

III. MANDATORY ARBITRATION: WHY IT'S BETTER THAN IT LOOKS

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“Mandatory arbitration” as used here means that employees must agree as a condition of employment to arbitrate all legal disputes with their employer, including statutory claims, rather than take them to court. The Supreme Court has upheld the validity of such agreements on the grounds that they merely provide for a change of forum and not a loss of substantive rights. Opponents contend this wrongfully deprives employees of the right to a judge-and-jury trial and other statutory procedural benefits. Various empirical studies indicate, however, that employees similarly situated do about as well in arbitration as in court actions, or even better, although successful plaintiffs get larger monetary awards in court. Perhaps most important as a practical matter, lower-paid employees generally cannot get access to court, although they can secure a hearing in arbitration. For most such workers, arbitration may be the only realistic option. This paper will conclude that the primary concern should be to ensure due process in mandatory arbitration. That would mean such guarantees as a mutually selected arbitrator, no broad prohibition of class actions, a fair hearing, reasonable costs, and the same remedies as provided by any applicable law.

Introduction

Employers were doubly vexed by employment-law developments in the 1980s. First, a series of court decisions, which would eventually embrace all but a couple of states, imposed significant qualifications on the traditional American common-law doctrine of “employment at will.”¹ Under that doctrine, as chillingly described in a classic 19th century case, employers may lawfully “dismiss their employes [sic] at will...for good cause, for no cause or even for cause morally wrong.”² The exceptions that were carved out, with increasing frequency during the 1980s, were

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¹9A Lab. Rel. Rep. (BNA) 505:51 (2004) (Louisiana and Rhode Island were the holdouts).

²Payne v. Western & A.R.R., 81 Tenn. 507, 519–20 (1884). See also Wood, Law of Master and Servant (1877), 272–73.

based on such theories as public policy (a tort),³ implied contract,⁴ and, much less often, the covenant of good faith and fair dealing.⁵ As it turned out, however, careful employers could avoid most of the adverse effects of these new legal developments by sensible behavior, by contractual disclaimers,⁶ and even by the revocation of prior promises through reasonable notice to the work force.⁷

The second blow to employers during this period was the award by judges and juries of substantial damages to employees who were found to be victims of wrongful discharge. For example, several studies showed that plaintiffs in California won about 75 percent of the discharge cases that went to juries, with the average award being around \$450,000.⁸ Nationwide, single individuals during that period received jury awards for actual and punitive damages for wrongful discharge as high as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, and \$1.5 million.⁹ Even winning was not cost-free for business. By the end of the 1980s, the fees and expenses for a successful defense of a discharge case before a jury could range between \$100,000 and \$150,000 in major Mid-western cities, and amount to around \$200,000 on the coasts.¹⁰

³Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (employee refused to join price-fixing conspiracy); Sheets v. Teddy's Frosted Foods, 427 A.2d 385 (Conn. 1980) (whistleblower); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (whistleblower). *Contra* Murphy v. American Home Prod. Corp., 448 N.E.2d 86 (N.Y. 1983) (whistleblower).

⁴Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980) (oral commitment to employee when hiring); Pugh v. See's Candies, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (same); Woolley v. Hoffmann-LaRoche, Inc., 499 A.2d 515 (N.J. 1985) (policy statement in personnel manual); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441 (N.Y. 1982) (same; reliance also a factor).

⁵Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Buysse v. Paine, Webber, Jackson & Curtis, 623 F.2d 1244 (8th Cir. 1980) (applying Minnesota law); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988). *Contra* Murphy v. American Home Prod. Corp., 448 N.E.2d 86 (N.Y. 1983).

⁶Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986) (applying Michigan law); Anderson v. Douglas A. Lomason Co., 540 N.W.2d 277 (Iowa 1995) (unambiguous disclaimer effective despite placement on last page of 53-page handbook). *But cf.* Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783 (Alaska 1989) (one-sentence disclaimer in 85-page manual ineffective as unclear and inconspicuous).

⁷In re Certified Question (Bankey v. Storer Broadcasting Co.), 443 N.W.2d 112 (Mich. 1989). *But cf.* Doyle v. Holy Cross Hosp., 682 N.E.2d 68 (Ill. App. Ct. 1997) (12-year-old commitment could not be revoked without employee's consent).

⁸Dertouzos et al., The Legal and Economic Consequences of Wrongful Termination (1988), at 24–26, 33–37; Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 Mich. B.J. 776 (1983); *Discharge Verdicts Average \$424,527 in 1986 Jury Trials*, Daily Lab. Rep. (BNA) (Feb. 24, 1987), at A-4–A-5.

⁹Lopatka & Martin, *Developments in the Law of Wrongful Discharge*, in ABA National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims (1986), vii, 13–18.

¹⁰Conversations between author and management attorneys at 1992 midwinter meeting of the ABA Labor and Employment Law Section's Committee on Individual Rights and Responsibilities in the Workplace, April 8–9, 1992.

One widespread employer reaction to these dual developments of new causes of action and costly litigation has been to impose so-called “mandatory arbitration.” To get or keep a job, employees must agree to arbitrate all legal disputes with their employer rather than take it to court. That would apply even to claims arising under federal or state civil rights legislation prohibiting discrimination against employees because of race, sex, religion, ethnicity, age, disability, and so on.¹¹ Mandatory arbitration, as its description alone should indicate, raises a host of legal and policy questions. That is especially true regarding the attempted prevention of resort to the courts for the vindication of statutory rights.

The purpose of this paper is to examine the pros and cons of mandatory arbitration in both theory and practice. Special emphasis is placed upon the various empirical studies that have tried to show how such arbitration has actually operated. Although the focus here is on arbitration in employment, mandatory arbitration has also proliferated in a variety of other contexts, including retail sales, medical situations, and financial dealings. In certain respects the position of an employee subject to an arbitration agreement may be quite different from that of the individual consumer or medical patient or other person bound by similar arrangements. Nonetheless, some of the findings in employment may have broader applications, or at least pose questions that require consideration in other areas.

Legal Status of Employment Arbitration

In two cases decided almost two decades apart, the Supreme Court took quite different positions—and some might reasonably argue perversely different positions—on employment arbitration. In *Alexander v. Gardner-Denver Co.*,¹² the Court held that an arbi-

¹¹ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 (2000 & Supp. IV 2004); Age Discrimination in Employment Act, 29 U.S.C. §§621–634 (2000 & Supp. IV 2004); Americans with Disabilities Act of 1990, 42 U.S.C. §§12101–12117, 12201–12213 (2000 & Supp. IV 2004). A number of state statutes and municipal ordinances extend the protected categories beyond the federal coverage. Thus, employment discrimination may be prohibited because of marital status, sexual orientation, gender identity, human immunodeficiency virus or acquired immune deficiency syndrome, and genetic testing. 8A Lab. Rel. Rep. (BNA) FEPM 451:1–5, 451:51–53 (2003, 2005, 2007).

¹² 415 U.S. 36 (1974). See also *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (employees not barred by arbitration award on wage claim under union contract from suing under Fair Labor Standards Act). In *Gardner-Denver*, the Court noted that the arbitrator’s award was admissible in subsequent court proceedings, and, if procedural safeguards were observed, it could be accorded “great weight.” 415 U.S. at 60 n.21. Cf. *Circuit City Stores v. Adams*, 523 U.S. 105 (2001) (Stevens, Souter, Ginsburg, and Breyer,

trator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing a claim in court that his discharge was based on racial discrimination in violation of Title VII of the 1964 Civil Rights Act. The Court reasoned that the arbitrator was only authorized to decide the contractual issue of discrimination, and not the statutory issue. But in *Gilmer v. Interstate/Johnson Lane Corp.*,¹³ the Court held that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer. The Court distinguished *Gardner-Denver* on the grounds that in *Gilmer* the arbitrator was authorized to handle statutory as well as contractual disputes. The earlier case was also said to involve a "tension" between union representation and individual statutory rights. Furthermore, the Court stressed that no loss of statutory rights occurred in *Gilmer*. It was only a change of forum. And the arbitral procedures must be such that they would not impair the employee's capacity to vindicate statutory rights. Even so, the Court noted that the stockbroker was not precluded from filing a charge with the Equal Employment Opportunity Commission (EEOC); only his court action was barred.¹⁴

The Court's emphasis on the difference in the authority of the arbitrators in *Gardner-Denver* and *Gilmer* would matter little if unions and employers could simply empower arbitrators in the labor contract to deal with statutory issues. But in *Wright v. Universal Maritime Service Corp.*,¹⁵ the Court held that any union-negotiated waiver of employees' statutory right to a judicial forum would have to be "clear and unmistakable." In terms of bargaining power, one can argue that a union's agreement to arbitrate and waive the judicial forum should be *more* acceptable—less of a contract of adhesion—than an isolated individual employee's agreement. Moreover, any concern that a labor organization might treat an employee's civil rights cavalierly should be tempered by the exis-

JJ., dissenting). Technically, *Circuit City* merely held that the Federal Arbitration Act (FAA) exempts only the contracts of transportation workers from its broad provision for the judicial enforcement of arbitration agreements. But the reality was a confirmation of *Gilmer*'s endorsement of mandatory arbitration. See *infra* text accompanying note 13.

