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Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury

Abstract

The rise of employment arbitration in the wake of the Supreme Court's 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision has been accompanied by vigorous debates over the relative advantages or dangers of using arbitration to resolve statutory claims by employees. Advocates have advanced arguments for the relative speed, efficiency and fairness of employment arbitration. Critics of employment arbitration have raised concerns about due process protections, cost barriers, unfavorable outcomes for employees, and dangers of repeat player biases in favor of employers. Unfortunately, over the past decade and a half, the volume of arguments raised for and against employment arbitration have far outnumbered the pieces of empirical research bearing on these questions. However, over time there has been a gradual increase in the number of empirical studies of employment arbitration. These studies have featured a growing use of more sophisticated, rigorous methodologies that allow us to begin to answer some of the critical questions surrounding employment arbitration.

Keywords

employment arbitration, litigation, dispute resolution, grievance procedures

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**EMPIRICAL RESEARCH ON EMPLOYMENT ARBITRATION:
CLARITY AMIDST THE SOUND AND FURY?**

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I. INTRODUCTION

The rise of employment arbitration in the wake of the Supreme Court's 1991 *Gilmer v. Interstate/Johnson Lane Corp.*¹ decision has been accompanied by vigorous debates over the relative advantages or dangers of using arbitration to resolve statutory claims by employees. Advocates have advanced arguments for the relative speed, efficiency and fairness of employment arbitration.² Critics of employment arbitration have raised concerns about due process protections, cost barriers, unfavorable outcomes for employees, and dangers of repeat player biases in favor of employers.³ Unfortunately, over the past decade and a half, the volume of arguments raised for and against employment arbitration have far outnumbered the pieces of empirical research bearing on these questions. However, over time there has been a gradual increase in the number of empirical studies of employment arbitration. These studies have featured a growing use of more sophisticated, rigorous methodologies that allow us to begin to answer some of the critical questions surrounding employment arbitration.

The present paper examines the empirical research on employment arbitration, focusing on a series of critical issues. First, what is the extent of adoption of employment arbitration and

1. 500 U.S. 20, 24-27,35 (1991).

2. See, e.g., Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349-52, 1356-59 (1997) [hereinafter Estreicher, *Predispute Agreements*] (arguing that employment arbitration is "less expensive, more expeditious, less draining and divisive" than litigation); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISF. RESOL. 559, 560-61, 563-68 (2001) [hereinafter Estreicher, *Saturns for Rickshaws*] (discussing that studies "suggest[] that properly designed employment arbitration systems can out-perform court-based litigation systems . . . because arbitration proceedings tend to be informal (and quicker)").

3. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36-40, 69-82, 101-04, 106-30 (arguing that clauses requiring pre-dispute arbitration prevent employees from exercising statutory rights and favor employers); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019-20, 0136-49 (1996) (arguing that mandatory employment arbitration clauses in hiring contracts raise due process concerns in part because employees "lack bargaining power and are needful of employment" when they sign hiring contracts).

what factors influence the decision by employers to adopt these procedures? Second, what are the outcomes of employment arbitration cases? In particular, how often do employees win in arbitration and what are the damages awarded in arbitration? To evaluate the answers to these questions, it is also important to look at the outcomes of employment litigation and compare arbitration to these. Third, is there a repeat player effect favoring employers in employment arbitration? This question has been of particular prominence in debates over employment arbitration and as a result deserves separate consideration. Fourth, what is the relationship between employment arbitration and other aspects of organizational dispute resolution systems such as internal grievance procedures? And, lastly, how does employment arbitration affect other human resource outcomes?

In addition to reviewing the existing empirical research on employment arbitration, I also investigate some of the major issues in this area using more recent data from arbitrations conducted under the auspices of the American Arbitration Association (AAA). State law in California requires arbitration service providers to provide public filings of certain key information about arbitrations they administer involving consumers.⁴ The filings by the AAA under this California law include all arbitration cases filed nationally involving consumers, not just those from California. Among employment arbitration cases, these filings include only those arbitration cases based on employer promulgated agreements, i.e. consumer-type arbitrations, and not cases based on individually negotiated agreements. As a result, the data in these filings relate specifically to the type of arbitration cases implicated in the Gilmer⁵ and

4. CAL. CIV. PROC. CODE § 1281.96 (West 2007).

5. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-27, 35 (1991).

