Employment Arbitration in the Securities Industry: Lessons from Recent Empirical Research

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Keywords
employment arbitration, securities industry, employment arbitration, gender

Disciplines
Dispute Resolution and Arbitration | Finance and Financial Management | Labor Relations

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Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research

J. Ryan Lamare† and David B. Lipsky‡‡

In this Article, we use evidence gathered from employment arbitration cases arising in the securities industry to address several research questions that emanate from the debate over the arbitration of employment disputes. We empirically answer the following questions: (1) Are critics correct in asserting that employment arbitration favors repeat players? (2) Do employees fare better under voluntary arbitration than they do under mandatory arbitration? (3) Are employees who allege violations of their civil rights, through the filing of discrimination charges, treated differently from those filing other types of claims? (4) Does the gender of the parties involved in the arbitration process affect outcomes in any way? (5) Is there evidence that companies learn from, or are affected by, the results of prior arbitration awards when dealing with a current claim? Although the literature has offered some answers to these questions, this Article provides a holistic review and overview of the arbitration experience within the securities industry and a summation of quantitative evidence on the subject.

INTRODUCTION .......................................................................................... 114
I. FINRA'S ARBITRATION PROGRAM ....................................................... 115
II. FINDINGS FROM OUR EMPIRICAL INVESTIGATION INTO FINRA AWARDS ......................................................................... 118
   A. Evidence of a Repeat-Player Effect Within the FINRA System .................................................................. 120
   B. Effects of FINRA's Changed Procedural Rules .............................................................................. 124
   C. Discrimination Charges Compared with Other Allegations .......................................................... 126

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INTRODUCTION

The arbitration of employment disputes has been the subject of intense interest in recent years. Proponents of the practice maintain that arbitration provides a faster and cheaper means of resolving employment disputes than litigation, and several seminal Supreme Court decisions have reinforced support for the use of arbitration to resolve employment disputes.1 Opponents of the practice argue that arbitration is not an adequate substitute for a judicial forum because it does not provide a level playing field for employment disputes. Among other concerns, for instance, critics of the practice maintain that experienced employers typically enjoy advantages in arbitration over inexperienced employees. The so-called repeat player effect holds that sophisticated employers, by virtue of their knowledge of and experience in the arbitration process, are likely to have an edge over employees, who are much less likely to have had any previous experience in arbitration.2

Critics have especially expressed their concerns about mandatory arbitration. Congress has recently considered a bill called the Arbitration Fairness Act ("AFA"), which would amend the Federal Arbitration Act to ban the use of mandatory pre-dispute arbitration agreements in employment, consumer, franchise, and civil rights disputes.3 A pre-dispute arbitration agreement results when Party A (for example, an employer) requires Party B (for example, an employee) to sign an agreement waiving Party B's right to adjudicate future disputes arising out of their relationship, and instead requires Party B to submit those disputes to arbitration. The sponsors of the AFA, reflecting the views of several interest groups that have long criticized mandatory arbitration agreements, critique mandatory arbitration in the proposed legislation's findings. For example, the AFA sponsors assert that mandatory arbitration "undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions."4 The sponsors maintain that "arbitrators enjoy

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near complete freedom to ignore the law and even their own rules” because they know that “their rulings will not be seriously examined by a court applying current law.”\(^5\)

In this Article, we use the evidence we have gathered from cases arising in the securities industry to address several research questions that emanate from the debate over the arbitration of employment disputes. The answers should contribute to our assessment of the validity of some of the claims made by both the proponents and opponents of mandatory employment arbitration. For example, are critics correct in asserting that employment arbitration favors repeat players? Do employees fare better under voluntary arbitration than they do under mandatory arbitration? Are employees who allege violations of their civil rights, through the filing of discrimination charges, treated differently from those filing other types of claims? Does the gender of the parties involved in the arbitration process affect outcomes in any way? Is there evidence that companies learn from, or are affected by, the results of prior arbitration awards when dealing with a current claim? Although empirical answers to each of these questions can be (and, in many cases, have been) explored in the literature, this Article provides a holistic review and overview of the arbitration experience within the securities industry and provides a summation of quantitative evidence on the subject.\(^6\)

I. FINRA’S ARBITRATION PROGRAM

The Financial Industry Regulatory Authority (“FINRA”) regulates nearly 5,000 securities firms in the U.S., along with their 633,000 representatives.\(^7\) One of FINRA’s primary responsibilities involves the administration of an ADR program for the resolution of disputes between customers and brokers (seventy-five percent of all filings), brokers and

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\(^5\) H.R. 1020 \(\S\) 2(5).


\(^7\) Lipsky, Lamare, & Gupta, supra note 6, at 322.
brokers (two percent of filings), and employees and their firms (twenty-three percent of filings). The FINRA employment dispute resolution program covers only “associated persons” in the securities industry; associated persons are employees who are registered with the Securities and Exchange Commission and can accept and execute customers’ buy-and-sell orders. “It is estimated that about one-third of the employees in the industry are registered representatives.” When a claim is made under this system, a filing fee is required from the claimant. This can range from $50 (for claims of $1,000 or less) to $1,800 (for claims greater than $1 million). In cases alleging employment discrimination, the maximum claim fee is $200.