¹³500 U.S. 20 (1991) (arbitration agreement not contrary to policy of Age Discrimination in Employment Act and enforceable under FAA).

¹⁴*Id.* at 28. The Court has since held that an individual's agreement to arbitrate employment disputes does not preclude the EEOC from seeking victim-specific relief in court, including reinstatement, back pay, and damages. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296–98 (2002).

¹⁵525 U.S. 70, 80–81 (1998).

tence of the well-established union duty of fair representation.¹⁶ In *14 Penn Plaza v. Pyett*,¹⁷ the Supreme Court held, in a sharply divided 5–4 decision, that employers could enforce a provision in a collective bargaining agreement that clearly and unmistakably required employees to arbitrate age discrimination claims.

For the lower courts since *Gilmer*, the major question in assessing mandatory arbitration is whether the agreement imposed by the employer is so one-sided and unfair as to be “unconscionable” and thus unenforceable. The final section deals with this issue.

The Debatable Nature of Mandatory Arbitration

Arguments against mandatory arbitration are easy to make, and they are conceptually powerful. That is especially true when sensitive statutory rights are at stake. Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the enforcement of those rights. In a given case the specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights themselves. No employer, acting alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum, procedures, and remedies as the price of getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy.

Opponents contend that an employer dealing with an individual employee is the “repeat player” against the one-timer, and invariably more knowledgeable about arbitral procedures and the arbitrators themselves.¹⁸ It has also been asserted that some sizable, well-publicized jury verdicts could do much more to deter workplace discrimination than any number of smaller, confidential

¹⁶*See, e.g.*, *Steele v. Louisville & N. R. R.*, 323 U.S. 192, 202–03 (1944); *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 330–31 (1969); *Rubber Workers Local 12 v. NLRB*, 368 F.2d 12 (5th Cir. 1966). Applying modern “public choice” theory concerning the political power of cohesive minority groups within any organization, one scholar has predicted that unions would not agree to arbitrate statutory claims if such groups believed arbitration was not in their best interest. Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 B.Y.U. L. Rev. 591, 605. In my view, a union should be able to waive the judicial forum only as to the employer, *not* the union itself. The latter waiver would constitute a conflict of interests.

¹⁷129 S. Ct. 1456 (U.S. 2009) (Stevens, Souter, Ginsburg, and Breyer, JJ., dissenting).

¹⁸Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol’y J. 189 (1997).

arbitration awards.¹⁹ A distinguished federal judge has further observed that the diversion of a large amount of civil rights litigation from the courts to arbitration, with the resulting decrease in the number of published judicial opinions, could have an enervating effect on the development of legal doctrine in this area.²⁰ For some persons, an employer's provision for arbitration is also a not-so-subtle antiunion device, as securing a grievance and arbitration system is regarded as one of the principal benefits of unionization and collective bargaining. For these and other reasons, numerous scholars, two federal agencies, and two prestigious private bodies have gone on record as opposed to mandatory arbitration of statutory employment claims.²¹

Against that position, a rugged individualist or legal formalist might contend that "freedom of contract" supports the legitimacy of so-called mandatory arbitration. After all, no one is forcing an employee to take or keep any particular job. But 20th century law recognized the value of competing public policies, especially in regulating a field like employment with its customarily unequal participants, and freedom of contract in such a context is no

¹⁹See, e.g., Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381, 429–31 (1996). Arbitral awards are traditionally not published unless all parties consent. Ruben, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (BNA Books 2003), at 571–72 [hereinafter Elkouri & Elkouri].

²⁰Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?* 16 Ga. St. U. L. Rev. 293, 297 (1999).

²¹See, e.g., Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1 (1996); Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denver U. L. Rev. 1017 (1996); Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33; EEOC, *Alternative Dispute Resolution Policy*, 8 Lab. Rel. Rep. (BNA) FEP 405:7301–7302, (1997). In July 1997 the EEOC issued a longer and even stronger condemnation of compulsory arbitration or pre-dispute agreements to arbitrate, declaring that "even the best arbitral systems do not afford the benefits of the judicial system." EEOC, *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 Lab. Rel. Rep. (BNA) FEP 405:7511, 405:7520 (1997). According to the court in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479 (D.C. Cir. 1997), the National Labor Relations Board (NLRB) General Counsel was apparently prepared at one point to issue unfair labor practice complaints on the issue. See also [Dunlop] Commission on the Future of Worker-Management Relations, U.S. Dep't of Commerce and Labor, Report and Recommendations 33 (Dec. 1994) [hereinafter Dunlop Commission]; National Academy of Arbitrators, *Statement on Condition of Employment Agreements*, in *Arbitration 1997: The Next Fifty Years*, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 312. Over time the NAA has softened its opposition, with its most recent resolution stating that "voluntary arbitration is always preferable," and "it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration." See National Academy of Arbitrators, Policy Statement on Employment Arbitration (May 20, 2009), available at www.naarb.org/due_process/due_process.html (last visited June 23, 2009).

longer going to carry the day.²² Still, for all the plausible arguments against mandatory arbitration that have been presented, they are plainly not conclusive. Thus, for example, one study indicates the greater success of the repeat player is simply the result of employer experience, not arbitrator bias.²³ In any event the repeat-player effect will diminish with the increasing growth of a plaintiffs-claimants bar. The deterrent value of a few large jury verdicts would seem evident, and yet it is widely thought that the certainty of sanctions is more of a deterrent than their severity.²⁴ The notion that the use of arbitration will inhibit the development of a body of judicial doctrine on workplace discrimination seems highly suspect in light of the very large caseload of the federal courts in this area.²⁵ The history recounted above indicates that employers' resort to mandatory arbitration in the 1980s was triggered far more by the size of jury verdicts and the cost of litigation than by efforts to stymie union organization.²⁶

There is no doubt that post-dispute arbitration agreements are inherently fairer to workers than mandatory, pre-dispute agreements. The latter are usually executed by employees at the time of hiring, when they are prone to sign any document placed before them. The post-dispute agreement is more likely to be truly voluntary, since it is entered into after a particular issue has arisen, the relevant facts are mostly known, and the employee can make an informed decision about whether to arbitrate or go to court. If an employee has been discharged, he or she has little or nothing to lose by rejecting an employer's offer of arbitration.

²² See, e.g., 15 Mclane Giesel, Corbin on Contracts: Contracts Contrary to Public Policy §79.4, at 22 (Perillo ed. rev. ed. 2003). For a discussion of the disparity in employer and employee bargaining power, see Reynolds, Masters & Moser, *Labor Economics and Labor Relations* 7–8 (9th ed. 1986).

²³ Sherwyn, Estreicher & Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1571 (2005).

²⁴ See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349, 380 (1997); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 *Wm. & Mary L. Rev.* 721, 731 (2005). Cf. *infra* the next section.

²⁵ During the current decade, filings of civil rights employment claims in federal court have averaged about 18,500 cases a year. That is more than the average total of cases under all labor laws combined. Administrative Office of the U.S. Courts, 2006 Judicial Business of the United States Courts Table C-2A, at 165–67.

