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# The Ascendancy of Employment Arbitrators in US Employment Relations: A New Actor in the American System?

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# The Ascendancy of Employment Arbitrators in US Employment Relations: A New Actor in the American System?

## Abstract

In this paper, we survey the underpinnings of the trend towards employment arbitration in the United States, and its implications for the broader industrial relations system. Specifically, we address the question of whether or not employment arbitrators have been substituted for collective bargaining by the government to an extent that warrants their inclusion as an actor in the industrial relations system. We review developments in workplace dispute resolution in the United States, the literature that attempts to explain these developments and posit an assessment of the stability of employment arbitration, and employment arbitrators, as a central feature of the US industrial relations system.

## Keywords

employment arbitration, collective bargaining, workplace dispute resolution, industrial relations

## Disciplines

Dispute Resolution and Arbitration | Labor Relations

## Comments

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The Ascendancy of Employment Arbitrators in US Employment Relations:  
A New Actor in the American System?

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**Abstract**

In this paper, we survey the underpinnings of the trend towards employment arbitration in the United States, and its implications for the broader industrial relations system. Specifically, we address the question of whether or not employment arbitrators have been substituted for collective bargaining by the government to an extent that warrants their inclusion as an actor in the industrial relations system. We review developments in workplace dispute resolution in the United States, the literature that attempts to explain these developments and posit an assessment of the stability of employment arbitration, and employment arbitrators, as a central feature of the US industrial relations system.

## 1. Introduction

In recent years, workplace dispute resolution has undergone dramatic changes in the United States. A variety of forces have resulted in a fundamental shift in favour of private methods, rather than governmental or collective, of resolving workplace disputes. Dissatisfaction with traditional methods of resolving workplace disputes has caused many US employers to use alternative dispute resolution (ADR), especially mediation and arbitration. In the United States, a growing number of scholars and practitioners are distinguishing labour arbitration (or mediation) from employment arbitration (or mediation). Labour arbitration now refers to the arbitration of collective labour-management disputes; employment arbitration refers to the arbitration of disputes arising between employers and non-unionized employees. As recently as 20 years ago, employment arbitrators were rarely used in disputes involving individual employees. Within the last decade, employment arbitrators have become significant new participants in US employment relations. Some observers regard the shift in dispute resolution from the courts and other public forums to arbitration and other private forums as nothing less than the *de facto* privatization of the American system of justice.

Whether or not employment arbitrators ought to be considered new actors in the US industrial relations system depends on to what extent they are truly playing a significant and influential role in the system. Dunlop maintained that there were three actors in an industrial relations system: (1) ‘a hierarchy of managers and their representatives in supervision’; (2) ‘a hierarchy of workers (non-managerial) and any spokesman’; and (3) ‘specialized governmental agencies (and specialized private agencies created by the first two actors) concerned with workers, enterprises, and their relationships’ (Dunlop 1958: 7). Subsequent scholars have

frequently referred to the three actors as employers, unions and the State (i.e. government) (Bellemare 2000: 383-440). We contend in this paper that if employment arbitrators are not already an actor in the US industrial relations system, then a variety of forces will cause them to emerge as an authentic actor in the foreseeable future. Essentially, the government has subcontracted to arbitrators the task of interpreting and applying the law of the workplace. If arbitrators are replacing the courts in performing this governmental function, then it seems clear to us that they ought to be considered a new actor in the system.

Our argument can be summarized briefly. For more than 30 years, the US system has been undergoing a historic transformation (Kochan *et al.* 1986). There are two significant features of that transformation that have led to the emergence of employment arbitrators. The first feature is the growth in the statutory regulation of US labour markets, motivated in large part by the desire to protect the individual rights of American workers. The growth in regulation resulted in dramatic increases in the number of employment disputes that were litigated in federal and state courts. The burden these disputes represented for both the court system and employers motivated the search for alternative methods of resolving them.

The second feature of the transformation is the relative decline in the US labour movement. Collective bargaining can be — and has been — used as a means of resolving workplace disputes generally and statutory claims by employees specifically. But the decline of collective bargaining had the effect of depriving both employers and employees of a proven method of resolving workplace disputes. Paradoxically, many American employers who have been opposed to unions discovered that in the absence of collective bargaining they were forced to rely increasingly on the court system to resolve statutory complaints by their employees. Many employers coped with the growing burden of employment disputes and the decline in

collective bargaining by developing their own means of handling these disputes, relying heavily on arbitration and mediation. American judges, facing burgeoning dockets, have been more than willing to delegate to employers the authority to resolve public claims using private methods.

This article is a review of the literature on employment arbitration in the United States. In addition to the work of other scholars, we draw heavily on the studies we have conducted over the last decade or so on employment arbitration specifically and ADR more generally. In 1997, we conducted a survey of the Fortune 1000 on their use of ADR, focusing particularly on employment and mediation; our survey was targeted at the general counsel of these companies, and we received responses from 606 of them (Lipsky and Seeber 1998). In 1999, we conducted a survey of the 599 members of the National Academy of Arbitrators (NAA), the premier organization of labour arbitrators in the United States; our survey focused on the extent to which these labour arbitrators had accepted employment arbitration cases and other ADR work, and we obtained completed surveys from 462 Academy members (Picher *et al.* 2000). Over the course of several years, we conducted (with Richard D. Fincher) over 200 field interviews with managers and attorneys in nearly 60 corporations in the United States with a view towards deepening our understanding of the development of workplace dispute resolution systems in these organizations (Lipsky and Seeber 2003; Lipsky *et al.* 2003; 2004).

## **2. The origins of employment arbitration in the United States**

The arbitration and mediation of statutorily based employment disputes in non-union workplace settings has been growing in recent years in the United States, Canada, and elsewhere (Lipsky *et al.* 2003); for recent developments in the United Kingdom, see Colling (2004);

Hughes and Pilling (2001); and Towers and Brown (2000). Some observers have called the rise of ‘alternative dispute resolution’ (ADR) in North America a ‘revolution’ in the method of handling workplace disputes. In this article we focus on arbitration, rather than mediation, because arbitrators in the United States have the authority to make final and binding decisions whereas mediators are confined to assisting disputants in reaching their own voluntary settlements. Thus, arbitration in the United States, used as a means of resolving statutory claims, serves as a substitute for the court system, but the use of mediation still allows disputants to have access to the courts.

As Elkouri and Elkouri point out, ‘Arbitration as an institution is not new, having been in use many centuries before the beginning of the English common law’ (Elkouri and Elkouri 2003: 3). The arbitration of commercial disputes has been a well-established technique for resolving disputes between businesses for nearly 200 years; the arbitration of international disputes has been used to settle disputes (and to avoid war) between nations since ancient times (Elkouri and Elkouri 2003: 3-5).

### *The Development of Labour Arbitration in the United States*

In the United States, the arbitration of labour-management disputes had its origins in the nineteenth century and became the standard method of resolving grievance disputes after the Second World War (Barrett 2004; Elkouri and Elkouri 2003: 5-7; Fleming 1965; Katz & Lipsky 1998: 145-61; Kheel 1999). In the United States, a distinction is made between disputes over ‘interests’ and disputes over ‘rights’ (Kheel 1999). In collective bargaining, *disputes over interests* are usually resolved by negotiations between the employer and the union that result in a

written collective bargaining agreement or contract. The failure of the parties in collective bargaining to agree on a new contract can result in a strike or a lockout. In the United States, non-binding techniques, especially mediation, are used to prevent or to resolve interest disputes. Binding arbitration is almost never used to resolve interest disputes, with the notable exception of certain states that use arbitration to resolve new contract disputes in the public sector, particularly those involving police officers and firefighters (Katz and Kochan 2004).

By contrast, *disputes over rights* are disagreements over the interpretation or application of the collective bargaining contract. In the United States, these disagreements are called grievances. To handle grievance disputes, almost all collective bargaining contracts in the United States contain grievance procedures. In virtually all collective bargaining agreements, the last step in the grievance procedure requires that an unresolved grievance be submitted to a neutral third-party arbitrator who is given the authority by the parties to make a final and binding decision in the case (Slichter *et al.* 1960: 692-880).

During the Second World War, the National War Labor Board (NWLB) was given statutory authority to resolve labour disputes. In the aftermath of the attack on Pearl Harbor, the labour movement made a no-strike pledge and vowed to adhere to it for the duration of the war. Although strikes occurred from time to time during the war, for the most part, the no-strike pledge reduced significantly the threat to production caused by intractable disputes over interests. The focus of the NWLB, therefore, shifted to controlling disputes over the application of the terms of collective bargaining agreements, that is grievances. In the 20,000 grievance cases referred to the NWLB during the war, the Board insisted that the parties use arbitration to resolve the dispute (Elkouri and Elkouri 2003: 18-9; Galenson 1960: 601-21). In the decades

following the Second World War, the arbitrators who had cut their teeth on resolving disputes under the NWLB dominated the labour arbitration profession in the United States.

In November 1945, President Truman convened the National Labor- Management Conference in Washington, a gathering of top-level management and union representatives. Truman hoped that the White House conference would set the ground rules for labour relations in the post-war era (Katz & Lipsky 1998: 147). The conferees agreed on only two of the many issues they considered. They supported the use of ‘conciliation’ (or mediation), rather than compulsory arbitration or fact-finding, to resolve interest disputes, and they strongly endorsed voluntary arbitration to resolve grievance disputes. American labour historians consider the conferees’ consensus on these points to have had a significant influence on the spread of grievance arbitration provisions in collective bargaining contracts over the following decade (Katz & Lipsky 1998: 147; Slichter *et al.* 1960: 746-47; Taft 1964: 565-66). In the United States, the sharp distinction made between disputes over interests and disputes over rights, and the use of mediation to resolve the former and arbitration to resolve the latter, had its genesis in the experience of unions and employers under the NWLB and the endorsement of the approach by the top leaders attending Truman’s White House conference in 1945.