There are approximately 6,400 arbitrators on the FINRA roster. Arbitrators are either public (who are not required to have knowledge of or connection to the securities industry) or non-public (who have a securities industry background). All arbitrators must complete at least a basic training course prior to becoming eligible to be listed on the FINRA roster. Arbitrators must agree to abide by the American Bar Association’s Code of Ethics for Arbitrators in Commercial Disputes as well as FINRA’s Code of Arbitration Procedure. In addition, before every case, arbitrators must provide a disclosure report, which gives information on all relationships the arbitrator might have with the parties and/or conflicts of interest. The arbitrator must also sign an oath declaring his or her impartiality. FINRA pays its arbitrators at most $200 per four-hour hearing session, with an additional maximum premium of $75 per day for chairpersons. Cases are heard in seventy-two locations within all fifty states, plus Puerto Rico and London. Arbitrators are assigned to primary locations based on their residence and are included on the lists sent to parties in that location.

8. Id. at 322-23.
9. Id. at 323.
10. Id. We use the term “employee” to refer only to registered representatives.
The financial crisis that began in 2008 led directly to a dramatic increase in FINRA case filings, from 3,238 in 2007 to 4,982 in 2008 and to 7,137 in 2009.\textsuperscript{18} In other words, the FINRA caseload more than doubled between 2007 and 2009, and it increased by forty-three percent between 2008 and 2009.\textsuperscript{19} Although an analysis of the customer-broker cases would be valuable, our interest in employment relations led us to focus on the employment claims heard under FINRA auspices.

The FINRA system for arbitrator selection currently works as follows. If an employee claims $50,000 or less, a single arbitrator is appointed at random and a “simplified arbitration” occurs, wherein no hearing sessions will be held unless the claimant requests one.\textsuperscript{20} For claims between $50,000 and $100,000, FINRA provides each party with a list of ten randomly-selected, “chair-qualified” public arbitrators.\textsuperscript{21} Both parties strike at most four arbitrators from the list and rank the remainder; FINRA then selects the highest ranked available arbitrator, and a normal hearing is held.\textsuperscript{22} Cases with higher claim amounts are heard by a tripartite panel; in these cases, parties each receive three lists of ten arbitrators: a chair-qualified public list, an additional public list, and a non-public list.\textsuperscript{23} The parties then follow the same process of striking and ranking as outlined above.

The system provides different rules for arbitrations concerning statutory discrimination claims. For instance, the maximum filing fee for discrimination claims is $200, whereas the fee can rise as high as $1,800 for non-discrimination cases.\textsuperscript{24} In addition, beginning in 2000, FINRA instituted stricter requirements regarding the composition of arbitration panels when discrimination has been alleged.\textsuperscript{25} In these cases, tripartite panels must consist of all public arbitrators (rather than a mixture of public and industry arbitrators), and the chair (or sole) arbitrator cannot have primarily represented employers or employees in the past five years.\textsuperscript{26}

Over the past twenty years, a substantial debate has arisen regarding the effectiveness and fairness of the arbitration process rules.\textsuperscript{27} As a

\textsuperscript{18} Dispute Resolution Statistics, supra note 11.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{26} Id.
\textsuperscript{27} See, e.g., Barbara Black & Jill I. Gross, Making It Up As They Go Along: The Role of Law in Securities Arbitration, 23 CARDOZO L. REV. 991 (2001); Edward Brunet & Jennifer J. Johnson,
consequence, a tremendous amount has been written on securities arbitration, including an array of opinion pieces, regulatory assessments, and scholarly articles. Within this vast literature, a primary complaint alleges that FINRA arbitration rules have tilted disputes in favor of the industry at the expense of investors and other claimants.  

The securities industry has often found itself at the forefront of the employment and consumer arbitration conversation, particularly discussions about the changing availability and usage of arbitration over the past several decades. Several of the Supreme Court’s most important decisions regarding employment and consumer arbitration originated in the securities industry. For example, Shearson/American Express v. McMahon held that investors who sign pre-dispute arbitration agreements with their brokers could be compelled to arbitrate claims arising under the Securities and Exchange Act, and Rodriguez de Quijas v. Shearson/American Express, Inc. overturned Wilko v. Swan, which held that claims arising under the Securities Act could not be compelled to arbitration by means of a contract.

Most critically for employment relations, the Supreme Court’s seminal decision in Gilmer v. Interstate/Johnson Lane Corp. held that a broker-employee who had signed a registration form with the SEC requiring the use of arbitration to resolve statutory claims had waived his right to take an age discrimination claim to federal court. The Gilmer case is widely credited with ushering in the widespread use of mandatory pre-dispute arbitration agreements in employment relations.