²⁶ See *supra* text accompanying notes 8–10. Except for a short-lived spurt during the Korean War, union density has been in steady decline since 1947, when the Taft-Hartley Act was passed. That year unionized employees constituted 33.7% of nonagricultural employment. U.S. Dept of Labor, *Handbook of Labor Statistics* 507 (1978). By 2008 union density had fallen to 12.4% overall and to 7.6% in the private sector. *Bureau of Labor Statistics News*, USDL 09-0095 (Jan. 28, 2009), available at www.bls.gov/news.release/pdf/union2.pdf. This was a slight upturn from the 2007 figures (12.1% and 7.5%, respectively). *Id.*

Yet this may be another instance where the best is the enemy of the good. Management representatives testified before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate.²⁷ Employers will wait out most smaller claims, assuming employees will not be able to pursue them in court. Conversely, employees and their lawyers are unlikely to agree to arbitrate the big case rather than get it before a judge and jury. Pre-dispute agreements to arbitrate, when neither party knows what may occur later, might be the most sensible arrangement for both sides as a practical matter.²⁸ In my mind that gets to the heart of this long-running debate. Employers generally believe they are better off with arbitration than with costly court suits before emotionally aroused juries. What about ordinary rank-and-file workers with a relatively small monetary claim but with a job and its related benefits at stake? What better serves them in actual operation: a mandatory arbitration system, defects and all, or the statutorily provided access to federal or state court? That is the critical inquiry, and here facts count more than abstract theories. To that we now turn.

A Comparison of Court Suits and Mandatory Arbitration

Access to Judicial and Arbitral Processes

The first and utterly indispensable requirement for an embattled claimant is an accessible forum. Unless one can secure that, the theoretically superior qualities of a particular tribunal amount to nothing but a beguiling mirage. Experienced plaintiffs' attorneys have estimated that only about 5 percent of the individuals with an employment claim who seek help from the private bar are able to obtain counsel.²⁹ One of the Detroit area's top employment specialists was more precise in a conversation with me. His secretary kept an actual count; he took on 1 out of 87 persons who contacted him for possible representation. In a recent and perhaps the most comprehensive survey of empirical studies of employment arbitration, Professor Alexander Colvin of Pennsyl-

²⁷See Commission on the Future of Worker-Management Relations, U.S. Dep't of Commerce and Labor, Fact Finding Report 118 (May 1994).

²⁸For an elaboration of this position, see Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563-64 (2001).

²⁹Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 58 (1998); Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 Disp. Resol. J. (Oct.-Dec. 1995), at 40, 45.

vania State has indicated that “one of the key potential advantages of employment arbitration over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income ranges [sic] employees.”³⁰ One study concluded that litigation is not a plausible option for employees below around the \$60,000 income level, but arbitration is a realistic alternative.³¹ In 2007 the median income of full-time, year-round workers under 65 years of age was \$41,061.³² Such persons will seldom be able to get to court to contest a discharge.

Professor Peter Feuille of Illinois, commenting on Professor Colvin’s paper as presented at a conference sponsored by the National Academy of Arbitrators (NAA) in early 2007 in Chicago, said his own conclusion was that the ordinary employee’s alternative to arbitration for pursuit of his or her claims was, for all practical purposes, “Nothing.”³³ Lewis Maltby, President of the National Workrights Institute, is an opponent of mandatory arbitration. Yet at this same conference he recounted his own troubling experience while director of the American Civil Liberties Union’s (ACLU’s) Task Force on Civil Liberties in the Workplace. Many persons approached him with reports of wrongful treatment in their jobs. Although he concluded that most of the claims were unsustainable, he believed that a couple dozen or so were legitimate and should be taken to court. He placed many calls asking lawyers for assistance. Even with Maltby’s prescreening of the cases, he was able to find representation for only one employee.

Of course, a substantial number of those who cannot obtain legal representation will not have meritorious claims. But others will be workers whose potential dollar recovery will simply not justify the investment of the time and money of a first-rate lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse. It will cost a lawyer far less time and effort to take a case to arbitration;

³⁰Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Emp. Rts. & Emp. Pol’y J. 405, 419 (2007), citing Estreicher, *supra* note 28; Eisenberg & Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Res. J. (Nov. 2003–Jan. 2004), at 44.

³¹Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. (May–Jul. 2003), at 8, 10–11.

³²U.S. Census Bureau, *Current Population Survey, 2008 Annual Social and Economic Supplement*, http://pubdb3.census.gov/macro/032008/perinc/new01_028.htm (last visited June 23, 2009).

³³National Academy of Arbitrators, 2007 Spring Educational Conference, *Beyond the Due Process Protocol: The Future of Due Process in Workplace Dispute Resolution*, April 13–14, 2007. The author attended this conference.

at worst, claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum.

Individual employees with discrimination claims may find little relief from the EEOC. Before a severely overburdened and underfunded Commission resorted to its “triage” procedure in the mid-1990s, classifying cases as “A,” “B,” or “C” priorities depending on merit and importance, and tossing out many charges after the briefest of investigations, its backlog had soared past 100,000 and it was receiving almost 100,000 new charges a year.³⁴ The situation was so bleak that one knowledgeable scholar recommended, quite understandably, that the EEOC get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices.³⁵ At best, the Commission tends to concentrate on the big case or the test case. Again, for many individual discriminatees, it looks like arbitration—or nothing.

Results in Arbitration and in Court

Early reports on the relative success rates of claimants in employment arbitration and in court were quite startling, suggesting that employees did far better in arbitration. The American Arbitration Association (AAA) in one study found a winning rate of 63 percent for arbitral claimants.³⁶ In a much-criticized system operated by the securities industry, employees still prevailed 55 percent of the time, according to the U.S. General Accounting Office.³⁷ By contrast, plaintiffs’ success rates in separate surveys of federal court and EEOC trials were only 14.9 percent and 16.8 percent, respectively.³⁸ As might be expected, *successful* plaintiffs obtained larger awards from judges or juries. But claimants as a group recovered more in arbitration.³⁹

Some early reports may have been comparing apples and oranges. Professor Colvin, in his more recent arbitration study,

³⁴EEOC Adopts Change-Priority System, 149 Lab. Rel. Rep. (BNA), May 1, 1995, at 13, 14; National Enforcement Plan Tops EEOC Agenda, 151 Lab. Rel. Rep. (BNA), Feb. 5, 1996, at 143, 156.

³⁵Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol’y Rev. 219, 278–79 (1995).

³⁶Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 46 (1998).

³⁷*Id.* at 50. See also Wheeler, Klass & Mahony, *Workplace Justice Without Unions* 48 (2004).

³⁸Maltby, *supra* note 36, at 49. In their own research into cases decided mostly in the late 1990s, Professor Wheeler and his colleagues found a 12% employee win rate in federal district court as contrasted with 33% in arbitration. Wheeler et al., *supra* note 37, at 54.

³⁹Maltby, *supra* note 36, at 54.

points out that “a majority of these awards appear to have involved claims by employees, typically managers and executives, under individually negotiated contracts, rather than claims brought under arbitration provisions from employment manuals or handbooks.”⁴⁰ When more refined analyses took account of these differences, the success rates varied significantly. Professor Lisa Bingham of Indiana found in two separate studies that employees won 68.8 percent and 61.3 percent of the claims based on individual contracts but only 21.3 percent and 27.6 percent of the claims based on personnel manuals.⁴¹ A later report on 200 AAA awards from 1999 and 2000 showed an employee win rate of 34 percent in cases based on employer-mandated plans as against an overall win rate of 43 percent for all claims.⁴²

Professor Theodore Eisenberg of Cornell and Elizabeth Hill introduced several helpful distinctions in analyzing the outcomes of 215 AAA cases resolved in the 1999–2000 period and the results of 1,430 federal court trials of that period and 160 state court trials in 1996. In non-civil rights employment disputes, higher-paid employees (more likely operating under individual contracts) won 64.9 percent of the arbitrations and lower-paid employees (more likely operating under employer-promulgated plans) won 39.6 percent, while state court trials resulted in a 56.6 percent winning percentage for plaintiffs, who were probably mostly higher-paid employees.⁴³ In civil-rights employment cases, the winning percentages in arbitrations were 40.0 percent for higher-paid employees and 24.3 percent for lower-paid employees, 43.8 percent for plaintiffs in state court trials, and 36.4 percent for plaintiffs in federal court trials. Especially if one assumes that most plaintiffs in court actions were higher-paid employees, the differences in result were negligible. Also significant, of the 215 arbitral resolutions, only 42, or 19.5 percent, dealt with employment

⁴⁰Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 *Emp. Rts. & Emp. Pol’y J.* 405, 413 (2007).