For more than 40 years, the US Supreme Court has, with few exceptions, consistently reinforced the labour arbitrator’s authority to resolve both statutory and contractual claims, severely narrowing the scope for judicial review of arbitration decisions. In 1960, the Supreme Court, in the so-called ‘Steelworkers Trilogy’, made it clear that the courts should generally *defer* to the decisions of arbitrators handling grievance disputes under collective bargaining contracts.<sup>1</sup> The Court viewed the use of arbitration to resolve grievances as the *quid pro quo* for a union and an employer agreeing to a no-strike-no-lockout clause in their collective bargaining

agreement. Thereafter, if a unionized employee brought a claim in court against his or her employer that could arguably be resolved by an arbitrator, the judge would order the dispute to be returned to the parties for submission to the grievance procedure contained in their collective bargaining contract. Thus, for several decades American courts have adhered to the doctrine of deferring to the authority of arbitrators generally and labour arbitrators specifically. Recently, for example, the Court decided that a disputant challenging the validity of a contract as a whole, and not specifically the arbitration clause within it, must go to an arbitrator and not to the Court, *even if the contract is arguably illegal (Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006))*.

In 1974, the Supreme Court carved out an important exception to the deferral policy for claims involving race discrimination arising under Title VII of the Civil Rights Act of 1964. The Court decided that federal courts should not necessarily defer to the decisions of labour arbitrators deciding Title VII claims because the Court viewed the resolution of disputes involving individual rights protected by federal law to be too important to be restricted to the procedures contained in collective bargaining agreements (*Alexander v. Gardner-Denver, 415 US 36, 1974*). Despite the Court's decision in *Gardner-Denver*, over the years, labour arbitrators increasingly decided not only contractual claims but also statutory claims arising in unionized settings (Picher *et al.* 2000: 26-7).

In our 1999 survey of the members of the NAA, we discovered that four out of five Academy members within the three years prior to the survey had arbitrated at least one dispute that required them to interpret or apply a statute (Picher *et al.* 2000: 26-7). There remains an ongoing debate in the United States regarding the propriety of labour arbitrators resolving employee complaints that also constitute a potential cause of action under federal and state

statutes. In 1998, in a further attempt to clarify this matter, the Supreme Court decided, in *Wright v. Universal Maritime Serv. Corp.*, 525 US 70 (1998), that for a union to preclude an employee with a statutory claim from having access to the courts, the union must have declared a 'clear and unequivocal' waiver with which the claimant knowingly agreed (for a discussion of these developments, see especially Elkouri and Elkouri 2003: 485-554; of the many articles on these developments, see Hodges 2004; Howlett 1967; Malin and Vonhof 2005; Meltzer 1967).

We regard it as a truism that if the practice of using arbitration to resolve rights disputes arising under collective bargaining agreements had not become so thoroughly entrenched in the years and decades following the Second World War, American courts and employers would not have so readily adopted arbitration to resolve employment disputes in non-union settings.

### *The Rise of Employment Arbitration*

Prior to the 1970s, arbitration was seldom used in the United States to resolve *employment* disputes. In the employment arena, its use was largely confined to resolving disputes arising under individual (written) employment contracts, particularly between executives and their companies. It is important to recognize the distinction between the so-called 'court-annexed' or 'court-based' ADR, on the one hand, and employer-promulgated ADR, on the other. Beginning in the 1970s, federal and state courts began experimenting with the use of a variety of ADR techniques, including arbitration, mediation, early neutral evaluation, case valuation and summary jury trials. In 1989, Congress encouraged the further development of court-based ADR by authorizing 10 federal district courts 'to implement mandatory arbitration programmes and an additional ten to establish voluntary arbitration programmes' (Plapinger and

Stienstra 1996: 3). A year later, Congress passed the Civil Justice Reform Act, which mandated all federal district courts to establish programmes ‘to reduce cost and delay in civil litigation’ (28 USC §§ 471-482). Virtually, every district court has now established an ADR programme and a large majority of them use either arbitration or mediation to resolve civil cases. It should be noted, however, that only non-binding arbitration is offered by US district courts (Kakalik *et al.* 1996; Plapinger and Stienstra 1996: 4-6).

Regarding arbitration policies established by employers, another important distinction is between employees who agree to use arbitration as part of individually negotiated employment contracts and employees who are subject to the use of arbitration under policies and procedures promulgated by the employer that are intended to cover groups or classes of employees. The American Arbitration Association (AAA) refers to the former as ‘N’ employees and the latter as ‘P’ employees (Hill 2003: 794). Some employment contracts, for example, provide for *voluntary arbitration*, that is the contract stipulates that if a dispute arises between the employer and the employee, the parties have the option of choosing arbitration to resolve the dispute. In the United States, the use of employment arbitration in any form to resolve workplace disputes is controversial, but by far the most controversial form of the practice is the so-called *mandatory arbitration*. The vast majority of employer-promulgated arbitration programmes require an employee, usually at the time of hire, to sign an agreement that requires the individual to *waive his or her right to sue the employer, and instead, to agree to submit any future dispute to arbitration*. Because such agreements are signed *before* a dispute arises, they are frequently called *mandatory predispute arbitration agreements* (Dunlop and Zack 1997; Sternlight 2001; Stone 1996; Zack 1999). Some scholars and practitioners also use the term *compulsory arbitration* to refer to the same practice (Bales 1997).

Also, throughout most of the twentieth century, there were some non-union employers who used grievance procedures to handle employee disputes (Jacoby 1997; Lewin 1987). Prior to the rise of ADR, however, employer- promulgated grievance procedures almost never contained arbitration as the last step in the procedure. Several scholars have documented the extent to which non-union employers have established grievance procedures and the circumstances governing their use (Foulkes 1980; Lewin 1987; McCabe 1989). We discovered in our 1997 survey of the Fortune 1000 that about one-third of these companies had established in-house grievance procedures for nonunion employees (Lipsky and Seeber 1998).

Beginning in the 1970s, the availability of employment arbitration spread rapidly through many, if not most, industries and occupations. Many scholars believe that a seminal event in the development of ADR in the United States was the Pound Conference, held at Harvard in April 1976. At that conference, attended by more than 200 influential leaders of the bar, Warren Burger, Chief Justice of the US Supreme Court, called for the development of informal dispute resolution processes, including arbitration, as an alternative to litigation (Burger 1976; Symposium on the Impact of Mediation . . . 2002). Scholars also credit a paper presented at the Pound Conference by Harvard Professor Frank Sander for propelling the ADR movement (Sander 1976; see Barrett 2004: 182-3; Dunlop and Zack 1997: 48).

### **3. Factors explaining the rise of employment arbitration**

A variety of forces have resulted in a fundamental shift in favour of private, rather than governmental or collective, methods of resolving workplace disputes. Research suggests that two principal factors, and several subsidiary ones, explain the growth of ADR, particularly

employment arbitration, over the past three decades. The two principal factors might be labelled *litigation avoidance* and *union substitution* (Colvin 2003; Lipsky *et al.* 2003).

### *Litigation Avoidance*

#### *(a) The increase in the statutory regulation of employment relations*

Beginning in the 1960s, there was a significant increase in the number of federal statutes that regulate and protect individual, rather than collective, rights in the workplace. This trend began in 1963 with the passage of the Equal Pay Act, continued with the passage of the Civil Rights Act in the following year, and was followed by the Occupational Safety and Health Act in 1970, the Employment Retirement Income Security Act in 1974, the Americans with Disabilities Act in 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993.

In 1993-1994, a blue-ribbon commission chaired by John Dunlop examined the growing use of ADR in employment relations. The Dunlop Commission estimated that the number of workplace statutes administered by the US federal government increased from 20 or so in 1960 to about 180 by the turn of the millennium (US Department of Labor 1994: 49-55). Not surprisingly, the proliferation of individual rights in employment led to a sharp increase in employment cases filed in federal and state courts, a development in the 1970s and 1980s that many called a 'litigation explosion' (Olson 1991). The court system lacked the resources necessary to handle its growing employment caseload, and the parties in these cases (particularly employers) increasingly turned to private dispute resolution as a means of resolving them (Lipsky *et al.* 2003: 58-66).

*(b) Seminal decisions by the US Supreme Court*

Another significant factor facilitating the growth of employment arbitration has been a series of seminal decisions by the federal courts (Colvin 2003: 378-80). The first important question the courts had to decide was whether an employer could require an employee, as a condition of employment, to waive his or her right to sue the employer and, instead, accept arbitration as the means of resolving statutory claims. Two US Supreme Court decisions (*Gilmer vs Interstate/Johnson Lane Corp.*, 500 US 20, 1991 and *Circuit City Stores v. Saint Clair Adams*, 532 US 105, 2001) have largely settled the question, supporting an employer's right to require arbitration even if it meant that an employee was denied access to the public justice system.

The Equal Employment Opportunity Commission (EEOC), however, continued to assert its authority to prosecute claims of employment discrimination regardless of whether or not employees had signed mandatory arbitration agreements. Even if an employee lost in arbitration, the EEOC insisted it could still litigate the employee's discrimination claim. Essentially, the EEOC desired to limit the arbitral deferral policy adopted by the Supreme Court in *Gilmer* and to give employees 'two bites of the apple'. In 2002, the Supreme Court in *EEOC v. Waffle House* agreed that the EEOC is not bound by a private arbitration agreement between an employee-complainant and an employer and can prosecute a claim in its own name (*EEOC v. Waffle House, Inc.*, 534 US 279, 2002). Although some observers viewed the *Waffle House* decision as a step back from the Court's support of employment arbitration, on a practical level, the EEOC lacks sufficient resources to pursue more than 200 or 300 discrimination claims in the federal courts per year (Lipsky *et al.* 2003: 202-3). Shortly after the *Waffle House* decision, the EEOC, 'with considerable fanfare', began a pilot programme for a limited number of companies with

employment arbitration programmes that allow the EEOC, with the consent of the complaining employee, to suspend the processing of a charge for up to 60 days to give the parties an opportunity to resolve their dispute using the employer's dispute resolution procedures (Waks and Steinberg 2003).