II. FINDINGS FROM OUR EMPIRICAL INVESTIGATION INTO FINRA AWARDS


28. See Jennifer J. Johnson, Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration, 84 N.C.L. Rev. 123 (2005) (examining the National Association of Securities Dealers which oversees most securities arbitrations); Brunet & Johnson, supra note 27.


arbitration through 2006. In 2007, we purchased data files from FINRA that provided information on: award amounts; claim amounts; characteristics of claimant-employees, respondent-employers, arbitrators, and attorneys; hearing length and location; claim filing and award issuance dates; allegations made by employees; any counterclaims made by employers. This information was included on an award-by-award basis over the lifespan of the FINRA system, totaling 3,200 cases. We cleaned and coded the data so that it was suitable for empirical analysis, either on our own or in conjunction with graduate students at Cornell University’s ILR School.

Arbitrators in the FINRA system were tasked with handling a variety of different types of employment disputes over the period studied. Figure 1 shows the types of claims made by employees in the 3,200 cases we analyzed: in 22.9 percent of the cases employees claimed their employer had denied them compensation they had been owed; in 35.2 percent of the cases employees claimed their employer had defamed them in some fashion (e.g., by alleging they had “churned” a customer’s account); in 20.8 percent of the cases employees claimed they had been wrongfully terminated; and in 29.3 percent of the cases employees claimed their employer breached their contract. Cases involving a claim of statutory discrimination constituted 18.9 percent of the total.

![Frequency of Allegations 1986-2007](image)

Figure 1: Frequency of Distribution of All FINRA Case Allegations

In every case the employee (and his or her attorney) presented the arbitrator with a monetary figure representing the damages associated with the claim. The figure presented to the arbitrator usually included the

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claimant’s demand for back pay and often punitive damages as well. The employers in these cases always denied that the employees’ claims had merit and sometimes filed counterclaims. The employer’s position in each of these cases was that the arbitrator should not award the employee-claimant any money at all.

Our analysis of the FINRA awards casts light on five major considerations for assessing the suitability of employment arbitration. First, do repeat players (usually employers) have an advantage over one-shot players (usually employees)? Second, are there differences in outcomes depending on whether the system is mandatory or voluntary? Third, are parties awarded different amounts depending on the gender of the employee, his or her attorney, the employer’s attorney, or the chair arbitrator? Fourth, do arbitration outcomes differ depending on the employee’s allegation? In particular, are employees treated differently if they take statutory discrimination claims to arbitration when compared against other types of allegations? Fifth, can we assess, using empirical measures, the extent to which companies treat each arbitration separately, or whether a given arbitration is influenced by a firm’s prior outcome? Each of these questions will be fully answered in the following sections. In answering these questions, we rely on evidence gleaned from our published articles, unpublished working papers, and new or previously unreported empirical analysis.

A. Evidence of a Repeat-Player Effect Within the FINRA System

Research assessing the adequacy and fairness of arbitration in resolving employment disputes has raised the problematic possibility that parties who engage in arbitration the most will enjoy inherent advantages over parties who are one-time users of the system. This has been termed the repeat-player effect. Although some empirical studies of repeat-player effects exist, many gaps remain in this literature. The first formal conceptualization of repeat players, compared against one-shot players, comes from Marc Galanter. Galanter argues that in any legal system repeat players garner advantages over one-shot players for several reasons: repeat players are more knowledgeable about the forum in which they operate, having been there before; they have access to specialists on the issue; they are able to develop informal institutional relationships; they are viewed as more committed to certain bargaining positions; they are able to take more risks; they can use their influence to lobby for favorable rules; and they are more

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34. Portions of this section are drawn or paraphrased from the unpublished manuscript, Lamare and Lipsky, The Repeat-Player Effect, supra note 6.

likely to invest greater resources in order to affect the rules. Conversely, one-shot players have more to lose; may employ risk-averse strategies; have no interest in long-term gains or relationships; are unconcerned with precedent and future rule changes; have no institutional relationship; have no knowledge-experience base from which to draw; and have lesser access to advocates who are experts on the issue. This, according to Galanter, contributes to a legal system in which the “haves” (typically large, well-resourced firms) enjoy significant advantages over the “have-nots” (aggrieved individuals).

Galanter’s repeat-player theory was first applied to the employment arbitration setting by Lisa Bingham, who determined that employers involved in multiple arbitration cases did better than those engaging in only a single case. In explaining this finding, Bingham suggested legitimate reasons related to arbitration policy distinctions between one-shot players and repeat players, as well as the possibility that experienced repeat players could more easily identify and settle unwinnable cases. Bingham also suggested that pro-employer bias might exist within employment arbitration, where arbitrators would favor firms in order to gain future business. However, these results have been challenged on grounds related to sample size and truncation problems, as well as concerns that her findings of possible arbitrator bias may have been conflated with issues related to employer size, experience, and institutional memory.