⁴¹Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 *New Zealand J. Indus. Rel.* (June 1998), at 5, 16; Bingham & Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *Alternative Dispute Resolution in the Employment Arena*, Proceedings of the N.Y.U. 53rd Annual Conference on Labor, ed. Estreicher & Sherwyn (2004), 303, 323, tbl. 2.

⁴²Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 *Disp. Resol. J.* (May–Jul. 2003), at 11, 13.

⁴³Eisenberg & Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 *Disp. Res. J.* (Nov. 2003–Jan. 2004), at 48–49, tbl. 1. Employees earning less than \$60,000 a year were classified as “lower-paid.” *Id.* at 46.

discrimination claims. The great majority dealt with claims based on individual contracts, personnel manuals, and the like. This sharply reduces the argument that arbitration, mandatory or otherwise, is having a deleterious effect on the enforcement of civil rights legislation. Finally, pre-trial settlements may skew the comparative figures between court judgments and arbitration awards. Because employers win the vast majority of summary judgments in federal court employment cases, and because employers naturally try to buy out the stronger employee cases during preliminary proceedings in litigation, decent arguments can be made either way about whether trial results exaggerate or depress employee win rates, at least in federal court.⁴⁴

Professors David Sherwyn and Michael Heise of Cornell and Samuel Estreicher of N.Y.U., after concluding from various empirical studies that “there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration],” would take an entirely different approach in assessing the respective merits of dispute resolution systems.⁴⁵ As they put it: “A more useful barometer would focus on the resolutions of discrimination cases that take place during conciliation, mediation, and settlement negotiations.”⁴⁶ On the basis of highly preliminary comparisons between EEOC data and the experience of one major company, the authors observe that disputes were resolved more often by the employer than by EEOC, without resort to “external resources” such as courts or arbitration; they were resolved much more quickly by the employer’s internal processes (81 percent of the claims in less than a week); and that the damages awarded by the employer averaged less than one-third of the EEOC’s, in major part because of the swiftness of the employer’s settlements but also because the EEOC considers only legally cognizable claims.⁴⁷ Insofar as this study focused on data involving the EEOC and employment discrimination claims, however, it does not cover the most common grist for arbitration’s mill, which consists of claims based on contracts or personnel manuals.⁴⁸

Curiously, there have been few recent comparisons of employee win rates in *employment* arbitration (generally nonunion) and in

⁴⁴ See Colvin, *supra* note 40, at 416–18.

⁴⁵ Sherwyn, Estreicher & Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. (2005), at 1578.

⁴⁶ *Id.* at 1582. See also Colvin, *supra* note 40, at 438–42.

⁴⁷ Sherwyn et al., *supra* note 45, at 1588–89.

⁴⁸ See *supra* text following note 43.

traditional *labor* arbitration (between unions and employers).⁴⁹ The members of the NAA, who adopted a policy statement opposing mandatory employment arbitration but whose principal occupation is labor arbitration, would undoubtedly regard the latter as the gold standard of arbitration. The same view is probably held by many if not most of the academic opponents of mandatory employment arbitration. Yet many persons (including me) would be surprised by the results of an examination I made of the outcomes of the 200 latest discharge arbitrations filed from 1999 to 2007 in one of the country's oldest and most respected union-management arbitration systems. The issue was whether there was "just cause" or "proper cause" for the discharges under the parties' collective bargaining agreement. Employees were reinstated or received other substantial relief in only 46 instances, or 23 percent, of the 200 arbitrations.⁵⁰ That is a lower winning percentage than in all but one of the employment arbitration studies previously discussed.

Conclusions

Winning percentages for one selected group of participants are hardly the best gauge of the fairness of any dispute resolution system. A whole host of factors, alone or in combination, including a party's financial resources and representation, the specified steps of the process, the competence of the decision maker, and indeed, one hopes, the facts in evidence, may have a crucial bearing on the outcome. But insofar as a comparison between employee win rates in employment arbitration and those in either court litigation or in traditional labor arbitration is any guide, it cannot be said that mandatory arbitration in actual practice is detrimental

⁴⁹Comparisons of the way employment arbitrators and labor arbitrators treat *hypothetical* scenarios have been conducted by Bingham & Mesch, *Decision Making in Employment and Labor Arbitration*, 39 *Indus. Rel.* 671 (2000); Klaas, Mahony & Wheeler, *Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors*, 45 *Indus. Rel.* 68 (2006). Both studies found employment arbitrators significantly less likely to rule for employees than labor arbitrators. But Bingham and Mesch found that the employment-labor distinction was not statistically significant if the occupation of the arbitrator was taken into account. Attorneys who arbitrate were less favorable toward employees than full-time arbitrators or part-time arbitrators from academia.

⁵⁰The relatively low employee/union success rate is probably attributable to the company's extensive experience with the type of discharges that will be upheld and the union's willingness to let grievants have their "day in court." Earlier studies indicated that union grievants generally won in whole or in part at least half the time in labor arbitrations. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 *New Zealand J. Indus. Rel.* (June 1998), at 10–11.

to the individual employee. For most lower-paid workers, it may in fact be their only feasible option. Most important, then, is the accessibility to a forum that any kind of arbitration, including mandatory pre-dispute arbitration, offers such employees. After the initial contrary outcry from scholarly critics, an increasing number of them now seem more favorably disposed.⁵¹ Ironically, however, the former employer enthusiasm for mandatory arbitration may be waning, as management recognizes the success employees have had under this regime.⁵² One would like to think that it will turn out to be a win-win situation. Employees, particularly those at the lower end of the pay scale, will find readier access to effective relief in arbitration, and employers will find fewer devastating jury verdicts and lower litigation costs. The remaining inquiry goes to what is necessary to ensure that mandatory arbitration will meet appropriate due process standards.

Ensuring Fairness in Arbitration Procedures

All disinterested scholars and reputable groups that have considered mandatory arbitration agree that it is vital that employees be accorded due process. A reasonable consensus has developed about certain procedural requirements for a fair individual arbitration, mandatory or otherwise. About other proposed requirements there is still considerable debate. These questions will be discussed next.

Generally Accepted Standards of Due Process

In the mid-1990s both the Dunlop Commission on the Future of Worker-Management Relations and a broadly sponsored Task Force on Alternative Dispute Resolution in Employment, which drafted a Due Process Protocol, produced very similar lists of necessary procedural guarantees in employment arbitration.⁵³ These included:

⁵¹ See, e.g., Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 Lab. Law. 511 (1998); Estreicher, *Pre-dispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1182 (1997); FitzGibbon, *Reflections on Gilmer and Cole*, 1 Emp. Rts. & Emp. Pol'y J. 221 (1997).

⁵² Cf. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399, 418–64 (2000); Tukul, *To Arbitrate or Not to Arbitrate Discrimination Claims: That Is Now the Question for Michigan Employers*, 79 Mich. B.J. 1206, 1207–08 (2000).

⁵³ See Dunlop Commission, *supra* note 21, at 118–19; Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (1995), *reprinted in* 9A

1. A jointly selected neutral arbitrator who knows the law.
2. Simple, adequate discovery.
3. Cost-sharing to ensure arbitrator neutrality.⁵⁴
4. Right to representation by a person of the employee's choice.
5. Remedies equal to those provided by the law.
6. A written opinion and award, with reasons.
7. Limited judicial review, concentrating on the law.