It is now clear that an American employer may, with near total impunity, require an employee, *as a condition of hiring and continued employment*, to use private arbitration as the means of resolving public claims against the employer that involve a statutorily protected right. Moreover, US courts regard the decisions of employment arbitrators as final and binding unless the courts find that the arbitration process and the arbitrator's decision were affected by fraud, bias, duress or unconscionability (Lipsky *et al.* 2003: 207- 12).<sup>2</sup> Mandatory arbitration agreements have many critics, and one has called them the 'yellow-dog contract' of our era (Stone 1996). Of course, such agreements also have many defenders, particularly in the business community (see, e.g. Estreicher 2001; see also, Bales 1997).

The legal battleground has shifted to the question of whether or not the mandatory arbitration procedures used by employers provide adequate procedural and substantive due process protections for employees (see, e.g. *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Hooters of America, Inc. v. Annette R. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Parilla v. IAP Worldwide Services V.I., Inc.*, 368 F.3d 296 (3rd. Cir. 2004)). The lower courts have generally held that if the employer requires arbitration, then the employer ought to pay for it. In *Parilla*, for example, the Third Circuit found that several provisions in an employer-promulgated arbitration agreement were 'unconscionable', including the requirement that each party had to 'bear its own costs and expenses, including attorney's fees' (*Parilla v. IAP Worldwide Services VI., Inc.*, 368 F.3d 296 (3rd. Cir. 2004): 277-8).

The circuit courts have been divided on the extent to which employers are required to provide due process in arbitration procedures. Eventually, the Supreme Court will need to reconcile these differences. For many years, the Court has been very supportive of arbitration generally, and the recent appointments of Justices Roberts and Alito make it highly unlikely that the Court will reverse field at any time in the foreseeable future.

### *Union Substitution*

In the United States, the proportion of wage and salary workers who are union members declined from 35 per cent in 1954 to 12.5 per cent in 2004; 36 per cent of government workers were union members in 2004 but only eight per cent of private sector workers (US Department of Labor, Bureau of Labor Statistics 2005). The ascendancy of employment arbitration specifically, and ADR more generally, is to a large extent linked to the decline of the labour movement in the United States. No informed observer has claimed that the secular decline in the American labour movement has been accompanied by a corresponding decline in workplace conflict. All the evidence suggests that quite the contrary is the case (Ford 2000; Garry 1997; US Department of Labor 1994). Thus, the decline in collective representation has left a vacuum in the available means of resolving workplace disputes, which has been filled, at least in part, by employment arbitration and mediation.

In the interviews we conducted with employers, we found that many readily acknowledged that they view the use of arbitration and other ADR techniques as a means of avoiding unionization. Some employers only acknowledged this motivation after they were promised it would be kept in confidence. But others have said publicly that union avoidance is

one of their major motives for using ADR. (The reader should note the distinction between *union substitution* and *union avoidance*; the former does not necessarily signify anti-union animus on the part of the employer, but the latter does.) For example, the director of the ADR programme at Raytheon Corporation has said in many forums (including our own classroom) that his company established its sophisticated dispute resolution system in large part to deter the spread of unionism to its non-union plants.

Understandably, many unions view non-union arbitration with scepticism, and the union movement has joined with civil rights organizations, the plaintiffs' bar, and other liberal interest groups (such as the American Civil Liberties Union) in opposing mandatory predispute arbitration. On the other hand, some unions have embraced ADR (including voluntary but not mandatory arbitration) because they believe 'ADR systems can extend the authority and influence of a union into areas normally considered management prerogatives' (Lipsky *et al.* 2003: 133, 301-77). The US Federal Mediation and Conciliation Service (FMCS) launched a new initiative called 'DyADS' (short for Dynamic Adaptive Dispute Systems) in 2002 through which the FMCS now assists both its labour and management clients in collective bargaining relationships to design and establish an ADR system (Robinson *et al.* 2005).

#### *Other Factors Related to the Rise of Employment Arbitration*

Globalization, rapid technological change and the deregulation of major industries led to a significant reorganization of the way work is performed in many US companies. A hallmark of the reorganization of work is the decline in the importance of hierarchy and the rise of team-based work (Kochan *et al.* 1986). The pinnacle of team-based work is the so-called 'high-

performance work system'. In previous research, we discovered that a growing number of US employers recognized that a dispute resolution system was 'the logical handmaiden of a high-performance work system' (Lipsky *et al.* 2003: 68; Stone 2001). Virtually, all of the dispute resolution systems in facilities with team-based work provide mediation and (ultimately) arbitration as the means of resolving employment disputes.

Our findings on the effects of high-performance work systems are based on the case studies we conducted of companies in a variety of industries. By contrast, Colvin conducted an empirical analysis of the adoption of dispute resolution procedures in 165 non-union establishments in the telecommunications industry and found that the adoption of a high-performance work system by the establishment was not significantly related to the adoption of non-union arbitration, but it was significantly related to the adoption of peer review procedures (Colvin 2003: 384-91).

The growing use of employment arbitration is also associated with the changing nature of the US workforce. As the proportion of professional, technical, high-skilled, and other white-collar employees in the US workforce grew, employers began to realize that traditional methods of resolving disputes were not sufficient to meet the expectations of the individuals holding these jobs. In interviews we conducted with employers, we found that many of them, to compete in the so-called 'talent wars', had begun to 'sell' arbitration (and ADR more generally) to prospective employees as a competitive benefit — as a fair, cheap and quick means of settling disputes (Lipsky and Seeber 2006: 367). There is evidence, however, that non-union dispute resolution procedures have no significant effect on an employer's ability to retain employees (Batt *et al.* 2002).

Last, but certainly not least, many American employers adopted the use of arbitration because they realized that arbitration allowed them to do a much better job of managing and controlling conflict than did litigation. They appreciated the fact that they could determine the conditions governing its use, including the possibility of eliminating or reducing discovery, maintaining confidentiality, avoiding legal precedents, and controlling the selection of the arbitrator. Of course, opponents of employment arbitration object to its use for precisely the same reasons (Lipsky *et al.* 2003: 76-88; Slaikou and Hasson 1998).

#### **4. The debate about employment arbitration**

Perhaps no issue in employment relations has generated more intense debate in the last decade or so than the debate about employment arbitration, especially mandatory predispute arbitration. In part, this debate pits pro-business and conservative groups against pro-labour and liberal groups — groups that believe they have a vital stake in the success or failure of employment arbitration. In part, the debate involves both scholars and practitioners, regardless of their ideology, who differ on the wisdom of relying so heavily on private parties to resolve public claims. The intensity of the debate alone suggests the significance of the phenomenon. There is disagreement on almost every facet of employment arbitration, but here we will focus on three key issues in the debate.

*To What Extent Is Employment Arbitration Being Used?*

Nearly all observers who regard the emergence of employment arbitration as a development of historic significance in US industrial relations believe that its widespread use is evidence of its significance. Some observers, however, do not regard employment arbitration as a major development because they believe it is not as widely used as others assume. One can find in the literature on employment arbitration many statements about the growth of employment arbitration in the United States. For example, Stone writes that in recent years ‘the use of arbitration has grown *exponentially* in consumer, employment, real estate, and many other areas’ (Stone 2003: iv, italics added). In reality, however, no observer can claim to know to what extent employment arbitration is actually being used in the United States because there are no comprehensive statistics on its use. Neither the federal government nor the state governments collect data on employment arbitration cases (or for that matter, on arbitration cases more generally), and the principal providers of arbitrator services, such as the AAA, JAMS, and the FMCS, do not regularly publish statistics on arbitration caseloads (Stipanowich 2004: 846-7).<sup>3</sup>

Later we will rely on reports that we or other researchers have discovered, but even if the providers published caseload statistics on a regular basis, we would only know some fraction of the total number of cases submitted to arbitration. It could be a substantial fraction, but we would not know how many employers using arbitration do not use the principal providers but rely either on less prominent ones or on arbitrators of their own choosing (usually referred to as arbitrators retained ‘by direct appointment’).

By its very nature, employment arbitration is a private matter under the control of employers who establish the procedures governing its use. Employers, as noted earlier, like the

confidential nature of employment arbitration, although recent court decisions cast doubt on whether or not employers in the future will be able to retain the full confidentiality of the process (see, e.g. *Ting v. AT&T*, 319 F.3d 1126 (9<sup>th</sup> Cir. 2003), cert. denied, 540 US 811, 2003). Very few employment arbitration awards are published (and it has been estimated that not more than 10 per cent of labour arbitration awards are published). As arbitrator Dana Eischen has noted, ‘The award and opinion are the arbitrator’s work product, but not the arbitrator’s property. They “belong” to the parties in the arbitration proceeding and must be treated as confidential unless a statute requires or the parties jointly agree to publication’ (quoted in Elkouri and Elkouri 2003: 571). In parallel developments in the UK, the privatization of dispute resolution through the Arbitration Conciliation and Advisory Service (ACAS) Arbitration Scheme and other ADR systems is also mostly invisible to the public. The lack of transparency, including the public’s inability to scrutinize decisions, has led to a ‘diminishing [of] the diffusion of best practice usually derived from public hearings’ (Colling 2004: 558).

*(a) Distinguishing the availability of employment arbitration from its use*

To understand the extent of employment arbitration in the United States, one must distinguish its *availability* from its actual *use*. Based on the research we have conducted, we believe arbitration is now widely available throughout the United States as an option, offered by the courts or by employers, for resolving employment disputes (Lipsky *et al.* 2003: 80-99). In his study of the telecommunications industry, Colvin found that in 1998, 16 per cent of the non-union establishments he studied had adopted employment arbitration procedures, and nearly two-

thirds of the establishments with employment arbitration procedures linked them to preliminary steps in some type of formal workplace procedure (Colvin 2001: 648-50).