Circuit City Stores, Inc. v. Adams⁶ cases that have been the primary focus of the debates over mandatory arbitration. Although there are some limitations to the information that service providers are required to include, these filings nonetheless provide an extremely valuable new source of data for researchers. In particular the requirement that service providers include data on all arbitration cases filed with them results in larger datasets on arbitration outcomes than have been available in earlier studies. Another important feature of this data is that the filings include more recent decisions, from 2003 to the present, than the arbitration decisions examined in previous studies. As a result, they are likely to provide a better indicator of the nature of the more fully developed system of employment arbitration, over fifteen years after Gilmer, a decade after the Due Process Protocol,⁷ and a half decade after Circuit City. In this paper, I report results from an analysis of a sample of 2763 employment arbitration cases administered by the AAA from January 1, 2003 to September 30, 2006, which produced 836 employment arbitration awards (I will refer to these as the "AAA C-filings data"),

II. THE EXTENT OF ADOPTION OF EMPLOYMENT ARBITRATION

One of the most basic empirical questions concerning employment arbitration is how widespread these procedures have become. Unfortunately, the existing research on this question is very limited in extent. Unlike issues like the extent of union representation, which is annually measured and reported on by the Bureau of Labor Statistics, there is no standard

6. 532 U.S. 105, at 108-15, 119-24 (2001) (holding that courts can enforce agreements to arbitrate in employment contracts).

7. In 1995 a Task Force on Alternative Dispute Resolution in Employment comprised of arbitration professionals created a model standard for employment arbitrations that focused on preserving due process protections. See DUE PROCESS PROTOCOL FOR MEDIATION & ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), *available at* http://www.naarb.org/due_process/due.process.html [hereinafter DUE PROCESS PROTOCOL].

public data set indicating the percentage of organizations that have adopted employment arbitration procedures. To get a picture of the extent to which employment arbitration has spread through American workplaces, we need to draw on evidence from a series of different studies that in the course of examining various related issues gathered statistics on the adoption of employment arbitration.

The contemporary phenomenon of employment arbitration received its initial major impetus with the Supreme Court's 1991 Gilmer decision. An early indication of the extent of adoption of employment arbitration soon after the Gilmer decision is provided by a 1992 survey conducted by Peter Feuille and Denise Chachere.⁸ In their study, Feuille and Chachere surveyed 195 alumni of a Masters in Industrial Relations and Human Resources (IRHR) program on the types of dispute resolution procedures available for nonunion employees in the organization where they were employed. Among various questions about the characteristics of these procedures, the survey asked if the procedures included arbitration.⁹ Of the respondents, 2.1 percent indicated that their organizations had adopted employment arbitration.¹⁰ This estimate is likely to somewhat overstate the overall extent of adoption of employment arbitration at this point in time, since the types of employers likely to hire alumni of a graduate program in IRHR are also likely to have relatively sophisticated human resource management practices, including more elaborate dispute resolution procedures.¹¹ However, the results of

8. Peter Feuille & Denise R. Chachere, Looking Fair and Being Fair: *Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27 (1995).

9. *Id.* at 31-32.

10. *Id.* at 36.

11. *Id.* at 30-32 (stating that the since the survey "deliberately oversampled large firms with more formal HR policies " that its results may not be representative of "all of this country's private employers.").

this study do give us a good indication of the relatively limited extent of adoption of employment arbitration at the time around the Gilmer decision.

The next major study providing an indication of the spread of employment arbitration is a 1995 General Accounting Office (GAO) survey of use of alternative dispute resolution procedures.¹² The GAO surveyed 1448 establishments subject to Office of Federal Contract Compliance Programs (OFCCP) reporting requirements.¹³ Of the respondents, 9.9 percent indicated that they had adopted employment arbitration procedures for nonunion employees.¹⁴ However, when the GAO contacted these employers seeking additional details of their procedures, a number of respondents indicated that they did not in fact have employment arbitration procedures.¹⁵ One major reason for the erroneous responses was respondents indicating they had employment arbitration procedures when what they actually had were labor arbitration procedures for unionized employees.¹⁶ This type of confusion by respondents is something all researchers need to be concerned about in this area. Fortunately, the GAO's additional step of contacting employers for follow-up questions allows us to correct for this problem in the responses. With this correction made, the GAO survey results indicate a 7.6 percent incidence of employment arbitration.¹⁷ As with the Feuille and Chachere study, to the extent that employers subject to OFCCP reporting requirements are likely to have heightened

12. See GENERAL ACCOUNTING OFFICE, GAO/HEHS 95-150, EMPLOYMENT DISCRIMINATION, MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7-8 (1995), available at <<http://www.gao.gov/archive/1995/he95150.pdf>>.

13. *Id.* at 1-3, 24.

14. *Id.* at 7.