The variegated membership of the Task Force that produced the Due Process Protocol was not able to take a position on the acceptability of pre-dispute as distinguished from post-dispute agreements to arbitrate—and thus effectively on their “voluntariness”⁵⁵—but it did agree they should be “knowingly made.”⁵⁶ In contrast, the more homogeneous membership of the Dunlop Commission (mostly academics and neutral persons) could declare: “[A]ny choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract.”⁵⁷ Significantly, however, Professor Paul Weiler of Harvard, who served as counsel to the Commission, told me that he had reservations about this position on the grounds that even mandatory arbitration provided employees with an access to relief for employment wrongdoing that they might not otherwise have. The Commission itself hinted at the possibility of more flexibility in the future, by suggesting that the issue be revisited after there was more experience with the arbitration of employment claims.⁵⁸

Lab. Rel. Rep. (BNA) IERM 534:401 (1996) [hereinafter Due Process Protocol]. The Task Force consisted of management, union, and plaintiffs' attorneys from the American Bar Association and the National Employment Lawyers Association, and representatives of the AAA, the ACLU, the Federal Mediation and Conciliation Service, the NAA, and the Society of Professionals in Dispute Resolution. *Id.* at 534:404.

⁵⁴In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997), the court *required* (2–1) the employer to pay all the arbitrator's fees as a condition for enforcing an individual employee's waiver of a judicial forum. Judge Harry Edwards, who spoke for the majority, was surely correct that the *source* of payment is not the key to arbitrator neutrality. *Id.* at 1485. Arbitrators are naturally concerned about getting their fee but ordinarily not about where it comes from. *Id.* Individual employees, of course, may feel more comfortable paying part of the arbitrator's fees, fearing that whoever pays the piper may also call the tune. *Cole* may have gone too far, moreover, in insisting that the employer pay *all* of the arbitrator's fee. Access to a court, at least initially, would normally not be cost-free. *Id.* at 1484. See *infra* text accompanying note 105 (consideration of the issue of costs).

⁵⁵See *supra* text accompanying notes 26–27 (distinguishing pre-dispute and post-dispute arbitration agreements).

⁵⁶Due Process Protocol, *supra* note 53, at 38.

⁵⁷Dunlop Commission, *supra* note 21, at 33.

⁵⁸*Id.*

The influence of the Employment Protocol in particular has been substantial. Thus, such major providers of arbitral services as the AAA and JAMS (originally the Judicial Arbitration and Mediation Services) endorsed the Protocol and decreed that they would not administer arbitrations that did not comply with the Protocol's principles.⁵⁹ The Employment Protocol also served as the model for two additional Protocols, the Due Process Protocol for Consumer Disputes and the Health Care Due Process Protocol.⁶⁰ Finally, courts and legislative bodies have taken the Employment Protocol into account in their decisions and deliberations.⁶¹ Yet since the Employment Protocol was written, the courts have had to confront a whole host of new issues not anticipated at the time. These will be the subject of the last part of this paper.⁶²

Major Due Process Issues in Employment Arbitration

At the 2007 conference sponsored by the NAA on "Beyond the Due Process Protocol," Professors Richard Bales of Salmon P. Chase College of Law, Northern Kentucky University, and Martin H. Malin of the Chicago-Kent College of Law discussed extensively a number of the major issues of due process in employment arbitration that have emerged in recent years, and that remain largely unresolved.⁶³ I shall focus on several that I regard as especially important and especially difficult.

General Principles. In *Cole v. Burns International Security Services*,⁶⁴ the D.C. Circuit held that a court could enforce an employment arbitration arrangement as long as it:

(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.⁶⁵

As can be seen, these conditions parallel the requirements of the Due Process Protocol, except for the provision against the employ-

⁵⁹Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. J. Disp. Resol. 369, 403–04 (2004).

⁶⁰*Id.* at 405.

⁶¹*Id.* at 409–12.

⁶²See generally Harding, *supra* note 59; Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 Emp. Rts. & Emp. Pol'y J. 301 (2007).

⁶³See generally Bales, *supra* note 62; Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 Emp. Rts. & Emp. Pol'y J. 363 (2007).

⁶⁴105 F.3d 1465 (D.C. Cir. 1997).

⁶⁵*Id.* at 1482 (emphasis supplied regarding arbitrator's fees and expenses).

ee's payment of *any* arbitrators' fees.⁶⁶ In Professor Malin's view, *Cole* portended a regime of "strict judicial policing," in which the courts would rely on the policies of any statutes involved and the common-law concept of unconscionability to safeguard employees' rights under employer-promulgated arbitration systems.⁶⁷ *Cole's* use of five specified conditions for a valid arbitration agreement indeed suggests that the courts should apply "bright-line" rules. That would be in keeping, Malin feels, with *Gilmer's* notion that mandatory arbitration changes only the forum, not any substantive rights, and must be structured so as not to imperil the vindication of statutory rights.⁶⁸

The Supreme Court charted a quite different course in *Green Tree Financial Corp. v. Randolph*⁶⁹ and a subsequent series of decisions under the Federal Arbitration Act (FAA).⁷⁰ Although these cases did not involve employment arbitration, their reasoning seems clearly applicable. The cumulative import is that the question whether arbitral procedures impair the effective vindication of employees' federal statutory rights must be resolved on a case-by-case analysis of the particular facts, and is generally an issue for the arbitrator to decide, not the court.⁷¹ In *Randolph*, the plaintiff had financed the purchase of a mobile home through an agreement that required the arbitration of all disputes arising under the agreement. Plaintiff Randolph sued lender Green Tree, alleging violations of federal statutes on truth in lending and equal credit opportunity. The arbitration agreement did not specify which party would be responsible for the arbitrator's fees and related costs. In a 5–4 decision, the Supreme Court held that the agreement to arbitrate was enforceable, stating that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears

⁶⁶ See Due Process Protocol, *supra* note 53, at IERM 534:404.

⁶⁷ See Malin, *supra* note 63, at 366–67.

⁶⁸ See *supra* notes 13–14 and accompanying text.

⁶⁹ 531 U.S. 79 (2000).

⁷⁰ 9 U.S.C. §§1–16 (2000). The FAA applies to employment arbitration agreements except those in the transportation industry. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

⁷¹ In addition to *Green Tree v. Randolph*, see *PacificCare Health Sys. v. Book*, 538 U.S. 401 (2001) (arbitration enforceable even though agreement precluded "punitive" damages and claim was under federal statute authorizing treble damages; arbitrator must resolve "ambiguity"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (silence of arbitration agreement on permissibility of class actions left the question for arbitrator rather than court); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (validity under state law of contract containing arbitration clause was issue for arbitrator).

the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden.”⁷²

Professor Malin argues strongly that the Supreme Court took a wrong turn in *Green Tree v. Randolph* and its progeny, placing too heavy and ill-defined a burden on employees and other plaintiffs, and that questions of arbitral adequacy should be resolved by the courts, not by arbitrators, especially when statutory rights are at stake.⁷³ Malin makes some excellent points but they must be placed in perspective. The substantial majority of arbitration cases do not involve statutory claims; they are contractual claims of one type or another.⁷⁴ The latter come without any specific legislative policies to serve as guidelines in developing appropriate due process standards. In any event, we do not know that arbitrators will be any less generous to employees than would be the judiciary, particularly today’s relatively conservative federal judiciary, in resolving the various procedural and remedial questions that have emerged in employment arbitration in recent years. I also do not think we can yet be sure whether fact-specific case-by-case determinations or the kind of bright-line rules enunciated by *Cole* will be fairer for both employers and employees. What we can be sure about is that the answers in most cases will come faster, cheaper, and more easily in arbitration than in court.

In addition to testing arbitral procedures against statutory policies in those cases where a statutory claim exists, decision makers have available a more expansive and generally applicable standard in the common-law doctrine of unconscionability. Although the term has no generally accepted definition, Professor Corbin’s classic treatise on contract law underscores the influence of the Uniform Commercial Code in establishing the purpose of the doctrine as the prevention of two evils, oppression and unfair surprise. Corbin continues:

Although the twofold purpose has led to a distinction between “substantive” (oppression) and “procedural” (unfair surprise) unconscionability, most cases do not neatly fall into one of these two categories. Most frequently, elements of both are present. Indeed, some courts

⁷²531 U.S. at 91–92. *Randolph* would seem to have assumed that the courts would determine whether the arbitral arrangements impaired a plaintiff’s capacity to vindicate statutory rights. Later decisions definitely appear to make the question one for the arbitrator in the usual case. See cases cited *supra* note 71.