Alexander Colvin’s work overcomes many of these problems. He used a larger sample, a broader timeframe (2003 to 2007), and a more nuanced analysis of possible employer-arbitrator biases. Colvin maintains that repeat-player effects might be serving as a proxy for size effects. Larger employers are more likely to repeat. These firms may also enjoy certain advantages such as resource availability, legal expertise, and knowledge of the arbitral forum; might adopt HR practices that ensure fairer employment decisions; and could be more likely to settle meritorious cases using internal grievance systems. Employing a quantitative analysis of American Arbitration Association (AAA) data, Colvin finds a considerable

36. Id. at 98-103.
37. Id.
38. Id. at 103-04.
41. Colvin, supra note 40.
42. Id. at 12.
repeat-player effect, but attributes this to inherent advantages available to large employers, rather than systemic bias.\textsuperscript{43} Colvin also finds a smaller, but still significant, repeat player-arbitrator effect, where employers selecting the same arbitrator multiple times tend to receive favorable outcomes.\textsuperscript{44} Colvin argues that this finding does indeed indicate pro-employer arbitrator bias, attributable to both arbitrators’ hope for future business from employers and also to repetitious firms’ greater expertise in selecting pro-employer arbitrators.\textsuperscript{45}

However, issues remain to be resolved within this literature. All repeat-player studies have faced problems of sample truncation, where the available data are unable to capture the full range of awards since the arbitration system’s inception. Without including all awards over a system’s lifetime, the data used to analyze repetition effects cannot ensure that parties identified as one-shot players did not participate in cases within the system prior to the timeframe chosen for analysis. In addition, published studies on repetition have treated the key independent variable in only a dichotomized manner; thus, all repeat players are treated equally when being measured against those who do not repeat.

Similarly, in terms of dependent variables, the most robust quantitative research into repetition effects on employment arbitration has measured only the total monetary amounts awarded and dichotomized “win/loss” outcomes, where any value over zero counts as an employee victory. As Colvin notes, this is an extremely narrow definition of what might constitute a “win” for one side and a “loss” for another.\textsuperscript{46} Further, although studies suggest that access to expert lawyers may explain the repeat-player results, no work on the subject has fully accounted for attorney effects. Finally, all studies on the subject suffer from substantial omitted variable problems.

Our analysis of FINRA cases overcomes many of these issues and, in so doing, provides the most complete analysis to date of repeat-player effects on employment arbitration. For one, we have a non-truncated sample of all decisions rendered within the FINRA employment arbitration system since its beginning. For another, we are able to consider degrees of experience. This allows us to account for the effects of increasing levels of experience on arbitration outcomes. Additionally, we include attorney and chair arbitrator repetition in our final analysis, as well as employer repetition. Further, we are able to capture both relative (percent-based) and absolute (award sum-based) measures of awards. This overcomes concerns regarding the difficulty in determining what constitutes a “win” when absolute monetary values are used and also mitigates issues over the possibility of

\textsuperscript{43} Id. at 21.
\textsuperscript{44} Id. at 21.
\textsuperscript{45} Id. at 12, 14-15.
\textsuperscript{46} Id. at 5.
inflated claims artificially depressing relative award results. Finally, we control for an array of factors that might also affect outcomes, including the claim size, gender, location, year, case complexity, and allegations.

We find some evidence of repetition and experience effects within the FINRA system, as indicated by Table 1. After controlling for the location of the arbitration hearing, the complexity of the case, the size of the initial amount claimed by employees, time, and party characteristics, we find that, with every additional FINRA arbitration case in which an employer participates, employees are considerably less likely to win larger shares of their initial claim amounts. As arbitrators become more experienced in the FINRA system, they also tend to more heavily favor employers, at least with regard to awards relative to claim size. However, we find no significant effects of multiple pairings of the same employer and arbitrator on relative awards. Nor does increasing attorney experience affect award outcomes for either party.

<table>
<thead>
<tr>
<th>Increases in Employer’s Experience</th>
<th>Percent-Based Measure of Award Outcomes</th>
<th>Absolute Measure of Award Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increases in Employee Attorney’s Experience</td>
<td>Negative Effect on Employee Outcomes</td>
<td>Negative Effect on Employee Outcomes</td>
</tr>
<tr>
<td>Increases in Employer Attorney’s Experience</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>Increases in Arbitrator’s Experience</td>
<td>Negative Effect on Employee Outcomes</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>Repeated Pairs of Firms and Arbitrators</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
</tbody>
</table>

Table 1: Repeat-Player Effects within the FINRA System

These results do not necessarily suggest that the arbitration system under FINRA is biased to benefit employers. Colvin finds the most compelling empirical evidence of bias in employment arbitration by testing the effects of matched employer-arbitrator pairs on awards in the AAA system. Colvin’s outcomes support the assertions that arbitrators will unfairly favor employers in the hope that this will lead to future business, and that repeat employers are able to identify and select biased arbitrators. Generally, our study finds a different result from that of Colvin. Our