15. *Id.* at 22.

16. *Id.*

17. See *id.*

awareness of employment law issues, these results may somewhat overestimate the incidence of employment arbitration compared to the general population of employers. Nevertheless, the results do strongly suggest the expansion of employment arbitration in the early 1990s.

Two more recent studies from my own research provide further indications of the continued expansion of employment arbitration. These studies were part of a broader research project on changing patterns of work and employment practices in the telecommunications industry.¹⁸ In a 1998 survey of 213 establishments in the telecommunications industry, I found that 16.3 percent had adopted employment arbitration procedures.¹⁹ This survey included multiple questions designed to separate out procedures for unionized employees and avoid respondents confusing labor arbitration with employment arbitration.²⁰ However, the survey was also specifically directed at issues concerning alternative dispute resolution, which may have led to some response bias of organizations with more elaborate dispute resolution procedures, including employment arbitration, being more likely to respond.²¹ In a subsequent 2003 survey of establishments in the telecommunications industry, this problem of potential response bias was reduced by embedding the questions concerning employment arbitration in a general survey of work and employment practices.²² In this 2003 survey, out of 291

18. Rosemary Batt et al., *Telecoms 2004: Strategy, H.R. Practices & Performance*, Final Report of the Cornell-Rutgers Telecommunications Project (2004) (unpublished survey) (on file with the author).

19. Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 *INDUS. & LAB. REL. REV.* 375, 381-83, 385 (2003) [hereinafter Covin, *Institutional Pressures*].

20. *Id.* at 381-85.

21. *See id.*

22. *See* Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 *CORNELL J.L. & PUB. POL'Y* 581, 586-92 (2004) [hereinafter Colvin, *From Supreme Court to Shop Floor*].

respondents, 14.1 percent had adopted employment arbitration procedures.²³ This figure represents the percentage of employers that had adopted employment arbitration procedures.²⁴ Since employers with larger workforces were more likely to have adopted these procedures, the percentage of employees covered by employment arbitration procedures was higher.²⁵ Adjusting for workforce size of the establishments, 22.7 percent of nonunion employees in this survey were covered by employment arbitration procedures. Although this was an industry specific survey²⁶ and there may be some variation across industries, this study does provide a relatively recent general indication of the extent of expansion of employment arbitration.

An estimate of similar magnitude was found in a national survey of firms conducted in 2000 by Galle and Koen.²⁷ Out of a sample of 123 firms, they found that 19 percent had adopted employment arbitration procedures.²⁸ Although the response rate for this survey (12.3 percent)²⁹ was somewhat lower than for the other studies discussed above, its estimate of the incidence of employment arbitration is generally consistent with their findings.

Although there are limitations to the existing studies, they do show a consistent pattern of significant expansion of employment arbitration in the decade and a half since the Gilmer decision. Extrapolating from them, a current estimate in the range of 15 to 25 percent of

23. *Id.* at 587 (citing Batt et al., *supra* note 18).

24. See Colvin, *From Supreme Court to Shop Floor*, *supra* note 22, at 586-89.

25. See *id.* at 586-92.

26. *Id.* at 586, 588 (stating that the survey was specific to the telecommunications industry).

27. William P. Galle Jr. & Clifford M. Koen, *Reducing Post-Termination Disputes: A National Survey of Contract Clauses Used in Employment Contracts*, 9 J. INDIVIDUAL EMP. RTS. 277,234-41 (2001).

28. *Id.* at 234,239.

29. *Id.* at 234.

employers having adopted employment arbitration seems reasonable.³⁰ Although still a minority of employers, it is worth noting that this would make employment arbitration the process for resolving employment law claims for a substantial number of employees. For example, by comparison, the unionization rate was only 12.0 percent in 2006,³¹ suggesting that employment arbitration is likely already a more widespread system for governing employment relations than collective bargaining and labor arbitration.

Adoption of employment arbitration procedures is currently a decision at the discretion of individual employers. What do we know about the factors leading employers to adopt employment arbitration? Given that employment arbitration provides employers with a way to avoid litigation through the courts for employment law claims, one factor likely to affect the adoption of employment arbitration is the extent to which the employer perceives itself as subject to the threat of litigation. In my own field research examining procedures in individual firms, I found that adoption of employment arbitration was strongly influenced by past experiences with litigation.³² Lipsky, Seeber, and Fincher also found in their field research that litigation was a key driver of innovation in dispute resolution procedures.³³ In addition, employers were also influenced by the extent to which they were operating in environments where there were higher levels of employment litigation activity, for example in California in

30. See Colvin, *From Supreme Court to Shop Floor*, *supra* note 22, at 587-91.

31. U.S. Dep't of Lab., Bureau of Labor Statistics, *MLR: The Editor's Desk: Union Membership in 2006* (2007), available at < <http://www.bls.gov/opub/ted/2007/jan/wk4/art05.htm>>.