⁷³Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 *Emp. Rts. & Emp. Pol’y J.* 367–70 (2007).

⁷⁴See *supra* text accompanying note 43.

have said that both elements *must* ordinarily be present before a finding of unconscionability can be made.⁷⁵

Courts have often been willing to deal directly with unconscionability challenges to employment arbitration arrangements, rather than referring them to arbitrators, but the results are often widely diverse.⁷⁶ The following are some examples of important due process issues in employment arbitration, as handled by both courts and arbitrators.

Arbitrator Selection. The Employment Due Process Protocol contemplates as a standard procedure that the parties will select an arbitrator from a panel list supplied by a neutral designating agency such as the AAA.⁷⁷ One of the most pro-arbitration federal courts, the Fourth Circuit, invalidated an employer's unilaterally established arbitral rules as "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding,"⁷⁸ in part because the employer was given unlimited control over the composition of the arbitration panel. Nonetheless, suppose an employer, in order to save time and designating agency costs, creates its own panel, consisting of seven of the area's most respected arbitrators, five of whom are members of the NAA. An employee is then offered the choice of any of the seven, with the right to propose still another arbitrator if the employee could show reasonable grounds for rejecting all seven persons on the employer's panel.

The Sixth Circuit invalidated an arbitration selection procedure much like the one I have just described on the grounds that the employer still had "exclusive control over the selection pool,"⁷⁹ even though the arbitrators on the panel had to meet certain specified qualifications to ensure neutrality. But significantly my hypothetical arrangement contained a possible escape clause for employees with reasonable objections to the whole of

⁷⁵Perillo, Corbin on Contracts: Avoidance and Reformation §29.4 (rev. ed. 2002), at 388.

⁷⁶See Malin, *supra* note 73, at 380–85. See generally *Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669 (Cal. 2000).

⁷⁷Due Process Protocol, *supra* note 53, at 38–39.

⁷⁸*Hooter's of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999).

⁷⁹*McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004). Although the court struck down the offending portion of the arbitration provision, it upheld the trial court's severance of the clause and its order to arbitrate, with the substitution of the AAA's arbitrator selection procedures. *McMullen v. Meijer, Inc.*, 166 Fed. Appx. 164 (6th Cir. 2006). This approach, severing the invalid provision but enforcing arbitration, might appear a reasonable compromise. But it leaves the old problem that employers will have less incentive to clean up their contracts. Most employees will simply go along with the arbitration arrangement as written.

the employer's pool, and that might have made a difference with the Sixth Circuit.⁸⁰ Moreover, the plaintiff in the actual case was claiming Title VII violations and thus the *Gilmer* standard applied that the arbitral procedures must not impair a plaintiff's capacity to vindicate statutory rights.

In appraising the fairness of arbitrator-selection procedures, whether or not statutory rights are implicated, would a bright-line rule or a case-by-case analysis of the parties' contractual arrangement and their relationship seem more appropriate? I would applaud a designating agency or an employer that, as a matter of self-regulation, adopted rather stringent and hard-and-fast rules to enable the fullest practicable participation by employees in the selection process. But if a particular employer, especially one creating "good cause" *contractual* standards for employee discipline or discharge, prescribed an appointment procedure like the one in my above hypothetical (an employer-chosen panel with an employee "veto" for cause), I believe that a court could properly take account of all the facts in assessing its validity. Against the backdrop of American at-will employment, perhaps a self-imposed limit on the right to fire workers arbitrarily would justify allowing an employer some latitude in the arbitrator-selection process.

Shortening Limitations Periods. Collective bargaining agreements in unionized enterprises commonly require grievances to be filed within 30 days or so of the occurrence giving rise to the claim.⁸¹ These short periods are explained by the desire to avoid a "festering" of complaints in the workplace and to obtain a clear picture of the facts while memories and other evidence are still fresh. The presence of a union and a well-established and well-publicized grievance and arbitration procedure greatly reduces the likelihood that a union employee will fail to file a timely grievance. The situation is much different in a nonunion firm. Employees may be unaware even of the fairly generous 180-day or one-year time limits in many employer-promulgated arbitration systems. Statutes, of course, often provide for longer limitations periods for legal claims. What happens when an employee files a claim with the employer within the statutory period but beyond

⁸⁰ *Cf. Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898, 904 (S.C. Ct. App. 1998) (holding agreement not unconscionable where employee had power to "veto" employer's selection, which would result in court appointment of arbitrator under FAA), *aff'd after remand on other grounds sub nom. Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *vacated and remanded*, 539 U.S. 444 (2003).

⁸¹ See Elkouri & Elkouri, *supra* note 19, at 217-27. Some labor contracts have no specified time limit, or only a "reasonable" one, on the filing of grievances. *Id.* at 218.

the internal plan's deadline? The Due Process Protocol does not deal with this question expressly and the courts have responded variously.

In a sexual harassment case, the Ninth Circuit held substantively unconscionable an employer's one-year statute of limitations because it would conflict with the continuing violation doctrine under California's Fair Employment and Housing Act.⁸² For that and other reasons the arbitration agreement was unenforceable. A federal district court in Michigan ruled unconscionable and unenforceable an arbitration agreement with a six-month limitations period as applied to a claim under the federal Family and Medical Leave Act (FMLA), while the FMLA's limitations are three years for willful violations and two years for others.⁸³ In so doing the court boldly distinguished a decision from its own court of appeals,⁸⁴ with the comment that the latter's permission for waivers applied only to state law and claims under 42 U.S.C. §1981, not to claims under the FMLA.

Other courts have been more accommodating for employers. The Sixth Circuit held that a one-year's limitation period imposed by an arbitration agreement would not be an "undue burden" on an employee's vindication of rights under federal civil rights legislation.⁸⁵ Indeed, there is substantial federal case authority that regardless of the existence of an arbitration clause, an employee's agreement for a "reasonable" shortening of the limitations periods in federal statutes will be upheld.⁸⁶ A one-year limitations period would not affect the 180-day and 300-day initial filing periods of such commonly used federal antidiscrimination legislation as Title VII of the 1964 Civil Rights Act,⁸⁷ the Age Discrimination in Employment Act,⁸⁸ and the Americans with Disabilities Act.⁸⁹ A court might well feel differently about a 30-day or 60-day limitations period in the contract of an individual employee, even

⁸²Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003).

⁸³Conway v. Stryker Medical Div., 2006 WL 1008670 at *2 (W.D. Mich. 2006).

⁸⁴Thurman v. DaimlerChrysler, Inc., 397 F.3d 352, 357–59 (6th Cir. 2004) (upholding a six-month arbitral filing period without saying the scope of the ruling was limited on the reasonableness of waiving longer statutory periods).

⁸⁵Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 n.16 (6th Cir. 2003).

⁸⁶See, e.g., Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan, 160 F.3d 1301, 1303–04 (11th Cir. 1998) (Employee Retirement Income Security Act); Taylor v. Western & S. Life Ins. Co., 966 F.2d 1188, 1203–06 (7th Cir. 1992) (§ 1981).

⁸⁷42 U.S.C. §2000e-5(e)(1) (2000).

⁸⁸29 U.S.C. §626(d)(1) & (2) (2000).

⁸⁹42 U.S.C. §12117(d) (2000).

though those are standard filing requirements in the collective agreements of unionized employees.