A major employer objective in establishing a dispute resolution system is to provide a means of resolving workplace disputes internally and to avoid the necessity of turning to an outsider — an arbitrator — to impose a decision on the disputants. Thus, many employers hope that the availability of arbitration will provide incentives to both sides to resolve disputes earlier in the procedures and thus avoid the need to use arbitration. Industrial relations scholars have known for decades that the last step in a dispute resolution process affects the disputants' strategies and incentives to settle in earlier stages of a dispute (Lipsky *et al.* 2003). For example, Colvin discovered that employee use of a dispute resolution procedure was significantly affected by whether the last step in the procedure was either arbitration or peer review (Colvin 2001). The arbitration option, because of its potential cost and inconvenience, may provide strong incentives for the parties to settle a dispute at an earlier stage. On the other hand, it has long been recognized that the so-called 'conventional arbitration', which allows an arbitrator broad authority to fashion an award, can have a chilling effect on negotiations and other efforts to resolve a dispute before resorting to arbitration (Farber and Katz 1979; Stevens 1966). Evidence on the presence of the chilling effect, however, is based on the use of arbitration to resolve interest disputes, whereas employment arbitration is almost entirely confined to resolving rights disputes.

To date, there is no systematic empirical evidence on whether the availability of arbitration encourages or discourages the settlement of employment disputes at earlier stages. There is anecdotal evidence suggesting that some employers are reluctant to adopt employment arbitration because they fear it will encourage employees to file complaints they would not

otherwise pursue. (The Emerson Electric Company is one example; see Lipsky *et al.* 2003: 139.) But the research we conducted reveals that the availability of arbitration does not open the floodgates on employee complaints, but in fact has the opposite effect of encouraging the parties to resolve their disputes at earlier stages.

*(b) Evidence on the use of employment arbitration*

In our 1997 survey of the Fortune 1000, we discovered that 62 per cent of those firms had used arbitration at least once in the previous three years to resolve an employment dispute. About 20 per cent of the companies that used arbitration reported using it ‘frequently’ or ‘very frequently’; about 42 per cent reported using arbitration occasionally. On average, a Fortune 1000 firm had arbitrated three or four employment cases annually in the previous three years. This implies that about 7,000 employment disputes were submitted to arbitration by Fortune 1000 firms during the period 1994-1996, and almost certainly that number has grown since we conducted our survey. Of the firms using arbitration, the majority had used it on a case-by-case (*ad hoc*) basis, but we estimated that about one-third of the Fortune 1000 companies had established a policy of resorting to arbitration if an employment dispute could not be resolved by other means (Lipsky *et al.* 2003: 80-99; compare our estimate with Colvin’s findings, cited earlier).

Stipanowich obtained data from the AAA showing that its employment arbitration caseload increased from 1,342 in 1997 to 2,133 in 2002; by contrast labour cases handled by the AAA decreased from 15,670 in 1997 to 13,287 in 2002 (Stipanowich 2004: 873). The AAA’s employment arbitration caseload obviously is modest, but as noted, the AAA caseload is only the

tip of the iceberg. For example, the National Association of Securities Dealers (NASD) reports that the number of arbitration cases filed under its auspices increased from 830 in 1980 to 9,099 in 2002 (Stipanowich 2004: 905-7). The majority of these cases dealt with disputes between investors and brokers, but a significant and growing minority involved claims by employees in the securities industry.

In 2003, the AAA undertook a survey of the use of ADR by American companies, which the AAA acknowledged was modelled on the survey of the Fortune 1000 we conducted in 1997 (American Arbitration Association 2003: 3). The AAA's findings on Fortune 1000 companies largely replicated our own but the AAA also found substantial use of ADR procedures by mid-size and privately held companies, which contradicts the conventional wisdom about the penetration of ADR into smaller companies (American Arbitration Association 2003: 16-17). In comparing its findings with ours, the AAA noted that there had been across-the-board increases in the use of ADR procedures between 1997 and 2003 (American Arbitration Association 2003: 27).

Regarding the use of court-annexed arbitration, data on civil cases filed in US District Courts show that in the fiscal year 2003 there were 3,187 cases referred to non-binding arbitration in the district courts that use the procedure, which represented 6.7 per cent of the civil cases filed in those courts (Administrative Office of the US Courts 2004). Regrettably, no information is available on how many of these arbitration cases were employment disputes, but it is a fair guess that a substantial proportion were. Again, however, we are only looking at the tip of the court-annexed caseload because we lack comprehensive data for state court programmes. Stipanowich found that there were more than 1,200 court-annexed ADR programmes at the state level in 1990, but he notes that data on the use of these programmes are limited (Stipanowich

2004: 849-51). Most of these state-level programmes rely primarily on mediation, rather than arbitration, to resolve disputes. Illinois is one of several states that maintains a court-annexed mandatory arbitration programme; nearly 60,000 cases were referred to the programme in fiscal year 2005, and there were arbitration hearings in over 11,000 of these cases. But the website for the Illinois court system does not provide information on how many of these cases were employment disputes (Administrative Office of the Illinois Courts 2006).

In total, we know that arbitration provided by employers or the court system is widely available throughout the United States, but we lack data on how often the arbitration option is used in employment disputes. We believe the limited data available suggest that the number of employment disputes submitted to arbitration has been growing. Regardless of how often it is actually used, decades of research on dispute resolution supports the proposition that the availability of arbitration, combined with incentives to parties to settle disputes before resorting to arbitration, has a significant effect on the resolution of employment disputes.

### *Does Employment Arbitration Provide a Level Playing Field for the Disputants?*

Proponents of employment arbitration maintain that it provides a cheaper and faster method to resolve employment disputes than litigation. They argue that a well-designed arbitration procedure can provide the same level of due process protection the parties would enjoy in the court system. They acknowledge that employers have not always established arbitration programmes that provide essential due process protections, but they point out that major providers require their clients to abide by due process standards and the courts are also moving in the direction of requiring employers to do so. Estreicher argues that the arbitration

option 'is in the best interest not only of employers but of most employees, not to mention overburdened courts that cannot effectively process . . . fact-sensitive, emotional [employment] disputes' (Estreicher 2001: 570).

After the *Gilmer* decision, several professional associations and organizations banded together to develop a protocol that they pledged to follow in their administration or use of employment arbitration procedures. The so-called 'Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship' was developed by a task force consisting of representatives from the NAA, the Labor and Employment Law Section of the American Bar Association (ABA), the AAA, the Society for Professionals in Dispute Resolution (now the Association for Conflict Resolution), the FMCS, the National Employment Lawyers Association and the American Civil Liberties Union (Dunlop and Zack 1997).

The task force agreed on a set of 'standards of exemplary due process', including the right of employees in arbitration and mediation cases to be represented by a spokesperson of their own choosing, employer reimbursement of at least a portion of employees' attorney fees (especially for lower paid employees) and adequate employee access to all information reasonably relevant to the mediation and arbitration of their claims. The Protocol also calls for the use of qualified and impartial arbitrators and mediators drawn from rosters that are diversified on the basis of gender, ethnicity, background and experience. The task force debated the propriety of employers imposing mandatory predispute arbitration agreements on their employees but failed to achieve consensus on the issue, other than to agree that such agreements should be knowingly made (Dunlop and Zack 1997). However, some of the organizations that adopted the Due Process Protocol expressed their disapproval of mandatory predispute

arbitration. In May 1997, the NAA went on record as being opposed to the practice. NAA members particularly objected to employers using such arrangements as a means of preventing their employees from taking allegations of statutory violations to the courts (Picher *et al.* 2000: 8-9).

The signatories to the Protocol hoped it would bring about a more level playing field in employment arbitration and mediation. If an employer turns to the AAA to find an arbitrator, for example, the AAA will scrutinize the arbitration procedures used by the employer to determine if they comply with the Protocol. But, as noted earlier, many employers do not use the AAA and have no association with any of the other signatories to the Protocol. Even if an employer abides by the due process requirements contained in the Protocol, some researchers maintain that may not be enough to guarantee that employers and employees play on a level playing field in employment arbitration. One advantage an employer has over an employee in arbitration may be hard to overcome, namely, the typical employer is likely to have better representation and more experience with the procedure than the typical employee. It has been argued that the so-called 'repeat players' have a competitive edge against first-time players in arbitration.

Bingham has conducted several empirical studies of the repeat-player effect in employment arbitration. For example, using data obtained from the AAA for cases decided in 1993 and 1994, she found that employers who made repeated use of arbitration won the great majority of their cases, while employers who used arbitration only once lost most of their cases. She speculated that one possible explanation for the repeat-player effect was the likelihood that employers who went to arbitration frequently selected favourite arbitrators, who then were inclined to favour the employer in the hope that the employer would continue to select them in future cases (Bingham 1997; see, also, Bingham 1998). In another study, Bingham analysed 244

arbitration cases and found that the employee-win rate in cases with a repeat player was only 29 per cent, whereas the employee-win rate in cases without a repeat player was 62 per cent (Bingham and Sarraf 2004: 322-5). Her research supports the proposition that the so-called ‘repeat players’, normally employers, have advantages in arbitration that one-time players, normally employees, lack.

Bingham’s research has been controversial and has been criticized on methodological grounds (Sherwyn *et al.* 2005: 1570-22). Hill conducted an empirical study of 200 AAA employment dispute cases decided in 1999 and 2000. She found no support for either the repeat-player effect or the repeat-arbitrator theory. Hill maintains, ‘Just as there is no support for the “repeat arbitrator” theory, there is no support for the idea that employment arbitration sponsored by employers is a “kangaroo court” dominated by an “old boys’ network” of individuals who know one another, and that arbitrators render prejudiced verdicts for that reason’ (Hill 2003: 815). Hill’s conclusions are based primarily on the fact that in the 200 cases she examined, she found only two in which there was a repeat appearance by any of the parties (employer, employee, arbitrator or counsel) in the case. It remains to be seen whether or not the analysis of a larger sample of cases over a longer period of time would reveal more instances of repeat players.

### *Does Employment Arbitration Improve Employees’ Access to Affordable Justice?*

Estreicher has argued that a non-union arbitration system ‘can do a better job of delivering accessible justice for average claimants than a litigation-based approach’ (Estreicher 2001: 645). To understand Estreicher’s argument, one has to understand three stylized facts

about the US system of justice: (1) using the court system in the United States is difficult, if not impossible, if an individual is not represented by an attorney; (2) an individual's ability to obtain representation by an attorney in a civil case is not guaranteed; attorneys can choose to represent only those clients who have cases they prefer to pursue; and (3) in the United States, plaintiffs' attorneys are normally paid on a contingency basis: they receive anywhere from 30 to 40 per cent of the amount of an award or settlement (if there is one) (Olson 1991: 32-55).