32. Alexander J.S. Colvin, *Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations* (1999) (unpublished Ph.D. dissertation, Cornell University) (on file with author) [hereinafter Colvin, *Citizens and Citadels*].

33. DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT* 58-61, 75-76 (2003).

the early 1990s.³⁴ These case study based findings are supported by survey data analysis indicating that adoption of employment arbitration is more likely in states where employment law pressures on employers are greater.³⁵

II. EMPLOYMENT ARBITRATION OUTCOMES

A. Employee Win Rates

One of the most basic empirical questions regarding employment arbitration is how often employees win their cases in arbitration. Although this is a simple question, providing a definitive answer to it has proven difficult. Indeed part of the challenge in investigating this issue is that employee win rates may vary with factors such as the time period and type of dispute involved.

A number of the early studies examining employee win rates in arbitration involved analysis of American Arbitration Association (AAA) employment arbitration cases, primarily from the early 1990s. The results for these studies are relatively consistent. In a sample of AAA Commercial Arbitration awards from 1992 involving employment disputes, Lisa Bingham found an employee win rate of 74 percent.³⁶ Bingham also found a win rate of 70 percent in a subsequent study of AAA arbitration awards from 1993 and 1994.³⁷ Similarly, in a sample of AAA employment arbitration decisions from 1993-95, Lewis Maltby found an employee win

34. Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, in 13 *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* 69, 70-71, 80-87 (David Lewin & Bruce E. Kaufman eds., 2004) [hereinafter, Colvin, *Adoption and Use*].

35. Colvin, *Institutional Pressures*, *supra* note 19, at 375, 377-80, 385-88, 389-91.

36. Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5, 11 [hereinafter, Bingham, *Overview*].

37. *Id.* at 12 (finding 70 percent win rate for employees with "one-time player employers").

rate of 66 percent.³⁸ Lastly in a 1995 study of AAA employment arbitration cases, William Howard found an employee win rate of 68 percent.³⁹

Although these studies all produce consistent results, a couple of important caveats to them should be recognized. First, these studies were conducted of AAA employment arbitration awards prior to the adoption of the Due Process Protocol. The high employee win rate even prior to the adoption of the Protocol could be taken as suggesting that, at least where administered by the AAA, employment arbitration was already a relatively employee friendly process. Second, however, it is not clear that the types of cases represented in these AAA awards of the early 1990s are representative of the employment arbitration system that has arisen in more recent years. In particular, a majority of these awards appear to have involved claims by employees, typically managers and executives, under individually negotiated contracts, rather than claims brought under arbitration provisions from employment manuals or handbooks.⁴⁰ The results suggest that outcomes vary significantly between these different categories of cases. In a sample of 203 AAA awards decided under the AAA's Employment Rules between 1993 and 1995, Bingham found that whereas employee claimants won 68.8 percent in cases based on individual contracts, employee claimants only won 21.3 percent of the cases based on personnel manuals.⁴¹ This raises the concern that overall employee win rates may be

38. Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in *How ADR WORKS* 915, 921 (Norman Brand ed., 2002).

39. Wilham M. Howard, *Arbitrating Claims of Employment Discrimination*, *DISP. RESOL J.*, Oct-Dec 1995, at 40, 45.

40. See, e.g. Bingham, *Overview*, *supra* note 36, at 13, 16 (stating that in a sample of 170 AAA awards from 1993 to 1995, 109 of the awards, or 64 percent, were based on individual contracts, compared to 61 awards, or 36 percent, based on personnel manuals).

41. *Id.*

much lower under the employer promulgated mandatory arbitration procedures that have expanded in recent years than suggested by some of the early studies in this area.

Some of the most vigorous debates surrounding employment arbitration in the 1990s involved employment cases being heard under the securities industry arbitration procedures, which had been the site of the Gilmer case itself.⁴² A series of studies have looked at employee win rates in cases decided under securities industry arbitration procedures. Among these studies, employee win rates ranged from 24 to 55 percent, with win rates generally somewhat higher under the NYSE procedures than under the NASD procedures.⁴³ As with the early 1990s AAA awards, however, it is important to recognize that the experience under the securities industry system may not be representative of more general employment arbitration outcomes. Although employment arbitration in the securities industry system has involved numbers of cases dealing with statutory claims such as employment discrimination and sexual harassment, they also often involve violations of individual contracts and claims by relatively highly paid individuals.