A third approach is for the court to refer the matter to the arbitrator. A federal district court in Tennessee thus held that the question of timeliness was a “gateway” procedural issue and not a defense against arbitration on which the court should rule.⁹⁰ The court added: “Although the court cannot conclude, as a matter of federal arbitration law, that the ninety (90) day time limit is *per se* unenforceable, there are a number of legal and equitable reasons why an arbitrator might decide not to enforce the limit on the facts of this case.”⁹¹ The Third Circuit has similarly taken the position that the validity of an arbitration agreement’s provision for a limitations period shorter than the relevant statute’s is a question for the arbitrator.⁹² The same court added that the arbitrator should also handle the application of the AAA’s rule, which was incorporated in the arbitration agreement, that in disputes involving statutory rights, the relevant statute’s limitations period should govern the time for filing for arbitration.⁹³ I have not yet seen reports on how arbitrators are deciding these abbreviated limitations and other due process issues.

Class Action Waivers. Parties in a superior bargaining position, such as employers and business firms, frequently impose prohibitions on class actions in their arbitration agreements with employees and customers. The primary purpose is to discourage the pursuit of small monetary claims, where the individual may have so little at stake that it is not worth the costs even to seek arbitration. Only a class or collective action is a realistic option. Not surprisingly, most challenges to waivers of the right to bring a class action in arbitration have dealt with consumer claims rather than employee claims.⁹⁴ Employees typically have a dispute over a job

⁹⁰*Hardin v. Morningside of Jackson, L.L.C.*, 425 F. Supp. 2d 898, 911–12 (W.D. Tenn. 2006). See generally *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–86 (2002).

⁹¹*Hardin*, 425 F. Supp. at 911.

⁹²See *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997) (one-year limitations period in agreement).

⁹³*Blair v. Scott Specialty Gases*, 283 F.3d 595, 611 (3d Cir. 2003) (arbitration agreement contained a shorter one-year limitations period; the court also cited approvingly a prior decision in which the court itself addressed the merits of a public policy claim against an arbitral provision).

⁹⁴Court reactions have varied. Compare *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006) (finding class action waiver in arbitration agreement of cellular phone provider was unconscionable), *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (invalidating waiver in arbitration agreement of cable TV customers alleging antitrust violation), and *In re American Express Merchants’ Litigation*, 554 F.3d 300 (2d Cir. 2009) (holding waiver in arbitration clause in credit-card acceptance agreement not enforceable in plaintiff merchants’ federal antitrust action), with *Snowden v. CheckPoint Check*

and often thousands of dollars in lost pay. That is generally worth pursuing even on an individual basis.

The most notable recent decision on the validity of class action waivers in an employee's arbitration agreement is *Gentry v. Superior Court*.⁹⁵ Gentry sued Circuit City on behalf of himself and other salaried customer service managers, alleging that they had been misclassified as exempt employees not entitled to overtime pay under California's wage and hour laws. Circuit City moved to compel arbitration. Gentry's agreement contained a class action waiver as well as a provision allowing the employee 30 days to opt out of the arbitration arrangement. The California Supreme Court made several important rulings. First, the statutory wage and hour provisions were not waivable. Next, the court declared that if the trial court found that "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, . . . it must invalidate the class arbitration waiver."⁹⁶ Factors to consider in making that determination included "the modest size of the potential individual recovery, the potential for retaliation against members of the class, [and] the fact that absent members of the class may be ill informed about their rights."⁹⁷ But the court specifically held that not all class action waivers were invalid, thus refusing to apply a per se or bright-line rule.⁹⁸ Finally, the court rejected Circuit City's argument on the controlling importance of the 30-day opt-out provision in negating any notion that the arbitration agreement was procedurally unconscionable. Regardless of that, the nonwaivability of the statutory wage and hour rights was held the key to resolving the validity of the class action waiver.⁹⁹

In a case similar to *Gentry*, the First Circuit¹⁰⁰ held a class action waiver unconscionable under Massachusetts law as applied to an employee alleging a violation of the overtime provisions of the Fair Labor Standards Act. As in *Gentry*, the court emphasized that it was not declaring all such waiver clauses invalid but was making

Cashing, 290 F.3d 631 (4th Cir. 2002) (holding class action waiver not preclusive of effective vindication of statutory rights and not unconscionable), and *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003) (enforcing class action waiver in arbitration by borrowers against lenders).

⁹⁵165 P.3d 556 (Cal. 2007), cert. denied sub nom. *Circuit City Stores, Inc.*, 128 S. Ct. 1743 (U.S. 2008).

⁹⁶165 P.3d at 568.

⁹⁷*Id.*

⁹⁸*Id.* at 567–68

⁹⁹*Id.* at 570–71.

¹⁰⁰*Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59–60 (1st Cir. 2007).

a decision on the basis of only the particular facts before it. So viewed, the clause subjected employees to “oppression and unfair surprise” because “[t]he timing, the language, and the format of the presentation of the [Dispute Resolution] Program obscured, whether intentionally or not, the waiver of class rights.”¹⁰¹ Citing the Supreme Court’s *Bazze* decision,¹⁰² the court also stated that the waiver question would ordinarily be for the arbitrator to decide, but here the parties had agreed that the court should resolve it.¹⁰³

Some courts, like the Fifth Circuit,¹⁰⁴ apparently still believe that Supreme Court language in *Gilmer* calls for the routine enforcement of class action waivers in employment arbitration agreements. It is true that parties seeking the invalidation of these and other arbitration clauses bear the burden of proving that the provisions are unconscionable or impede the effective vindication of statutory rights. But the trend appears to be that, given appropriate circumstances, that burden can be carried without too much difficulty.

Fees and Costs. The Due Process Protocol required a sharing of the arbitrator’s fees by employer and employee, on the theory that the source of payment might affect at least the appearance of the arbitrator’s neutrality.¹⁰⁵ The D.C. Circuit’s *Cole* decision repudiated that perception and took the more practical position that imposing arbitral fees and costs on employees might block their access to arbitration.¹⁰⁶ Since then the question has become what, if any, fees and costs can lawfully be assessed against employees without invalidating the payment requirement or even the arbitration agreement as a whole. In many instances, however, this issue never arises. The employer frequently bears the entire cost of the arbitration proceedings, though usually not the employee’s attorneys’ fees or other representational costs.

Following the Supreme Court’s lead in *Randolph*,¹⁰⁷ the courts have generally placed the burden on plaintiffs to show that arbitration fees and costs are so excessive as to impair their ability to

¹⁰¹*Id.* at 60.

¹⁰²*Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 452 (2003).

¹⁰³*Shirchak*, 508 F.3d at 56–57.

¹⁰⁴*Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

¹⁰⁵See *supra* note 54 and accompanying text.

¹⁰⁶See *supra* note 54.

¹⁰⁷*Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (consumer case). See *supra* text accompanying notes 70–74.

vindicate their statutory rights. Decisions can naturally turn on quite specific facts, depending on the dollar amounts involved and the financial situation of individual employees. The Sixth¹⁰⁸ and Ninth¹⁰⁹ Circuits have been fairly generous to employees; the Fourth¹¹⁰ and Fifth¹¹¹ Circuits are not so favorable. These cases also present such issues as whether one determines employees' capacity to pay on an individual-by-individual basis or on the basis of similarly situated persons, and whether an invalid arbitration clause is severable, leaving the remainder of the arbitration agreement enforceable, or whether an invalid clause renders the whole arbitration agreement unenforceable.

If the provision requiring employee payments is found invalid but severable and arbitration is enforced, then once again there is the problem that the employer can leave the clause in the arbitration agreement and many other employees may be deterred from seeking arbitration or challenging the requirement.¹¹² The validity of these and other restrictive clauses may depend on the applicability of a specific federal or state law whose policy would be thwarted by their enforcement. An apparent peculiarity of a cost-sharing provision, as contrasted with other common clauses discussed earlier, is that the courts are generally more willing to assess its legitimacy themselves and not refer the matter to the arbitrator. A modest "tribunal fee," akin to the cost of filing a court suit, would seem reasonable and would tend to discourage frivolous claims.

¹⁰⁸*Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (holding cost-splitting provision unenforceable as it would deter substantial number of potential claimants under federal statute but clause severable and arbitration enforceable); *Cooper v. MRM Investment Co.*, 367 F.3d 493 (6th Cir. 2004) (stating same principle on cost-splitting but clause not severable and case remanded to determine validity of cost-splitting on facts and enforceability of arbitration).

