulgated procedures where the employee was the plaintiff, employees won 24.7 percent of the time and employers won 75.3 percent of the time, which does not suggest an attempt to split the outcomes between the parties. Cases involving employer-promulgated procedures where the employer was the plaintiff were closer to an even split, with employers winning 57.1 percent of the time and employees 42.9 percent of the time. When we look at cases deriving from individually negotiated agreements, we again see a lack of evidence of 50/50 splitting, with plaintiffs winning almost two thirds of the cases, whether

[36]Brian Bemmels, *Gender Effects in Grievance Arbitration*, 29(3) INDUS. REL. 513–25 (1990).

brought by employees (64.6 percent win rate) or employers (66.7 percent win rate).

Second, we can investigate whether the amounts awarded in cases tend to reflect compromise awards. To analyze this question, we looked at the relationship between claim amounts and award amounts in the cases in our dataset. We calculated the percentage of the initial claim that the plaintiff received in the award. For simplicity of presentation, we grouped the percentages of claims received into six categories: 0 recovery; > 0–20%; > 20–40%; > 40–60%; > 60–80%; and > 80%+. We then tabulated the numbers of cases in each of these categories (see Table 3) and graphed the results (see Figure 1). If the arbitrators were splitting the baby, we would expect to see a more normal shaped distribution, with most of the cases clustering in the middle categories. We find instead a U-shaped distribution in the data, with most of the cases clustering at either end of the distribution. For cases brought under employer-promulgated procedures, the largest category is 0 recovery, but the second-largest category is recovery of over 80 percent of the amount claimed. The most sparsely populated categories are those where the plaintiffs recovered between 20 and 80 percent of the amount claimed. Only 17 of 196 cases (or 8.7 percent) fell into these categories. The distribution of percentages recovered in cases deriving from individually negotiated agreements also form a U-shaped distribution (see Figure 2), with the lowest and highest percentage recovery categories containing the largest number of cases. The categories between 20 and 80 percent recovered are also the most sparsely populated in this distribution.

Table 3. Proportions of Claim Awarded

Percentage of Claim Awarded (%)	Employer-Promulgated Procedures	Individually Negotiated Agreements
0	119	38
> 0–20	21	17
> 20–40	6	13
> 40–60	5	9
> 60–80	6	9
> 80+	39	25

Figure 1. Percentage of Claims Awarded in Employer-Promulgated Procedure Cases

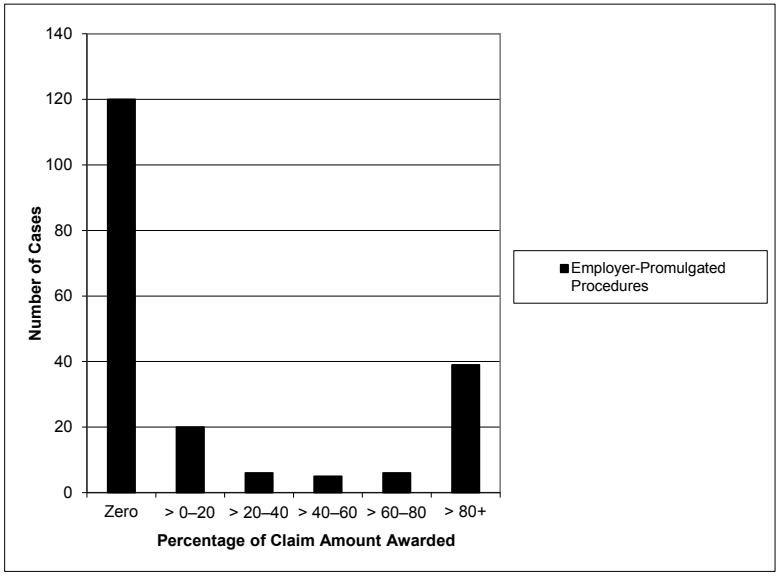
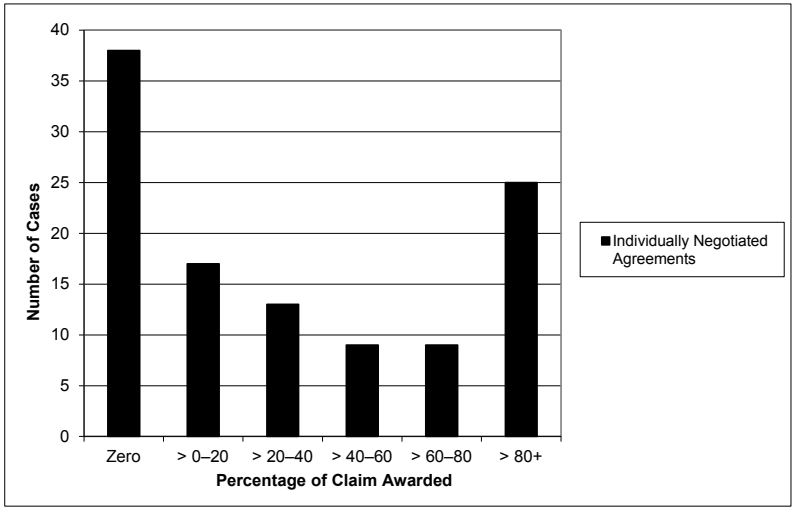


Figure 2. Percentage of Claims Awarded in Individually Negotiated Agreement Cases