What is the more recent experience as the system of employment arbitration has expanded to encompass a broader range of employees and more particularly since the advent of the Due Process Protocol? A 2000 study by Lisa Bingham and Shimon Sarraf extended Bingham's earlier work by examining the outcomes of AAA cases decided in 1996 and 1997

42. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22-24 (1991).

43. See HOYT N. WHEELER ET AL., *WORKPLACE JUSTICE WITHOUT UNIONS* 48, 50 (W.E. Upjohn Institute For Employment Research 2004) (finding 41 percent employee win rate under NYSE procedures and 24 percent win rate under NASD procedures).

during the first year after the implementation of the Protocol.⁴⁴ In these 58 awards the employee win rate was 39.7 percent. In a similar 2003 study, Elizabeth Hill analyzed the outcomes of 200 AAA awards from 1999 to 2000.⁴⁵ Among these awards, Hill found a 43 percent win rate, consistent with Bingham and Sarraf's results. Both of these studies found that outcomes vary with the type of case. In particular, Bingham found an employee win rate of 27.6 percent in personnel handbook based cases versus 61.3 percent in individual contract based cases and, interestingly, an employee win rate of 54.3 percent before, but only 39.7 percent after the implementation of the Due Process Protocol.⁴⁶ Hill found that in contrast to the overall 43 percent employee win rate in her sample, the employee win rate was 34 percent in cases based on employer promulgated agreements and among those cases only 24 percent where the employer had some type of internal grievance procedure that operated prior to arbitration.⁴⁷

How do employee win rates in employment arbitration compare to the outcomes of litigation? In contrast to the research on employment arbitration, larger scale datasets of employment litigation outcomes have been gathered by government agencies. Theodore Eisenberg and Elizabeth Hill report the results of analysis of such datasets for both federal and state court employment litigation outcomes and compare these to AAA employment

44. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitrations Before and after the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY 53rd ANNUAL CONFERENCE ON LABOR 303, 320-28 (Samuel Estreicher & David Sherwyn eds., 2004).

45. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May.-Jul. 2003, at 8, 11.

46. Bingham & Sarraf, *supra* note 44, at 320-28 (finding 39.7 percent win rate for employees).

47. Hill, *supra* note 45, at 13, 15.

arbitration awards.⁴⁸ Using data on 1430 employment discrimination cases in the Federal Courts from 1999 to 2000, they find an employee win rate of 36.4 percent.⁴⁹ Meanwhile, from data on 160 state court employment discrimination cases decided in 1996, they report an employee win rate of 43.8 percent.⁵⁰ By contrast, among forty-two AAA awards involving claims of employment discrimination, they find an employee win rate of 26.2 percent.⁵¹ In addition to claims of employment discrimination, Eisenberg and Hill also examine noncivil rights employment cases. For non-civil rights cases tried in state courts in 1996, they find an employee win rate of 56.6 percent based on a sample of 145 cases.⁵² By contrast, among non-civil rights based AAA employment arbitration awards, they find an employee win rate of 50.9 percent.⁵³ These win rates found by Eisenberg and Hill are consistent with win rates found by David Oppenheimer in a study of jury verdicts in California in 1998 and 1999.⁵⁴ Oppenheimer found an employee win rate of 50 percent out of 272 cases based on employment discrimination statutes and 59 percent in 117 cases involving common law discharge claims.⁵⁵

Eisenberg and Hill also break the results down by type of case.⁵⁶ The AAA classifies employment arbitration cases as "N" type cases, which involve individually negotiated

48. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan.2004, at 44, 46-49, 51-53.

49. *Id.* at 48.

50. *Id.*

51. This win rate is calculated by collapsing Eisenberg and Hill's numbers on discrimination claims from awards based on individually negotiated and employer promulgated agreements. This is done since there are only five awards involving individually negotiated contracts and discrimination based claims in their sample. *See id.* at 47-51.

52. *Id.* at 48.

53. *Id.* at 48-49.

54. See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535-49 (2003).

55. *Id.* at 516, 536.