Plaintiffs' attorneys, accordingly, weigh heavily the potential value of a case before agreeing to represent a client. Because an award in an employment dispute heard in the civil courts is typically based on the plaintiff's lost earnings, the higher the plaintiff's earnings, the greater the potential value of the case. Therefore, plaintiffs' attorneys are more likely to represent employees with high earnings than employees with low earnings. In a later article that Estreicher wrote with Sherwyn and Heise, the authors say, 'This harsh reality results in the unlikelihood of low-wage earners ever seeing the inside of a courtroom' (Sherwyn *et al.* 2005: 1157).<sup>4</sup> The so-called 'Cadillac' cases — cases that have potentially large payoffs — are pursued vigorously in the US courts, but the so-called 'rickshaw' cases — cases that have little value — are likely to go unheard. Switching from the court system to arbitration, Sherwyn *et al.* assert, does not necessarily improve an employee's chance of obtaining representation by an attorney in a low-value case. The critical difference between litigation and arbitration, these authors maintain, is that an employee who is not represented by an attorney has a much easier time pursuing his or her case in arbitration than in litigation (Sherwyn *et al.* 2005: 1157). Perhaps arbitration provides lower quality justice than litigation, both Estreicher and Sherwyn acknowledge, but in the absence of arbitration, many employees would not have access to any justice at all. Estreicher

says a properly designed arbitration system ‘stands a better chance of providing Saturns for average claimants, in place of the rickshaws now available’ (Estreicher 2001: 645).

Sherwyn *et al.* provide some empirical evidence to support their argument. If employees are more likely to have their low-value cases heard in arbitration than in litigation, then one would predict that the average award in an employment arbitration case would be lower than the average award in a litigated employment case, and the little empirical evidence that is available on this matter suggests that this difference exists (Sherwyn *et al.* 2005: 1575- 66).

Paradoxically, Estreicher and Sherwyn attempt to persuade their readers that several aspects of employment arbitration that many critics think are weaknesses are actually strengths. As we noted earlier, many employers fear that making arbitration available to employees will lead to a flood of complaints, many without merit. Estreicher and Sherwyn, by contrast, view the same phenomenon as a sign that employees can now find justice for their rickshaw cases. Similarly, critics worry that employees will be deprived of adequate representation in arbitration cases, but Estreicher and Sherwyn argue that the absence of lawyers in arbitration may not be entirely a bad thing. Critics lament the lack of procedural due process in employment arbitration, but Estreicher and Sherwyn argue that the lack of such safeguards makes it easier for employees to use the process without legal representation. Implicitly, Estreicher and Sherwyn think there is a tradeoff between access to justice and the quality of justice. The court system presumably provides quality justice but limits access, whereas arbitration increases access but provides lower quality justice.

## 5. Comparing employment arbitration with labour arbitration

Labour arbitration differs from employment arbitration on several critical dimensions, including the arbitrator's decision-making authority, the procedural standards governing the conduct of hearings, the right of the parties to representation (and the likelihood of *pro se* proceedings), the nature and scope of the arbitrator's award and other factors. Table 1 summarizes some of the critical differences between labour arbitration and employment arbitration. In labour-management relations, arbitrators are chosen through well-established channels, are compensated according to generally accepted norms, deal principally with disputes involving contract interpretation and are guided by rough precedents established through decades of history. Over time, standard approaches to the rules of evidence, the use of precedent and the appropriate decision rules have evolved. Earlier, we noted that neither labour arbitration decisions nor employment arbitration decisions are usually published, but over the decades, enough labour arbitration decisions have been published to give both practitioners and scholars a firm understanding of the standards used by labour arbitrators. Generally, labour arbitrators behave as if they are bound by norms of practice that have developed over the course of more than half a century.

By contrast, employment arbitrators are less constrained by established norms. Both labour arbitrators and employment arbitrators, of course, have the same responsibility to issue awards consistent with public law (or, at least, not 'repugnant' to it). Both have the responsibility of being neutral and impartial, and if their decisions are reviewed by the courts, the decisions are subject to similar, if not identical, standards. But beyond a certain point, the similarities end. For example, the fees of labour arbitrators are almost always shared equally by employers and

unions, whereas the fees of employment arbitrators are almost always paid entirely by the employer. The issue of whether or not the integrity of the arbitration process can be maintained when the arbitrator's fees are paid entirely by one party is another source of controversy (Picher *et al.* 2000).

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Insert Table 1 Here

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The key differences between labour and employment arbitration stem from the fact that employment arbitration systems are created and controlled by employers. Employer control raises fundamental concerns about whether or not employment arbitration provides a level playing field for employers and employees, a topic discussed earlier. Employment arbitration is even more proprietary than labour arbitration. The private and confidential nature of the proceedings and the lack of published awards raise fears that at least some employees are being subjected to kangaroo courts. The lack of transparency makes it difficult for employment arbitrators to develop a set of standardized norms for conducting hearings and writing awards.

Initially labour arbitration was developed to handle *contractual* disputes between unions and employers. It was not imagined in the early days of labour arbitration that arbitrators would be delegated the responsibility of resolving *statutory claims* by employees. Later, of course, labour arbitrators did begin to assume these responsibilities. By contrast, the initial motivation for using employment arbitration was to avoid litigation and allow arbitrators to handle statutory claims. In short order, however, employers began to delegate to employment arbitrators the authority to resolve disputes over virtually every type of workplace issue. In brief, there appears to be convergence in the scope of authority exercised by employment and labour arbitrators.

There is evidence, however, that decision making by labour arbitrators differs from decision making by employment arbitrators (Wheeler *et al.* 2004). Wheeler and his colleagues conducted an experimental study in which they administered 12 written scenarios, all involving employee termination, to different types of experienced decision makers and asked them whether they would uphold or overturn the termination. They then assessed the responses to determine whether or not the identity of the decision maker affected the nature of the decision. They found that labour arbitrators were most likely to rule in favour of the employee and employment arbitrators were least likely. Decision makers from within the organization, including peer review panellists and human resource managers, fell somewhere between employment arbitrators and labour arbitrators (Wheeler *et al.* 2004: 81-111). Subjects in the study who played the role of jurors, Wheeler *et al.* found, were also more likely than employment arbitrators to favour employees in these scenarios (Wheeler *et al.* 2004: 142-3). They concluded that, on the one hand, employees who use employment arbitration are likely to fare worse than those who have their claims decided by a jury. On the other hand, 'only a small proportion of potential claims are accepted by attorneys'. Accordingly, 'one should not conclude that employment arbitration is necessarily less favourable for employees than going to court. What is clear, however, is that labour arbitration offers employees the greatest advantages of any of the systems we have studied' (Wheeler *et al.* 2004: 144).

The Wheeler *et al.* study raises concerns about whether or not the quality of justice employees receive in employment arbitration is less than the quality of justice they receive in the courts or in labour arbitration. But the experimental nature of the study, confining the decision makers to hypothetical scenarios, limits the implications of its findings. Until researchers can conduct studies assessing how different decision makers handle real cases, we will not have an

adequate understanding of whether using employment arbitration does or does not affect the outcome of employment disputes.

The institutional and procedural differences between labour and employment arbitration have strongly influenced the supply of employment arbitrators. The practice of labour arbitration is dominated by veteran arbitrators — largely older white men — who have specialized in that practice for many years. For example, the average age of an NAA member at the time of our survey was 63; only 12 per cent of the members were women, and less than 6 per cent were nonwhite (Picher *et al.* 2000: 11-13). Many labour arbitrators have told us that their decision to accept an employment arbitration case is by no means a trivial matter. Veteran arbitrators frequently refuse to accept employment arbitration cases (Picher *et al.* 2000: 19-22). It is difficult to sort out their motives on a systematic basis. Some do not accept employment arbitration cases because their calendars are full with labour arbitration cases and they do not need additional case assignments. Others are afraid that if they accept employment arbitration cases they potentially risk their reputations with their union clients, who may understandably object to giving work to labour arbitrators who take non-union work. Even if labour arbitrators can earn higher fees in employment arbitration cases, they may jeopardize their ability to maintain their labour arbitration practices. Still others refuse employment arbitration cases as a matter of principle (Picher *et al.* 2000: 16-8).

The reluctance of some veteran labour arbitrators to accept employment arbitration cases has opened opportunities for younger arbitrators who do not have established labour arbitration practices. Not only younger people but also women and minorities have had greater access, relatively speaking, to the emerging and growing employment arbitration profession than to the mature and possibly shrinking labour arbitration profession. This tendency has been reinforced

by the fact that a high proportion of employment arbitration cases involve claims of race or gender discrimination under Title VII of the Civil Rights Act of 1964, and users of employment arbitration often seek an arbitrator of the same race or gender as the complainant.

Although there is certainly some overlap, the pool of employment arbitrators is becoming a distinctly different pool from the pool of labour arbitrators. Not only are employment arbitrators more likely to be younger, minorities and less seasoned than labour arbitrators, they are more likely to be lawyers. Our NAA survey revealed that the majority (61 per cent) of labour arbitrators are now lawyers, but non-lawyers continue to handle a significant proportion of the labour arbitration caseload. The vast majority of labour arbitration cases involve contract interpretation rather than the application of statutory law, so the parties have less anxiety about retaining a non-lawyer to handle a labour arbitration case. By contrast, a very large proportion of employment arbitration cases involve statutory claims, and therefore the users of employment arbitration have a strong preference for lawyers who are arguably better able to decide such claims than non-lawyers (Lipsky *et al.* 2003; Picher *et al.* 2000).

## **6. Is employment arbitration a new profession?**

We contend that employment arbitrators will be critical actors in the US industrial relations system to the extent that they are able to achieve and wield influence in the system. Bellemare suggests a revised definition of actor: 'An actor in an industrial relations environment can thus be defined as: an individual, a group or an institution that has the capability, through its action, to directly influence the industrial relations process, including the capability to influence the causal powers deployed by other actors in the IR environment' (Bellemare 2000: 386).