47. Controls: Hearing location, case complexity, initial amount claimed, party characteristics, allegations, time.
48. Id. at 21.
49. Id.
findings suggest that the FINRA system may have been largely successful in protecting against selection effects and overt employer bias. Throughout the twenty-year period we study, only 2.3 percent of cases involved employer-arbitrator pairs matched multiple times, considerably lower than the 15.9 percent Colvin finds in the AAA data. In 1998, FINRA introduced a system of automated panel selection, which may have adequately mitigated the possibility that employers are able to select arbitrators multiple times based on past history. Even when arbitrators and employers do have a prior relationship in the system, the safeguards FINRA has put into place to protect against bias (in the form of disclosure statements, sworn oaths, and a variety of other methods to preserve impartiality) arguably have proven to be effective. The repeat player problem raises two concerns: (1) that experienced parties in arbitration will be more successful than those that lack experience; and (2) that this success may be a product of systemic bias. Although we find evidence that there may be merit to the first concern, we find no support for the second claim. This result stands in contrast to previous work on the subject.

B. Effects of FINRA’s Changed Procedural Rules

In 1999 FINRA amended its rules to provide stricter policies regarding the arbitration of employment discrimination claims. The change in the handling of these claims after 1999 provides us with a unique opportunity to examine to what extent the procedures for handling such claims affect the outcomes of these types of cases. From the inception of the employment arbitration program through 1999, FINRA used mandatory arbitration for all claims, including those alleging discrimination. Since 1999, registered employees in the industry have had the option of using voluntary arbitration to resolve discrimination claims (but all other types of claims are still subject to mandatory arbitration). Critics maintain that mandatory arbitration has a significant effect on arbitration outcomes: claimants, they argue, are at a disadvantage under mandatory arrangements and are likely to receive lower awards than they would if they had the option of voluntary arbitration. Recall, also, that a year after FINRA switched from mandatory to voluntary procedures for handling discrimination claims, it enhanced the procedures used for those claims. Accordingly, we have the opportunity to compare three distinct regimes governing employment discrimination claims: a mandatory regime with somewhat loose procedures, a voluntary

50. Portions of this section are drawn or paraphrased from Lamare, Securities, supra note 6; Lipsky, Seebor & Lamare, supra note 6; and from the unpublished manuscript, Lamare & Lipsky, Resolving Discrimination Complaints, supra note 6.


52. See Lamare & Lipsky, Resolving Discrimination Complaints, supra note 6, at 8-9.
Table 2 provides the results. One major effect of the change was a dramatic decline in the number of discrimination cases after 1999. From the inception of the arbitration program through 1999, there were 220 discrimination awards. From 2000 through 2008 there were only 98 discrimination awards. There is no evidence that there was a sharp drop after 1999 in the number of employees who had discrimination complaints. Rather, the most reasonable explanation for the decline in discrimination awards is that after 1999, when employees in the securities industry were no longer compelled to arbitrate discrimination claims, most chose litigation over arbitration.

<table>
<thead>
<tr>
<th>Allegation Type:</th>
<th>Mandatory Arbitration for All Allegations</th>
<th>Voluntary for Discrimination without Rule Changes</th>
<th>Voluntary for Discrimination with Rule Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>D=Discrimination</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>O=Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>220</td>
<td>18</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>$91,309</td>
<td>$52,233</td>
<td>$157,890</td>
</tr>
<tr>
<td></td>
<td>$146,364</td>
<td>$156,690</td>
<td>$129,226</td>
</tr>
<tr>
<td>Mean Monetary Award</td>
<td>-2.6%</td>
<td>10.4%</td>
<td>17.1%</td>
</tr>
<tr>
<td>Mean Percent of Claim Awarded</td>
<td>18.9%</td>
<td>21.9%</td>
<td>17.5%</td>
</tr>
<tr>
<td>Mean Monetary Award</td>
<td>$183,022</td>
<td>$104,649</td>
<td>$311,073</td>
</tr>
<tr>
<td>Mean Percent of Claim Awarded</td>
<td>32.2%</td>
<td>30.8%</td>
<td>35.4%</td>
</tr>
<tr>
<td>Mean Employee Win Rate</td>
<td>49.0%</td>
<td>50.0%</td>
<td>52.6%</td>
</tr>
</tbody>
</table>

Table 2: Outcome Effects under Mandatory and Voluntary Systems

We discovered that the shift from mandatory to voluntary arbitration did not seem to have an effect on the size of the awards in discrimination cases, whereas the enhanced procedures did affect the size of the awards. Through 1999, the mean award in discrimination cases was $91,309. In 1999 (the year when discrimination charges were voluntary but no rule changes had occurred), the mean award in discrimination cases in fact fell.