56. *See* Eisenberg & Hill, *supra* note 48, at 46-53.

agreements, and "P" type cases, which involve employer promulgated agreements. This is an important and useful distinction made in the AAA awards since the latter category of P type cases involve the mandatory arbitration procedures that have inspired controversy in the wake of Gilmer, whereas the N type cases based on individually negotiated agreements are much less controversial due to the ability of the employees to bargain over their existence and terms. Interestingly, when the results in Eisenberg and Hill's study are broken down into these different types of cases, they report an employee win rate of 64.9 percent for the N type cases involving individually negotiated agreements and 39.6 percent for the P type cases involving employer promulgated agreements.⁵⁷ Eisenberg and Hill also note that cases based on employer promulgated agreements are more likely to involve employees whose salary levels are below \$60,000, and therefore use the P category of cases as a proxy for lower income employee cases.⁵⁸ Eisenberg and Hill advance the argument that the cases based on individually negotiated agreements involving higher paid employees are the more relevant comparison group for litigation, since in practice the lower paid employees wouldn't be able to bring cases through the court system.⁵⁹ In their results, however, they describe the results for the P and N categories of cases as corresponding to cases involving lower versus higher income employees, respectively, instead of the actual categories of employer promulgated versus individually negotiated agreements.⁶⁰ Although there is likely to be a correlation between lower versus higher income level and the P versus N case distinction, these categories are not the same and

57. *See id.* at 47

58. *Id.* at 46.

59. *Id.* at 48.

60. *Id.* at 47.

so the better interpretation of their results is as indicating differences between cases involving employer promulgated and individual negotiated agreements.

In another recent study comparing arbitration and litigation outcome, Michael Delikat and Morris Kleiner compared the outcomes of 186 awards made under the auspices of the NYSE and NASD between 1997 and 2001, with 125 trials conducted in the Southern District of New York over the same time period that involved claims of employment discrimination.⁶¹ They find an employee win rate of 46 percent in arbitration, but only 33.6 percent in litigation.⁶² As the authors admit, however, it is likely that there are differences in the types of cases brought in these forums, with many securities arbitration cases involving contractual claims and relatively highly paid employees. Given this likelihood of substantial differences in the types of plaintiffs and categories of cases involved in these forums, it may make more sense to view these results as descriptions of two different dispute resolution systems rather than as a matched arbitration-litigation comparison. Of additional interest in this study is the finding that the 125 trials represent only 3.8 percent of the employment discrimination claims filed in the Southern District of New York over this period,⁶³ reflecting the reality of the litigation pyramid in which relatively few cases survive preliminary dismissal proceedings and settlement efforts to ultimately reach trial.⁶⁴ This is not to say, however, that a high settlement rate is necessarily

61. Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. SEC. LITIG. 1, 8-10 (2003), available at <<http://www.arbforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2003DelikatKleinerConflictManagement.pdf>>.

62. *Id.* at 10.

63. *Id.* at 8-9.

64. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 432-37, 451-52, 455-57 (2004).

a bad feature of a dispute resolution system and indeed high rates of voluntarily negotiated settlements between parties can be a desirable outcome.

Although these last two studies make for interesting comparisons of arbitration and litigation outcomes, it is important to note that differences in employee win rates may reflect factors other than the relative employee or employer favorability of the decision-making process in each forum. In particular, there may be selection effects depending on the relative incentives for bringing cases to trial in each type of forum. For example, if litigation is viewed by potential claimants as a high-risk, high reward process, with large variation in award amounts, then employees may be willing to bring more marginal cases to trial even if the chance of winning is low, out of hope of winning a large verdict on the chance that they are successful. Conversely, simpler, faster procedures and resulting lower attorney fees may allow employees to bring lower value claims through arbitration than would be possible in litigation. The sample of actual cases that we observe are heavily influenced by the selection effect resulting from the calculations of the parties as to whether it is worth proceeding to trial in the forum. In addition, the greater availability of preliminary proceedings in litigation may lead to more of the marginal cases being dismissed before trial in litigation compared arbitration, resulting in higher litigation win rates.⁶⁵ However, it should also be recognized that failure of the employer to obtain dismissal of a case in preliminary proceedings in litigation may result in settlement of the

65. See Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 112-14 (2003) (stating that approximately 60 percent of employment cases in federal court are resolved before trial on summary judgment motions and that employers win 98 percent of those motions whereas "[s]ummary judgment in the AAA arbitration is so rare as to be statistically insignificant").

case on terms favorable to the employee, which would tend to depress the employee win rate in litigation by removing some of the stronger cases before trial.⁶⁶