Bellemare's definition of an actor is very similar, if not identical, to the sociologists' definition of a profession. It would therefore seem that to the extent that employment arbitration has become a new profession, to that extent it should be considered one of the key actors in the US system.

Sociologists and social scientists recognize that when an occupation is considered a profession, it signifies that the occupation has an elevated standing and stature in society. The members of a profession have considerable autonomy, control over their working conditions and influence on public policies relating to their work. As Trice and Beyer point out, there are many benefits of being a so-called 'professional'. The members of many occupations aspire to be considered professionals, but only a handful of occupations can be legitimately considered true professions (Trice and Beyer 1993: 185-7).

Today, it is probably safe to assert that there is widespread agreement in the United States that arbitration is an authentic profession. In both US Census data and the Current Population Survey (CPS), 'arbitration' is included in an occupational category that also includes mediators and conciliators, and this set of occupations is considered one of the 'legal professions'. In May 2004, CPS data show that there were approximately 5,000 arbitrators and mediators in the United States (US Department of Labor, Bureau of Labor Statistics 2004). For several reasons, this figure probably understates the number of individuals who regularly serve as arbitrators or mediators. For example, a significant, if unknown, number of arbitrators are not lawyers and would not be included in the CPS data. The AAA maintains a panel of approximately 8,000 arbitrators and mediators (American Arbitration Association 2005: 1). Census and CPS data do not distinguish labour or employment arbitrators from other types of arbitrators, and it is

impossible to know how many individuals at any point in time are serving as either labour or employment arbitrators.

The question we want to address is whether employment arbitration is a profession, and to what extent employment arbitration compares to labour arbitration on characteristics that sociologists believe define an authentic profession. Ritzer and Walczak identify three approaches to studying professionalization: the *process* approach, which focuses ‘on the historical steps an occupation must go through en route to professional status’; the *structural- functional* approach, which focuses ‘on the distinctive characteristics of a profession and on the structure of established professions’; and the *power* perspective, which focuses on the power needed to move an occupation up or down in the hierarchy of professions (Ritzer and Walczak 1986: 59-99).

Here we will use the process approach to deal with the question of whether employment arbitration is or is not an authentic profession. Ritzer and Walczak combined the approaches taken by Caplow and Wilensky and derived a list of six characteristics of a profession: (1) a full-time occupation; (2) a change of name, which becomes the occupation’s exclusive domain; (3) a national association; (4) ‘a training school’, that specializes in education and training; (5) a code of ethics; and (6) political agitation (i.e. lobbying) to win popular and legal support (Caplow 1954; Ritzer and Walczak 1986: 65-7; Wilensky 1964). It is within this framework that we want to examine whether or not employment arbitration can be considered a new profession distinct from labour arbitration.

*Full-Time Occupation*

It is well known in the United States that for many practitioners, arbitration is not a full-time occupation. Our survey of the members of the NAA revealed that 47 per cent of the male members and 66 per cent of the female members of the Academy worked full time as a neutral. The members of the Academy are arguably the most successful labour arbitrators in the United States; for less successful labour arbitrators, the proportion working full time must certainly be even lower. How many employment arbitrators work full time as employment arbitrators? The number doing so must be very small and might even be zero. We know personally dozens of arbitrators and we do not know a single one that works full time as an employment arbitrator. It is sufficient to point out here that on this particular dimension, a significantly greater proportion of labour arbitrators work full time in that capacity than do employment arbitrators.

*Change of Name*

Clearly, the title 'arbitrator' is well established in the United States and dissociates individuals in the occupation from individuals pursuing related occupations. 'Labour arbitration' and 'employment arbitration', however, are not necessarily job titles recognized even by practitioners in employment and labour relations. 'Labour arbitration' is widely used, but so is 'labour-management arbitration', 'grievance arbitration', and 'collective bargaining arbitration'. Only recently has the term 'employment arbitration' gained any currency, although at the moment, there do not appear to be any other terms jockeying for acceptance. Practitioners and

scholars (if not the general public) are beginning to recognize the distinction between labour arbitration and employment arbitration.

### *National Association*

An important step in the professionalization of arbitration occurred when the AAA was established in 1926 (American Arbitration Association 2004: 1-5). The AAA is a private, non-profit organization that ultimately became the major provider of arbitration services in the United States. The initial focus of the AAA was on commercial arbitration, but the rise of the labour movement in the 1930s led to the AAA adding labour arbitration to its portfolio of services. After the Second World War, when arbitration became the generally accepted method of resolving unsettled grievances, the AAA became the leading provider of grievance arbitrators. The AAA has worked strenuously to professionalize arbitration, offering numerous seminars and training programmes for arbitrators and other neutrals. It also developed codes of conduct for arbitrators and other neutrals, and it fostered standardization in the administrative rules used for arbitration hearings (American Arbitration Association 2004).

Other organizations also sought to professionalize arbitration, including especially the NAA. The Academy, established in 1947, had the explicit mission of fostering ‘high standards of conduct and competence for labour- management arbitrators’. Induction into the Academy was (and is) an honour reserved for well-established and highly respected arbitrators. Through its extensive educational programmes, study groups, annual meetings and other activities, the Academy endeavoured to gain recognition of labour arbitration as an authentic and pre-eminent profession (Elkouri and Elkouri 2003: 41-2).

The emerging field of employment arbitration, however, lacks a professional association that advocates on its behalf as ardently as the NAA advocates on behalf of labour arbitration. Indeed, Academy members are sharply divided on whether or not employment arbitrators should be admitted to membership (Picher *et al.* 2000: 8-9). The Association for Conflict Resolution (ACR) is a national association that welcomes employment arbitrators as members, but ACR membership is dominated by mediators, not arbitrators. The Dispute Resolution Section of the ABA, formed as a new section of the ABA less than a decade ago, also welcomes employment arbitrators as members. But the Dispute Resolution Section's membership is highly diverse, consisting of arbitrators, mediators and other dispute resolution professionals in a variety of dispute areas. In total, currently there is no national association in the United States that exclusively represents the interests of employment arbitrators.

### *Specialized Education and Training*

After the Second World War, the rise of labour arbitration coincided with the establishment of numerous institutions dedicated to providing education and training for labour relations professionals, including arbitrators. At American universities, virtually all the major industrial relations institutes and colleges were established in the 1940s, including those at Cornell, Illinois, Minnesota and Berkeley. These institutions helped train a high proportion of arbitrators in the post-war period. Most American law schools added courses in labour law and arbitration after the Second World War. As noted, training was also provided by professional associations such as the AAA and the NAA.

Even though numerous educational and training programmes were established for labour arbitrators, it needs to be noted that a formal education was never a prerequisite for a successful arbitration career. In the world of labour relations, the acceptability and the experience of the arbitrator have always been much more important than formal education in determining an arbitrator's success. But in recent years, the growing use of labour arbitration to resolve statutory claims has changed this picture, at least somewhat. As labour arbitration has increasingly become a forum for resolving statutory claims, rather than mere contractual claims, the parties have put more emphasis on the arbitrator possessing a Juris Doctor, or at least adequate training in the law (Picher *et al.* 2000: 26-7).

Employment arbitration is largely (but not entirely) centred on the resolution of statutory claims, and therefore most parties in these disputes value an arbitrator with a law degree. But it still remains the case that many successful employment arbitrators lack legal training (Picher *et al.* 2000: 26-7). The same institutions and associations that developed education and training programmes for labour arbitrators have, in recent years, developed similar programmes for employment arbitrators. A new wrinkle is the development of distance learning and on-line learning programmes, which are frequently available for both labour arbitrators and employment arbitrators (see, e.g., <http://www.ecornell.com>).

In the United States, there are no generally accepted standards controlling the quality of either labour or employment arbitrators. Arbitrators in the United States are not 'certified' in the sense that doctors, lawyers and accountants are: for example, there is no examination process for arbitrators that is the equivalent of the bar examination for lawyers or the exams that doctors are required to pass for board certification. Although some observers have lamented the lack of standards governing the quality of labour arbitrators, the issue has never generated the same

concern that more recently has been expressed about the standards appropriate for employment arbitrators.

Lively debates about the ‘certification’ of employment arbitrators and mediators have taken place in recent years. There has been no agreement on whether formal certification would or would not be desirable, in part because there has been no agreement on whether would-be arbitrators should be required to complete an education or training programme or pass a set of standard exams. Claims by some organizations that they offer ‘certification’ for employment arbitrators are not necessarily recognized as legitimate by practitioners and other organizations. Arbitration is not the only field in which obtaining a *certificate* for completing a training programme is often confused with *certification*. In total, although there are only informal standards for both labour and employment arbitrators, there is much more concern, and less agreement, on precisely what qualifies an individual to serve as an employment arbitrator.

### *Code of Ethics*

Ethical standards are more fully developed for labour arbitrators than for employment arbitrators. For arbitrators who are lawyers, a principal source of regulation is the code of ethics administered by state bar associations. Drucker notes that the ethics committees of the bar associations in some states have issued opinions holding that a lawyer may be subject to disciplinary action ‘if the state’s code and disciplinary rules are breached by the lawyer-neutral in the course of service as a neutral’ (Drucker 2003: 5). There is, however, no readily available data on how often state bar associations have actually disciplined labour or employment

arbitrators for breaches in ethics. A court will vacate an arbitration award if the court finds an arbitrator has engaged in a serious breach of ethics (such as bias or fraud).

Each of the major professional associations is devoted to promoting ethical behaviour by its members. In 1951, for example, the AAA, the NAA and the FMCS jointly adopted a 'Code of Professional Responsibility for Arbitrators of Labour-Management Disputes', which was subsequently revised on several occasions (American Arbitration Association 2003). But none of these organizations has yet adopted a code of ethics (or professional responsibility) for employment arbitrators. In large part, the lack of a code is the consequence of the intense debates that have occurred within these organizations over what is or is not appropriate behaviour for employment arbitrators.