¹⁰⁹*Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (holding that filing fee of \$75 and cost-splitting were unconscionable and numerous unconscionable clauses made arbitration unenforceable).

¹¹⁰*Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001) (finding 50–50 arbitrator fee splitting enforceable when plaintiff did not show it impaired his individual capacity to arbitrate, and arbitration thus enforceable).

¹¹¹*Cf. Williams v. Cigna*, 197 F.3d 752 (5th Cir. 1999) (stating that plaintiff failed to show arbitral award was contrary to public policy in requiring plaintiff to pay \$3,150 as his one-half share of "forum fee").

¹¹²An analogous problem is presented when an employer asserts its willingness to pay what would otherwise be excessive fees and costs, imposed on the employee by an arbitral agreement, in order to secure enforcement of the arbitration provision. *Compare Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004) (allowing such employer payment as "mooting" issue of cost-sharing's validity), *with Cooper v. MRM Inv. Co.*, 367 F.3d 493, 512 (6th Cir. 2004) (refusing to sever the cost-splitting provision in the absence of a severance clause, and pointing out that severance would provide an incentive for other employers to leave such illegal clauses in their arbitration agreements).

Limitations on Remedies. It is hard to imagine any provision in an arbitration agreement that would seem more contrary to public policy than one preventing the full relief authorized by an applicable statute. Both the Due Process Protocol and the Dunlop Commission specify that an arbitrator must have the authority to grant such a remedy.¹¹³ As Professor Malin has pointed out, however, if Judge Frank Easterbrook and a panel of the Seventh Circuit had their way, a party could agree to waive even a right as significant as the full statutory remedy, absent an anti-waiver provision in the statute.¹¹⁴ Judge Easterbrook took high ground in defending his position: “One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly.”¹¹⁵

Most courts confronting a conflict between the remedial schemes in a statute and in an employment arbitration agreement have not heeded Judge Easterbrook’s guidance, although he does seem to find support in his own Circuit.¹¹⁶ Elsewhere a variety of paths have been followed. The Third and Ninth Circuits have held that limitations on remedy, at least in conjunction with other unconscionable provisions, render the arbitration agreement unenforceable, and thus the claim must be litigated.¹¹⁷ Perhaps the most common approach, taken by the D.C., Third, Fifth, and Sixth Circuits, is to invalidate the limitations clause, sever it, and enforce arbitration, presumably with the arbitrator empowered to award the relief authorized by statute.¹¹⁸ The Eighth and Eleventh Circuits have left the validity of the limitations on remedy to the arbitrator in the first instance.¹¹⁹

The very foundation of *Gilmer*’s sustaining the enforceability of a mandatory arbitration clause was that it merely represented a change of forums and not a loss of substantive statutory rights.¹²⁰ It might well be that in other contexts, where one party in an equal

¹¹³ See *supra* text accompanying note 53.

¹¹⁴ Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 *Emp. Rts. & Emp. Pol’y J.* 393–94 (2007).

¹¹⁵ See *Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) (consumer case).

¹¹⁶ See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

¹¹⁷ *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

¹¹⁸ *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005); *Spinetti v. Service Corp. Int’l*, 324 F.3d 212 (3d Cir. 2003); *Hadnot v. Bay, Ltd.*, 344 F.3d 474 (5th Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003).

¹¹⁹ *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 n.6 (8th Cir. 2001); *Summers v. Dillard’s, Inc.*, 351 F.3d 1100 (11th Cir. 2003).

¹²⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

bargaining relationship decides to forgo certain statutory entitlements to obtain a more valued return, Judge Easterbrook's reasoning would make sense. But when a compelled arbitration clause is coupled with a compelled surrender of statutory rights, the rationale for upholding mandatory arbitration clauses collapses. The harder questions are what exactly should then be done, and who should decide.

I am not much troubled when a court decides to pay attention to all the facts of a case in making those determinations. For example, if an arbitration agreement is riddled by unconscionable clauses, not just a limitation on remedies, then one could conclude that an employer has made such a mockery of the process that the appropriate response is for the court to void the whole arbitral arrangement and proceed to handle the entire case itself. On the other hand, if the challenged clause simply precludes punitive damages (the common practice in contract disputes in arbitrations between unions and employers) and is invalidated because one applicable statute authorizes such damages, it may be reasonable to sever that provision and enforce arbitration. But I do not understand the reason for letting arbitrators decide the validity of the limitations clause (unless it is no more than determining the meaning of the provision). If ever there was a situation calling for a bright-line rule, then this would seem to be it. An arbitrator must be empowered to provide all the remedies available under applicable law, and any purported contractual diminution of that authority is null and void.

Conclusion

From my own research and experience, and from the three papers I have discussed by Professors Bales, Colvin, and Malin that were presented at the National NAA's conference in the spring of 2007, I draw three principal lessons.¹²¹ First, at least as far as mandatory arbitration in employment is concerned, it is time to stop talking about the theoretical deprivation of statutory procedures and to recognize the realities of the working world. The vast

¹²¹See Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 Emp. Rts. & Emp. Pol'y J. (2007); Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Emp. Rts. & Emp. Pol'y J. (2007); Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 Emp. Rts. & Emp. Pol'y J. (2007). Naturally, I do not claim that these three authors would necessarily agree with any of my conclusions. But I am much indebted to their research and analysis, and I apologize for any misuse that they may feel that I have made of it.

majority of ordinary, lower- and middle-income employees (essentially, those making less than \$60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

A great deal of debate still rages about the respective success rates of employees who have arbitrated claims against employers and those who have been fortunate enough to get into court to pursue their claims. I am prepared to concede that some of the early studies were overly optimistic about the chances of rank-and-file employees in arbitration. Apparently the initial surveys did not adequately distinguish between those employees, usually relying on “just cause” policies in personnel manuals, and professional and executive employees with individualized contracts of employment. The latter were significantly more successful. Nonetheless, my second lesson is that even the more refined recent studies show that lower-paid employees still had quite respectable success rates in arbitration, ranging from about 21 percent to almost 40 percent. That compares very favorably with the 23 percent win rate of union-represented employees that I found in one of the oldest and most respected labor arbitration systems in the country. So, employees subject to mandatory arbitration not only have access to relief that otherwise would seldom be available; the system works for them. A final point is that the great majority of these arbitrated cases do not involve statutory claims at all; they are contractually based on employee handbooks and the like. The substitution of an arbitral forum for a judicial forum in enforcing statutory rights is relatively infrequent.

The third and final lesson I would derive from all these studies is that the true challenge is to ensure due process in employment arbitration. Professors Bales and Malin both stress the need, in light of the perceived deficiencies in judicial supervision, for more self-regulation by employers, arbitrators, and arbitrator providers like the AAA and JAMS.¹²² Bales would try to amend and update the Due Process Protocol, despite the skepticism of its most influential proponent, Arnold Zack, that the Protocol was the product of a special historical moment that cannot be replicated. Malin urges the adoption of such standards as the NAA’s Guidelines for

¹²²Bales, *id.* at 340–44; Malin, *id.* at 396–403.

Employment Arbitration, and adherence to them by employers, arbitrators, and designating agencies. Malin also deplores the retreat by the courts from clear, bright-line rules in the application of due process standards. On this latter score I am of two minds. I would applaud the voluntary adoption of bright-line regulations by the various participating parties in the arbitration process. But when it comes to the courts, wielding the power of the state, I find more congenial the nuanced approach of case-by-case adjudication. As can be seen from the earlier discussion of various types of clauses in arbitration agreements, the provisions themselves can differ greatly and so can the situations in which they are applied. In fairness to all parties, I feel they deserve discriminating assessments of their own particular circumstances. For example, I could imagine limitations on class actions in certain situations that I would consider reasonable. But an absolute prohibition of limitations on statutory remedies seems appropriate.¹²³

Overall, my conclusion is that, whatever may be the contrary appeal of the siren song of perfection, mandatory arbitration is indeed better than it looks. For the lower-paid, nonunion employee, it may be the only realistic recourse.

¹²³I distinguish that from limitations on purely *contractual* remedies.