What does analysis of the AAA C-filings data indicate about the question of employee win rates? Among the 836 employment arbitration awards in the sample I examined, the employee win rate was 19.7 percent. This figure was based on a relatively broad definition of an employee win as any case in which the employee was awarded some amount of damages, however large or small. This employee win rate is strikingly lower than that found in many of the previous studies of employment arbitration discussed above, such as the 39.7 and 43.6 percent employee win rates found by Bingham and Hill respectively. It is also substantially lower than the employee win rates in employment discrimination litigation of 36.4 percent for federal courts and 43.8 percent for state courts found in the Eisenberg & Hill study⁶⁷ and 33.6 percent for the S.D.N.Y. in the Delikat and Kleiner study,⁶⁸ discussed above. However, it is closer to the 26.2 percent employee win rate in the smaller subsample of employment discrimination based arbitration cases in the Eisenberg and Hill study⁶⁹ and the 21.3 percent employee win rate Bingham found for arbitrations based on clauses included in personnel manuals.⁷⁰ The similarity with these latter two results suggests that the explanation for the dramatically lower employee win rates in the AAA C-filings data compared to previous studies may lie in the types of cases involved. Many of the earlier studies of arbitration outcomes were based on sets of

66. I am grateful to the Hon. Rebecca Pallmeyer, U.S. District Judge, Northern District of Illinois for raising this point in her presentation to the *Beyond the Protocol* conference.

67. Eisenberg & Hill, *supra* note 48, at 48.

68. Delikat & Kleiner, *supra* note 61, at 10.

69. See Eisenberg & Hill, *supra* note 48, at 47-51; and note 48 (describing calculation of 26.2 percent figure).

70. See Bingham, Overview, *supra* note 36, at 13, 16.

arbitration awards that included large numbers of cases deriving from individually negotiated contracts and involving contractual rather than discrimination based claims.⁷¹ By contrast, the AAA C-filings under the California state law requirement include only cases based on employer promulgated agreements.⁷² The result is that this data better reflects the more fully developed Gilmer-based system of employment arbitration deriving from employer promulgated agreements, rather than arbitration involving individually negotiated agreements, which may have very different characteristics.

The AAA C-filings data unfortunately includes only limited information about the specific nature of the claims involved in the cases. However, it does include data on the salary levels of claimants, which provides some clue as to the type of employees involved in most of these recent cases. Among 1,009 cases in which employee salary data was provided, including cases that settled prior to hearings, 841 or 83.3 percent, involved employees earning \$100,000 or less per year, whereas 128 or 12.7 percent involved employees earning between \$100,000 and \$250,000 and 40 or 4.0 percent involved employees earning over \$250,000.⁷³ This indicates that the large majority of these employment arbitration cases are not involving highly paid employees. It should be noted that the relatively lower salary levels of plaintiffs could also be an indicator of relative accessibility of employment arbitration. As Estreicher has argued, one of the key potential advantages of employment arbitration over litigation is that the relatively high

71. Both Bingham and Hill noted that these types of cases were the large majority of their overall samples: *See* Bingham, *Overview*, *supra* note 36, at 14.; Hill, *supra* note 44, at 12 ("Employment discrimination case have not comprised more than 7 percent of the total pool of employment cases in any study of AAA employment arbitrations.").

72. CAL. CIV. PROC CODE § 1281.96 (West 2007).

73. Author's calculations based on raw data from AAA.

costs of litigation inhibit access to the courts by lower to mid-income ranges employees.⁷⁴ Eisenberg and Hill suggest that for employees below around the \$60,000 income level employment arbitration is a plausible dispute resolution option, whereas litigation is not.⁷⁵ The generally lower income levels of plaintiffs in the AAA C-filings data are consistent with this argument.

B. Damages

It is an old legal adage that without a remedy there is no right. One of the main criticisms leveled at employment arbitration is that even when employees are successful arbitrators will not award damages similar to those that the employee would have obtained through litigation. There are two aspects to this comparison. First is the question of how typical awards in arbitration compare to typical awards in litigation. Second is the question of how the distribution of award amounts in arbitration compares to that in litigation. One of the striking outcomes of litigation is that there are a small number of very large verdicts, producing a highly skewed distribution of damage awards, indicated by large differences between mean (average) and median (typical) awards.⁷⁶ For critics of litigation this represents the danger of a system in which runaway juries can be convinced to award mega-verdicts disproportionate to any actual harm done. For advocates, the threat of the mega-verdict is a key element in the system influencing employer behavior through deterrence of illegal conduct even if the actual number

74. See Estreicher, *Saturns for Rickshaws*, *supra* note 2, at 559, 563-64, 567-68.

75. See Eisenberg & Hill, *supra* note 48, at 48, 50.

76. See Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution*, 16 OHIO ST. J. ON DISP. RESOL. 643, 663-67 (2001); [hereinafter Colvin, *Arbitration and Workplace Dispute Resolution*].