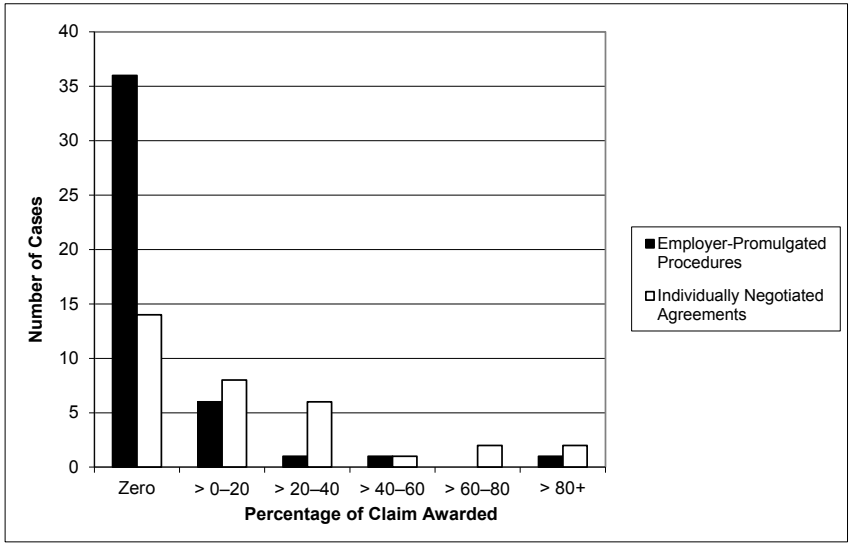
What these results indicate is that there is a lack of any evidence that employment arbitrators favor compromise awards. The results comport with what would be expected in traditional litigation. Judicial decision making generally involves two distinct phases, determination of liability and determination of damages. Initially the court determines whether there is any legal liability by applying the appropriate legal standard. If there is determined to be liability, then a separate determination is made of what damages were suffered and an appropriate award is made. In neither of these stages is there a process of balancing the positions of the two parties as is alleged to occur with split-the-baby arbitral decision making. The picture we have seen in the data of employment arbitration decision making much more closely resembles this judicial model than the proposition that arbitrators look to compromise between the positions of the two sides.

The second arbitral decision-making proposition was that employment arbitrators disfavor very large damage claims. We tested this argument by examining the distribution of percentages recovered for cases with large claims. Table 4 presents the same categories of percentages recovered limited to those cases where the plaintiff claimed more than $500,000 in damages. Unlike the U-shaped distribution of overall recoveries, for cases with large damage claims we find a skewed distribution tapering off at the higher categories (see Figure 3). The largest category is still 0 recovery, but for both the employer-promulgated procedure and

Table 4. Proportions of Claim Awarded for Cases With Claims of More Than $500,000

Percentage of Claim Awarded (%)	Employer-Promulgated Procedures	Individually Negotiated Agreements
0	33	14
> 0–20	7	8
> 20–40	1	6
> 40–60	1	1
> 60–80	0	2
> 80+	1	2

Figure 3. Percentage of Claims Awarded in Cases With Claims of More Than $500,000



the individually negotiated agreement distributions, the second-largest category of awards is where the plaintiff recovered more than 0 but less than 20 percent of the amount claimed. Whereas employment arbitrators do not appear to split the baby, this evidence suggests that they are less likely to grant the full amount on larger damage claims, which supports the second proposition about arbitral decision making.

The third arbitral decision-making proposition was that employment arbitrators tend to make some small award in favor of many claimants rather than fully denying liability. Put alternatively, the idea here was that if you go to arbitration, the arbitrator will give you something rather than entirely rejecting your claim. Our results do not support this proposition. There are relatively few small award cases. For example, the 25th percentile of the distribution of awards in cases brought by employees under employer-promulgated procedures was $12,770, meaning that only one-quarter of awards were smaller than that amount. Indeed, most awards from this type of case were more than $39,609 (the median award amount).

Conclusion

The rise of employment arbitration represents a major institutional innovation in the governance of employment relations in the United States. Rather than simply a development of new ADR techniques to manage conflict, employment arbitration is developing a new institutional structure for how disputes between employers and employees will be resolved. To help understand this new institution of nonunion employment relations, we gathered and analyzed data from arbitration cases administered by the AAA, a leading provider of arbitration services. Our key conclusions are that the characteristics and outcomes of arbitration cases are strongly influenced by the nature of the contractual relationships underlying arbitration and that the outcomes in arbitration reflect a decision-making process more similar to that of litigation than the split-the-baby compromise processes sometimes ascribed to arbitrators.

We find major differences in outcomes of arbitration depending on whether the case originated from an employer-promulgated procedure or from an individually negotiated agreement. Arbitration cases deriving from individually negotiated agreements tend to involve higher-paid professional or managerial employees making contractual claims and result in relatively high employee win rates, larger damage awards, and more compromise awards. Arbitration cases deriving from employer-promulgated procedures tend to involve lower-paid employees; commonly are based on statutory claims of employment discrimination; and result in relatively fewer employee wins, lower damages, and fewer compromise awards.

When we look at decision-making processes in employment arbitration, we see more resemblance to a legal process of determining liability and damages than to a process of balancing the positions of the parties through compromise decisions and evening out of the success rates of each side. To the degree that there is a particular effect in employment arbitration decision making, we find it is one of reducing large claim amounts rather than splitting the baby between the two sides. In addition, we find little evidence that arbitrators tend to issue small token awards in cases rather than simply denying liability.