Our survey of NAA members clearly demonstrated that the arbitrators themselves have serious disagreements about matters such as the payment of arbitrator fees, the representation of the parties and the arbitrator's obligations with respect to disclosure (Picher *et al.* 2000: 26-33). None of the relevant 'actors', including the courts, have yet to agree on the extent to which due process protections need to be maintained in employment arbitration proceedings. In total, clear standards of ethical behaviour have been established for labour arbitrators but not for employment arbitrators.

### *Lobbying*

It cannot reasonably be claimed that arbitrators and other neutrals have come close to matching the efforts of medical doctors, attorneys, accountants and other professionals in obtaining popular and legal support. Arbitrators, acting alone, are not a powerful interest group.

On the other hand, there are other interest groups (consultants, lawyers, other advocates, etc.) in the dispute resolution field who are often allied with arbitrators in seeking political and legislative support. Lobbying efforts on behalf of arbitration have served mainly to block restrictive regulations of the profession. Civil rights groups, unions and the plaintiffs' bar have engaged in a considerable amount of lobbying at both the federal and state level to obtain legislation regulating the use of mandatory arbitration in employment disputes, but arbitrators and their allies have, in almost all jurisdictions, blocked such efforts.

There is virtually no federal regulation of employment arbitrators and very limited state regulation (an exception is California; see, e.g., *Nixon Peabody LLP*, May 1, 2003; but see also, *Credit Suisse First Boston Corp. v. Grunwald*, 05 C.D.O.S. 1751 (9th Cir. 2005)). The Federal Arbitration Act (FAA) of 1925 is the principal federal statute that regulates arbitration (9 USC §§ 1-16, 1994), but the FAA and many similar state arbitration laws deal principally with the enforceability of agreements to arbitrate and the grounds upon which a court may vacate an arbitration award (Elkouri and Elkouri 2003: 27-33). Neither federal nor state law attempts to regulate entry into the profession, the ethics or standards of arbitrators, or other aspects of the arbitration profession.

To the extent that political action on behalf of arbitration exists, the interest groups that are allied in support of labour arbitration differ significantly from the ones that are allied in support of employment arbitration. The labour movement, for example, frequently lobbies on behalf of strengthening the practice of labour arbitration, but it has little interest in employment arbitration. But the labour movement, as noted, has joined with other interest groups in opposing mandatory employment arbitration (Lipsky *et al.* 2003: 303).

Lawyers and bar associations are also divided in their support of arbitration. Attorneys representing the business community generally support ADR, including employment arbitration. But attorneys representing employees — the plaintiffs' bar — have lobbied vigorously in Washington and many state capitols in opposition to mandatory employment arbitration and other initiatives intended to strengthen ADR. The National Employment Lawyers Association, a major association of plaintiffs' attorneys, was formed in 1985 largely for the purpose of opposing mandatory arbitration (National Employment Lawyers Association 2005). The American Civil Liberties Union has been adamant in its opposition to mandatory employment arbitration, although it otherwise supports the use of voluntary arbitration in employment relations (American Civil Liberties Union 1998).

In total, there is a virtual consensus on the part of employers, unions and other interest groups on the virtues of labour arbitration, which is too well-established in the United States to be challenged in the political arena. By contrast, there is no consensus on the virtues of employment arbitration and interest groups are divided in their political support of or opposition to the practice.

Table 2 summarizes the preceding discussion. We believe it is clear that labour arbitration has more of the characteristics of an authentic profession than employment arbitration. Labour arbitration may be further along the professionalization spectrum, but the profession has had a 60-year head start. Employment arbitration has not yet obtained as distinct an identity as labour arbitration and is not as well supported by a national association, a code of ethics, settled law and popular acceptance. Nevertheless, the continuing growth of private dispute resolution procedures in the United States will invariably push employment arbitration in the direction of professionalization. Studies of other professions demonstrate that the volatility,

uncertainty and contentious debates that surround employment arbitration have been common in the evolution of other professions (Trice and Beyer 1993: 188-93).

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Insert Table 2 Here

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## **7. Characteristics of the labour market for arbitrators**

An important corresponding development in the movement towards professionalization is the development of an effective labour market for the occupation. While there is some evidence that a working market is developing for employment arbitrators, the situation remains a bit chaotic, in part as a result of the lack of regulation and accepted standards for entrance into the market. The operation of the labour market for employment arbitrators is, in many respects, similar to the operation of the labour market for labour arbitrators. For example, the great majority of arbitrators in the United States, regardless of their specialization, work independently and are self-employed. They schedule their own cases and, whenever possible, set their own fees. Very few obtain cases through private sector firms that provide arbitration services. Some referring agencies (such as the NASD and the various state-level Public Employment Relations Boards) have a specific fee structure for the arbitrators they use, but generally, arbitrators have considerable discretion over the fees they charge. Moreover, arbitrators have almost complete control over the number and nature of cases they handle. As we have noted, some labour arbitrators have declined to accept employment arbitration cases, but there is no shortage of other younger, less-experienced arbitrators, who are eager to accept assignments in the non-union sector (Picher *et al.* 2000: 19-22).

There are essentially three channels an arbitrator can use to seek case assignments: an arbitrator can attempt to have his or her name added to the rosters maintained by the ‘providers’ (such as the AAA, the JAMS and the FMCS); an arbitrator can also have his or her name added to a roster maintained by a court-annexed ADR programme; or an arbitrator can obtain an assignment by being chosen through direct appointment of the parties. Although there are no formal educational, certification or licensing requirements for individuals who hope to become arbitrators, the providers and the court-annexed programmes perform critical gatekeeping functions in controlling arbitrators’ access to cases.

In many ways, the labour market for both labour and employment arbitrators resembles the market for professional athletes or professional actors. That is, it is a highly stratified market that seems to conform to the ‘winner- take-all’ characteristics associated with the so-called ‘tournament theory’ (Ehrenberg and Bognanno 1990; Frank and Cook 1995). A handful of ‘stars’ in the profession charge as much as US\$10,000 a day, but casual empiricism suggests that there are now literally thousands of would-be arbitrators in the US who struggle to obtain any case assignments whatsoever. Many of these would-be arbitrators are willing to work on a *pro bono* basis to get their foot in the door, but the fact remains that in any given year, the majority of the would-be arbitrators are not selected for even a single case. It is safe to surmise that the median annual income from arbitration of all those individuals who claim to be arbitrators is (like professional actors) probably zero.

Employment arbitrators are not bound by the same culture and tradition that constrains labour arbitrators. We have previously written, ‘One needs only to attend the meetings of professional societies in the two fields to understand [the] differences. They are related to age, race, gender, and experience; in labour relations there is less diversity among practitioners than

there is in ADR. There also seem to be cultural differences [which are] partly the result of differences in the degree of diversity but also partly because of other factors', including the widespread perception in labour relations that the future is 'bleak' as compared to the perception in employment relations that 'ADR will continue to expand in the future, leading to an attitude of hope rather than despair among practitioners' (Lipsky *et al.* 2003: xix).

In total, the labour market for arbitrators is becoming a highly segmented or 'balkanized' one. There is an emerging labour market for employment arbitrators that can clearly be distinguished from the traditional labour market for labour arbitrators, although the channels for obtaining assignments as an employment arbitrator are not as well established.

## 8. Conclusions

The roots of ADR in the United States can be found in large part in the protest movements of the 1960s, which led to the passage of a sequence of civil rights laws, followed by the so-called 'litigation explosion', and ultimately growing dissatisfaction with the court system. We share the view of several other American scholars who have argued that the forces transforming American society in the 1960s and 1970s brought about a new social contract at the workplace — one that features a diminished role for unionism, the prominent use of teams and a reduction in reliance on hierarchy in the workplace, and an emphasis on the use of arbitration, mediation and other ADR techniques to resolve workplace disputes (Lipsky *et al.* 2003: 29-77; Penner *et al.* 2000).

For decades, American employers, aided and abetted by the more conservative American presidents, have successfully sought to limit the reach and influence of the labour movement.

Their success gave rise to the need to replace some of the functions performed by unions through the collective bargaining process. The federal government has stepped into this gap, for example, by passing laws that protect basic workplace rights, such as protection against discrimination on the basis of race, gender, religion and ethnicity. The simultaneous decline in the labour movement and growth of individual rights raises questions about cause and effect. It is possible that the growth in government protection of individual rights at the workplace has contributed to the decline of the labour movement. Nonetheless, some of the protections formerly provided by unionism and collective bargaining are now, to a greater or lesser extent, provided by federal statute.

Employers have found that the non-union workplace they desire is not free of conflict simply because it is free of unionization. Over time, employers became aware that minimizing unionism required channelling conflict and conflict resolution into newly created systems, and they have done so through the creation not only of employment arbitration schemes but also highly sophisticated conflict management systems that ordinarily feature arbitration as an option (Lipsky *et al.* 2003). Beyond question, we believe, employment arbitrators have achieved a level of visibility and importance in these systems that few scholars, including Dunlop, could have imagined in the 1950s. It cannot be denied that one purpose served by the creation of an employment arbitration system is to fill, at least partially, the void resulting from the decline of unionism and collective bargaining. But we believe the form of justice found through employment arbitration is an imperfect substitute for unionism because the absence of an independent trade union in this process means that the rights of workers cannot be advanced or protected with the same vigour a union would exert.

In our review of the literature on employment arbitration, we have not found any scholar or practitioner who dismisses the significance of the rise of employment arbitration in the United States. The intense debates on employment arbitration do not centre on its significance but rather on questions such as the extent to which it has actually been used, the extent to which it provides quality justice and is an adequate substitute for the courts, and the extent to which employment arbitrators are adequately trained and capable of handling the responsibilities they have been given. Very few scholars now predict that the two principal factors that brought about the rise of employment arbitration — the decline of the labour movement and the inadequacy of the court system — are likely to reverse course in the immediate future. If employment arbitration is not used to fill the void in workplace dispute resolution created by these factors, what other options are there? In many European countries, labour courts and tribunals, work councils and codetermination have been institutional mechanisms that have proved useful in managing and resolving workplace conflict. It seems obvious that there is not the remotest chance that these types of institutions can be established in the United States.