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to $52,233. After 2000, under a voluntary regime with enhanced rules, the mean award jumped to $157,890. We find similar evidence with regard to the percent of the initial claim that was awarded by the arbitrator and the mean employee win rate. In sum, our analysis of the FINRA data suggests that there is no other factor that can explain both the noteworthy drop in the number of discrimination cases and the significant increase in the size of awards in those cases after 1999 other than the changes FINRA made in its system of arbitration. By allowing discrimination cases to proceed to litigation and, most importantly, providing a fair and balanced system for those cases that went to arbitration—one that offered adequate due process protections for complainants and impartial, well-trained arbitrators knowledgeable about relevant statutes—FINRA brought about a dramatic change in the handling of discrimination complaints in the securities industry.

C. Discrimination Charges Compared with Other Allegations

How do cases arbitrated under the FINRA system involving allegations of discrimination compare with cases involving other types of allegations? Table 3 provides the results of comparisons between discrimination cases and other types of cases. When considering all awards, individuals taking discrimination cases to arbitration received monetary compensation that was 21.4 percent lower than those whose claims did not involve allegations of discrimination.

<table>
<thead>
<tr>
<th></th>
<th>Mean Money Award</th>
<th>Employee Win Rate</th>
<th>Percent of Claim Awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination Cases</td>
<td>$108,488</td>
<td>50.2%</td>
<td>14.9%</td>
</tr>
<tr>
<td>Other Allegations</td>
<td>$138,003</td>
<td>64.8%</td>
<td>24.1%</td>
</tr>
<tr>
<td>Difference between</td>
<td>-21.4%***</td>
<td>-29.1%***</td>
<td>-61.7%***</td>
</tr>
<tr>
<td>Discrimination and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Allegations</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 3: Award Amounts and Win Rates for Discrimination and Other Cases

Additionally, similar findings are uncovered when measuring the relative success rates of employees (as determined by the percentage of the individual’s claim amount awarded by the arbitrator). Over the twenty-year period, only half of all employees taking discrimination cases to arbitration won anything at all (compared with 64.8 percent of those alleging other claims). When an arbitrator found merit in an employee’s case, an

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54. Portions of this section are drawn or paraphrased from Lamare, Securities, supra note 6, and from the unpublished manuscript, Lamare & Lipsky, Resolving Discrimination Complaints, supra note 6.

55. *** = significant at the .01 level. Throughout Table 3, monetary awards are deflated to 1986 dollars. “Percent of Claim Awarded” includes zeros.
individual with a discrimination claim won about twenty-nine percent of the amount he or she initially demanded, whereas an individual with a non-discrimination claim received over thirty-six percent of his or her request. We discovered a similar difference when we looked at awards in which the arbitrator found for the employer. Each of the differences between outcomes for discrimination cases and outcomes for non-discrimination cases is statistically significant at the ninety-five or ninety-nine percent confidence level. In addition, the results remained robust when we applied regression analysis to the data and controlled for initial claim amounts, gender and repeat-player effects, case complexity, time, and geographic location. There is, on the whole, clear evidence that employees taking discrimination cases to arbitration received lower awards than those with other types of claims.

D. Gender of the Parties Involved in Arbitration

The securities industry has not always been a hospitable place for women. Indeed, there is considerable evidence that for most of its history, the industry was a hostile environment for women. As Louise Marie Roth has written:

Not so long ago—as recently as the mid-1980s—Wall Street was one big men’s club of smoked-filled rooms and strippers on the trading floor. Women, to the degree that they were welcome at all, were relegated to roles as secretaries and sex objects. Firms blatantly discriminated against the few women who did fight to become traders, and court cases demonstrate a long history of groping, name calling, come-ons, blocked mobility, and sexual pranks.

Over the last fifteen years, major class action lawsuits were brought against Smith Barney, Merrill Lynch, and Morgan Stanley charging those firms with the improper treatment of women. Each firm paid out more than $100 million to resolve these lawsuits, although each firm denied that it had engaged in any systematic discrimination against women.

In 2006 the U.S. Equal Employment Opportunity Commission reported that about one-third of the “officials and managers” in the securities industry were women, compared to nearly one-half in the banking, credit, and

56. Portions of this section are drawn or paraphrased from Lipsky, Lamare, & Gupta, supra note 6.
57. LOUISE MARIE ROTH, SELLING WOMEN SHORT: GENDER AND MONEY ON WALL STREET (2006). For a thorough description of the discriminatory conditions women faced on Wall Street through the early part of this century, see SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM (2002).
58. ROTH, supra note 57.
insurance industries. Many observers contend that sexism continues to plague the securities industry. In 2010 women alleging sex discrimination filed class action lawsuits against both Goldman Sachs and Bank of America Merrill Lynch; both firms have denied that these suits have any merit. Nevertheless, reports of “women fleeing Wall Street” have been abundant in the financial and business press. In the first decade of this century 141,000 women, or 2.6 percent of the female workforce, left the industry, while the number of men working for Wall Street firms grew by 389,000, a 9.6 percent increase of the male workforce. “The economic downturn produced a talent pool overflowing with highly-qualified candidates, both men and women, but evidence suggests that the bar for women to reenter Wall Street is disproportionately high.”

In the securities industry several reasons lead us to hypothesize that women will do less well than men in arbitration cases. It is possible that the reasons women fare poorly may stem from biases that exist in the arbitration process itself. Indeed, arbitrators themselves (whether male or female) may be affected by a subtle form of bias. They may be unconsciously influenced by deeply rooted cultural stereotypes about men and women. Without realizing it, arbitrators may find more merit in claims brought by men as compared to women, even when the claims are equally meritorious. Our argument, however, does not necessarily rest on the premise that the arbitrators or other participants in the FINRA arbitration process are consciously or unconsciously biased against women. There are other factors, we maintain, that may influence the relative success of men and women in FINRA arbitration cases. These factors include, for example, the possibility that employers have greater willingness to settle early in the

process with women to avoid potentially high-profile gender discrimination cases. Another factor might be that the gender of the claimant (and the gender of the claimant's attorney) serves as a proxy for experience. Brokers with greater experience tend to earn more than brokers with less experience, and awards are based largely on unpaid compensation. Therefore, since male brokers in general have more experience than female brokers, their back pay awards would be larger than the back pay awards obtained by female claimants.

<table>
<thead>
<tr>
<th>Employee is Male</th>
<th>Percent-Based Measure of Award Outcomes</th>
<th>Absolute Measure of Award Outcomes</th>
</tr>
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<tbody>
<tr>
<td>Positive Effect on Employee Outcomes</td>
<td>Positive Effect on Employee Outcomes</td>
<td></td>
</tr>
<tr>
<td>Employee's Attorney is Male</td>
<td>Positive Effect on Employee Outcomes</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>Employer's Attorney is Male</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
<tr>
<td>Arbiter is Male</td>
<td>No Effect on Awards</td>
<td>No Effect on Awards</td>
</tr>
</tbody>
</table>

Table 4: Gender Effects within the FINRA System

Table 4 provides the results of gender effects on arbitration awards; the results are based on a regression analysis of our data that controls for other relevant variables. We find that female employees and female employee attorneys receive lower awards than do male employees and male employee attorneys. However, we do not conclude from this that the FINRA system is biased toward women. Consider our finding that the gender of the arbitrator does not affect the relative size of the award. We did not find, for example, that male employees obtained larger awards from male arbitrators, nor did we find that female employees obtained larger awards from female arbitrators. Rather, we found that male employees did better than female employees regardless of the gender of the arbitrator. In our view, this finding provides at least limited support for our belief that FINRA arbitrators do not overtly discriminate against women. We suspect that gender in our results might plausibly be a proxy for other factors that influence the experience of men and women in the FINRA arbitration process, but unfortunately we lack the data to test this assertion more fully.

**E. Past Arbitration Awards' Effect on Current Cases**

The final question we ask in this paper relates to the concept of independence between arbitration awards. To what extent are the

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65. Controls: hearing location, case complexity, initial amount claimed, party characteristics, allegations, time.
employment arbitration awards obtained by employers independent of previous awards they have obtained? Are employers affected by the results of prior hearings, or do they treat each arbitration case as a unique event?

This question is difficult to answer empirically, and there is no literature of which we are aware that has attempted to study the issue. An initial assumption is that firms learn from their prior awards. The logic behind this assumption is that a company, acting strategically, will consider its institutional history when confronting a given arbitration case and its strategy for that case will depend on the company’s prior experiences. This in part helps to explain the repeat-player findings reported earlier.

However, deeper consideration makes this theory more ambiguous. We might expect that a firm’s overall experience with FINRA arbitration benefits that firm, as the theory suggests, but the idea that an award depends on the firm’s immediate prior outcome may be illogical. Firms, and their employees, are highly diverse entities, and it is not necessarily the case that an arbitrator’s ruling on, say, a breach of contract case filed at the firm’s Kansas City office would have any bearing on a subsequent discrimination charge filed at the firm’s New York City branch.

With our data, we are able to test explicitly the extent to which a company’s given arbitration outcome is affected by the award preceding it. In essence, we can test whether companies learn from (or depend in any way on) the most recent past award when they go to arbitration. Although we cannot provide a more nuanced measure of corporate learning in this regard, we are at least able to introduce the concept through empirical analysis.

To answer this question, we rely on statistical tests for the presence of autocorrelation between the data. In the absence of autocorrelation, it is fair to assume that each of the arbitration awards obtained by a given firm operates independently of the firm’s other awards. However, if autocorrelation is found to be present, this indicates that the company’s arbitration outcome is affected by some earlier case. In this instance, we lag the results by one time period (that is, we measure the correlation at time one and compare it to the correlation at time two) to test whether the employer’s immediate prior award shaped the employer’s award in the current case.