Conceivably, other developments might curb the ascendancy of employment arbitration. On the left, some political activists in the United States are striving to build a left-labour political party that can successfully challenge Republicans and Democrats at the polls and, among other objectives, achieve workplace democracy and justice (an example is the Working Families Party (2005); see <http://www.workingfamiliesparty.org/>). Optimism about the success of these endeavors seems to us to be a classic example of the triumph of hope over experience. Other activists are working hard to revitalize the American labour movement, and the split in the AFL-CIO in 2005 that resulted in the establishment of the Change to Win coalition is only the most prominent example of how ardently some labour activists are striving to achieve revitalization

(see <http://www.changetowin.org/>). Still other pro-labour activists are seeking to influence employment relations by building alliances between unions and various so-called 'identity' groups, especially immigrants and Latinos (Milkman and Voss 2004). Here it is sufficient to say that if revitalization succeeds it would, at least to some degree, limit the significance of employment arbitration in the US system of industrial relations.

On the right, organizations allied with business, including the National Association of Manufacturers and the Chamber of Commerce, have lobbied vigorously for the so-called 'tort reform' that would limit the ability of one party to sue another. Corporations and their allies have joined forces with the Republican Party to press for tort reform, and President Bush included federal tort reform as a plank in the platform on which he ran in both 2000 and 2004. To date, however, the movement for tort reform has had mixed and limited success (Lipsky *et al.* 2003: 60-1). If American corporations succeeded in achieving tort reform, thus reducing their burden of litigation, it would obviously serve to reduce, at least to some degree, their need to rely on ADR, including employment arbitration. One can possibly think of other alternatives to employment arbitration, but it is difficult to maintain that the void currently being filled by employment arbitration could be filled realistically by any other alternative. Accordingly, we believe that employment arbitration will only grow in significance and become increasingly an authentic actor in the American system.

Dunlop recognized the important role that neutrals play in resolving workplace disputes. But he viewed arbitrators, mediators, and other neutrals as either agents of the parties (unions and employers) or agents of the government. In the 'later phases' of economic development, Dunlop believed neutrals would have greater authority for making final and binding decisions. But it cannot be claimed that he viewed neutrals as an actor in the industrial relations system.

Their role, in his view, was limited to interpreting and applying the rules written by the other actors (Dunlop 1958: 367-71). Dunlop himself was an experienced arbitrator and mediator, as were most of his coauthors, and those who knew him personally (including the authors of this paper) were fully aware of the significance he attached to the role neutrals played in industrial relations. Nevertheless, however significant the role they played, Dunlop viewed neutrals as subservient to the other actors. One cannot fault Dunlop, writing at mid-century, for failing to imagine the dramatic changes that would occur in the American industrial relations system later in the century. Very few individuals were prescient enough to foresee the transformative effects that globalization, international competition, technological change and other factors would have on US employment relations. Nor did Dunlop or most other American scholars in the 1950s predict the long-term decline of the American labour movement.

Dunlop believed that in an industrial relations system, there would be a tendency for the three principal actors to achieve an equilibrium. In later work with Kerr, Harbison and Myers, he endorsed the so-called 'convergence hypothesis', which holds that over time industrial relations systems dominated by one or two parties tend to become three-party systems (Kerr *et al.* 1964). He clearly did not envision that the void that might result from the decline of unionism (or other forms of worker representation) could be filled indefinitely by the remaining two actors, namely employers and the government.

We hope we have made it clear that the US government has essentially subcontracted dispute resolution to private employment arbitrators. But there is a significant question about the future role of these arbitrators. Will they remain essentially subcontracted agents of the government, fulfilling a critical dispute resolution function? In the industrial relations system that existed in the United States after the Second World War, the role of the government in

workplace dispute resolution, as Dunlop noted, was principally to serve as a referee between unions and employers. In that capacity, the government — whether or not controlled by Democrats or Republicans — generally tried to ensure that there was a level playing field in labour disputes. Now the government (both the judicial and the legislative branch) has fully sanctioned employer-promulgated, non-union dispute resolution systems. In essence, the government allows employers to establish, maintain and staff these systems.

We share Dunlop's view that a two-actor system is unlikely to be a stable one. At the moment, it appears that employment arbitrators are in the ascendancy, and as we argued earlier, their role is only likely to expand in the foreseeable future. But a long-term view of industrial relations systems suggests that there will ultimately emerge a separate and independent voice for worker advocacy, albeit not necessarily in the form of traditional unionism. If that occurs, it is likely to diminish the role of employment arbitrators in the industrial relations system.

Another scenario is possible. In the absence of a revitalized union movement or some other form of worker advocacy, the role of employment arbitrators could shift. It is possible that the role of employment arbitrators could evolve so that they become less dependent on employers and better able to protect basic worker rights. Achieving greater independence and autonomy for employment arbitrators, however, will only be possible if the current imperfections in employment arbitration are corrected, either by statute or by court decisions. Providing adequate procedural and substantive due process protections for employees using arbitration is critical to strengthening the role of employment arbitrators. Making employment arbitration less proprietary and more transparent would also strengthen the role of arbitrators. The downside of pursuing these measures, however, is that they lead in the direction of making arbitration identical to litigation. Dunlop argued that an authentic actor in an industrial relations system

must have the power to shape its own role. It remains to be seen whether employment arbitrators, whether by statutory regulation, court decisions, professionalization, lobbying and political influence, licensing and certification, or other means, can truly shape their own role. If they can, it is possible that they may prefer to place primary emphasis on the protection of workplace rights and less emphasis on serving the interests of employers.

### Notes

1. The three cases in the Steelworkers Trilogy were *Steelworkers v. American Manufacturing Co.*, 363 US 564, 1960 (if there are doubts about the arbitrability of a grievance, they should be decided in favour of sending the case to arbitration), *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574, 1960 (disputes over contract terms are assumed to be arbitrable unless they are specifically excluded by the contract; arbitration is viewed as the *quid pro quo* for the union giving up the right to strike during the term of the contract), and *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 US 593, 1960 (courts should not review the merits of the arbitrator's decision as long as it is based on the content of the collective bargaining contract).
2. The Federal Arbitration Act of 1925 provides only four grounds for vacating an arbitration award: (1) corruption, fraud or undue means; (2) evident partiality on the part of the arbitrator; (3) arbitrator misconduct; or (4) excess or imperfect execution of arbitrator powers. *Federal Arbitration Act*, 9 USC. §§1-16 (1994 and Supp. 2000).
3. Stipanowich notes the 'paucity of useful, reliable information', on ADR. He writes, 'The American Arbitration Association has from time to time made available data on current or closed cases for the benefit of researchers', but otherwise does not regularly publish statistics on caseloads (Stipanowich 2004: 846-7). Stipanowich succeeded in obtaining longitudinal caseload data from the AAA, but failed to obtain it from JAMS and the National Arbitration Forum, two of the other major providers (Stipanowich 2004: 872).
4. This line of argument needs to be qualified by the following considerations: (1) some employment statutes allow for both punitive damages and damages based on lost

earnings; an example is the Americans with Disabilities Act, 42 USC §§ 12101-12213 (2000), (2) some statutes place a cap on damages; an example is Title VII of the Civil Rights Act of 1964, 42 USC § 1981a(a)(1), (b)(3) (2000) and (3) some plaintiffs' attorneys charge hourly rates rather than working on a contingency basis.

Table 1

TABLE 1  
Comparing Employment Arbitration with Labour Arbitration

|                                   | <i>Labour arbitration</i>  | <i>Employment arbitration</i>  |
|-----------------------------------|--|--|
| Types of disputes                 | Grievances arising under existing collective bargaining agreements                     | Statutory claims and breaches of individual employment contracts   |
| Scope of arbitrator's authority   | Defined by the collective bargaining agreement   | Defined by the employer or the employment contract   |
| Trigger                           | Final step in the grievance procedure contained in the collective bargaining agreement | Mandatory predispute arbitration: required by individual employment contract<br>Voluntary post-dispute arbitration: mutually agreed upon by employer and employee after dispute arises |
| Rules governing the procedure     | Written jointly by the employer and the union  | Written by the employer or contained in an individual employment contract  |
| Selection of the arbitrator       | Selected jointly by the employer and the union   | May be selected jointly by the employer and the employee; can be selected solely by the employer   |
| Payment of the arbitrator         | Paid jointly by the employer and the union   | Usually paid by the employer   |
| Representation of the complainant | Complainant represented by the union   | Complainant may be represented by an attorney; representation not necessarily guaranteed   |
| 'Repeat player effect'            | Highly unlikely  | Some research suggests it may be common  |

Table 2

TABLE 2  
Comparing Labour Arbitration to Employment Arbitration Using Six Characteristics of a Profession

| <i>Characteristic</i>                                | <i>Labour arbitration</i>  | <i>Employment arbitration</i>  |
|--|--|--|
| Full-time occupation                                 | A full-time occupation for a significant proportion of the practitioners, but not for all  | Not a full-time occupation for virtually any of the practitioners  |
| Change of name                                       | 'Labour arbitrator' is generally recognized as the name of a profession, but other names are also used   | 'Employment arbitrator' has only recently emerged as a bona fide name but is less recognized than 'labour arbitrator'  |
| National association                                 | American Arbitration Association (1926) and National Academy of Arbitrators (1947)   | No national organization exclusively represents the interests of employment arbitrators  |
| Training school                                      | No formal education and training requirements, but numerous programmes are offered by colleges, providers and professional associations                          | No formal education and training requirements, but general recognition that practitioners need a JD to resolve statutory claims; sharply divided opinion on the need for certification   |
| Code of ethics                                       | Administered by state bar associations and professional associations; enforcement is questionable but clear standards of ethical behaviour have been established | Codes and protocols have been promulgated by professional associations; enforcement is questionable and opinion is sharply divided on many due process considerations  |
| Political agitation to win popular and legal support | Consensus on the benefits of labour arbitration; legal support provided by the Federal Arbitration Act, the Taft–Hartley Act and numerous court decisions        | No consensus on the benefits of employment arbitration; interest groups are divided in their political support of or opposition to the practice; legal support provided by the Federal Arbitration Act, but many legal issues are unresolved |

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