We ran empirical tests and find no evidence for the presence of autocorrelation within our data. However, we do not interpret this finding as necessarily suggesting that each arbitration case should be viewed as a unique event in the company’s arbitration experience. It may be that firms do indeed pay attention to earlier awards when handling a given case, but only when those earlier cases match the current case in specific ways. For instance, a firm’s Los Angeles attorneys might examine the company’s performance in discrimination cases in that region and learn from those specific experiences—a notion again supported by our repeat-player
findings. Although we cannot perform such nuanced tests of this concept using our data, we encourage researchers to consider measuring for autocorrelation in their analyses of arbitration awards over time.

CONCLUSION

Our examination of employment arbitration in the securities industry produces a mixed picture—one that does not entirely support either the proponents or the opponents to mandatory workplace arbitration. For example, we find strong evidence of a repeat-player effect in the securities industry, to some degree replicating the findings of both Bingham and Colvin in their analyses of AAA cases. Our analysis has the advantage of avoiding some of the limitations of earlier studies of the repeat-player hypothesis. Because we have data on all employment arbitration cases arising in the securities industry from the inception of the program, our analysis avoids the truncation bias of earlier studies; also, we have been able to test whether the repeat-player effect is a phenomenon related to the experience of the firm or, on the other hand, a phenomenon related to the experience of the attorneys representing the disputants. Our findings strongly support the view that the repeat-player effect is a consequence of the experience of the firm and not the firm’s attorney.

Opponents of employment arbitration may use this evidence to support their contention that employment arbitration does not provide a level playing field for the disputants but inherently favors employers. However, in contrast to Colvin, we find no evidence that the repeat pairings of an arbitrator and an employer-respondent in the securities industry results in outcomes that favor the employer. Our evidence suggests that the procedural safeguards that FINRA has put in place over the years have mitigated the advantages of repeat players—a finding that should provide a lesson for other providers of arbitration services.

Similarly, our findings cast light on whether mandatory arbitration, compared to voluntary arbitration, puts employee-plaintiffs at a disadvantage. The significant change in the rules governing employment arbitration in the securities industry in 1999 and 2000 allowed us to test the effects of mandatory arbitration on outcomes in discrimination cases. On the one hand, we found that the change from a mandatory to a voluntary arbitration program for discrimination complaints significantly decreased the number of discrimination claims resulting in arbitration awards. Presumably after 1999 most discrimination cases were litigated rather than arbitrated.

On the other hand, consistent with our finding on the repeat-player effect, FINRA’s rule changes in 2000, designed to enhance the fairness and due process protections of complaints in discrimination cases, proved to have a very significant positive effect on the outcomes obtained by complainants in arbitration cases. Again, the rules FINRA used to protect
employee-disputants appear to have had dramatic effects on arbitration awards, suggesting that procedural safeguards may be more important than whether an arbitration program is mandatory or voluntary.\footnote{66 We acknowledge that a more definitive answer to this question would require an examination of how securities employees with discrimination complaints fared in litigation; regrettably, we do not have the data to address this question.}

But our analysis also suggests that employees in the securities industry with discrimination complaints fared less well than employees with other types of claims. Again, we lack the data to estimate what employees with discrimination complaints might have received had they litigated their claims. What we have uncovered, however, is \textit{prima facie} evidence that, all other things considered, in the securities industry arbitrators treat employees with discrimination complaints less favorably than they treat employees with non-discrimination claims. This result may stem from the fact that arbitrators are more reluctant to find that an employer has violated a statute than they are to find that an employer has breached a contract.

Lastly, we find that, controlling for other relevant factors, women have obtained lower arbitration awards than men in the securities industry. On the one hand, critics might add this finding to their arsenal of objections to employment arbitration. On the other hand, our evidence suggests that the effect of gender on arbitration awards probably results from long-standing employment practices in the securities industry and not from the nature of the arbitration process itself. Clearly, there is no evidence to support the proposition that arbitrators consciously discriminate against women complainants in the industry.

In sum, in common with other researchers, we find that employment arbitration in the securities industry potentially has defects identified by critics of the practice. However, we also find that the regime of rules used by the provider can substantially correct those defects. For instance, where other arbitral forums (namely, AAA) have been studied, evidence indicates that there is at least the potential for bias to affect arbitration outcomes. However, in our study of FINRA, using generally comparable data, we find no such evidence of bias. As such, we argue that employment arbitration systems should not be considered monolithic in nature – the problems with arbitration that might have occurred under one regime may be less present, or nonexistent, under a different system. Specifically, we maintain that the FINRA approach to arbitration serves as a useful template for designing a system that limits many of the concerns around employment arbitration. The FINRA system has strict arbitrator training and disclosure requirements (especially for discrimination claims), employs a randomized and automated selection process, and makes arbitrator decisions publicly available. Although we accept and indeed advocate for the position that ADR programs are not monolithic, we hold that, if other dispute resolution forums
were to adopt some or all of these protocols, it is conceivable that they would find similar levels of success in promoting arbitration fairness.