of cases is relatively small.⁷⁷ A common view of arbitration is that arbitrators are less likely to award extremely large damages compared to juries in litigation. Depending on one's perspective, this could serve to either dampen unjustifiable extreme outcomes or to undermine the deterrent effect that makes the litigation system effective.⁷⁸

What does the empirical research tell us about damages awarded in employment arbitration? Some of the studies that examined employee win rates also looked at damage awards. In her study of AAA employment arbitration awards from 1993 to 1995, Bingham found a mean award to employees of \$49,030⁷⁹ (\$64,612 in 2005 dollars),⁸⁰ with a standard deviation of \$188,299⁸¹ (\$248,143 in 2005 dollars). It is important to note that her calculation of the mean (average) award included the cases employers won, resulting in zero damages for these cases.⁸² Limiting the analysis to only those cases where the employee won some damages produces a mean damage award of \$94,288 (\$124,254 in 2005 dollars) for Bingham's sample. It should be noted, as discussed above, that this early 1990s AAA sample included a relatively larger number of individually negotiated contract based cases where the employees were likely to be higher earners, increasing the potential damages.⁸³ Bingham also calculated the proportion of damages demanded by employees that were awarded by arbitrators.⁸⁴ She found that overall employees on average received 25 percent of the amount they demanded, or 48

77. *Id.*

78. *See id.*

79. Bingham, *Overview*, *supra* note 36, at 14.

80. Equivalent in 2005 dollar amounts for earlier studies are provided to facilitate comparison to the results for the AAA C-filings data. For that data, 2005 is the middle year of the sample and so is used as the reference year for the comparisons.

81. Bingham, *Overview*, *supra* note 36, at 14.

82. *See id.* at 13-16.

83. *Id.* at 14.

84. *Id.*

percent on average of the amount demanded if we only consider employees who received some amount of damages.⁸⁵

In their study of securities industry employment arbitration awards, Delikat and Kleiner also examined damage awards.⁸⁶ Among the 186 arbitration awards from 1997 to 2001 in their sample, they found a median damage award for prevailing claimants of \$100,000 (\$117,227 in 2005 dollars) and a mean damage award of \$236,292 (\$276,998 in 2005 dollars).⁸⁷ By comparison, among the 125 employment discrimination trials from 1997 to 2001 in the Southern District of New York that they examined, the median damage award was \$95,554 (\$112,015 in 2005 dollars) and the mean damage award was \$377,030 (\$441,981 in 2005 dollars).⁸⁸ Taking the approach used by Bingham of including the zero recovery cases in the calculation of the mean damage award⁸⁹ narrows the difference between arbitration and litigation outcomes for this study. Calculated across all cases, including those where no damages were recovered, the mean damage awards were \$108,694 (\$127,419 in 2005 dollars) for the securities industry arbitration cases and \$126,682 (\$148,505 in 2005 dollars) for the S.D.N.Y. employment discrimination trials. In both samples, the much higher mean than median award amounts indicates that the distribution is skewed by a relatively small number of large damage awards. The comparison also indicates that whereas typical awards in the two samples are very similar, the distribution of the litigation awards is more strongly skewed by a small number of large awards than is the arbitration sample. As noted above, however, it is not clear

85. *Id.*

86. Delikat & Kleiner, *supra* note 61, at 8.

87. *Id.* at 9.

88. *Id.* at 10.

89. See Bingham, *Overview, supra* note 36, at 13-17.

whether these samples involve comparable cases. In particular, individuals employed in the securities industry may have higher income levels, resulting in larger damage awards, and be more likely to be involved in contractual disputes rather than claims of employment discrimination.

A similar comparison of arbitration and litigation damage awards is made in the 2003 study by Eisenberg and Hill.⁹⁰ Among non-civil rights employment disputes decided in 1999 and 2000 AAA arbitration cases, they find for forty-four cases involving individual negotiated agreements (with typically higher paid employees) a median award of \$94,984 (\$111,347 in 2005 dollars) and a mean award of \$211,720 (\$248,193 in 2005 dollars, whereas for 26 cases involving employer promulgated agreements (with typically lower paid employees) they find a median award of \$13,450 (\$15,767 in 2005 dollars) and a mean award of \$38,723 (\$45,394 in 2005 dollars).⁹¹ Although one would expect to find award amounts varying with income level given that this will directly impact the quantum of damages suffered, the low level of damages for cases involving employer promulgated agreements is nonetheless striking. Eisenberg and Hill argue, however, that employees in this category will often have lower income levels and would be unable in any event to bring their cases through the litigation system due to the small amount of potential damages involved and, as a result, the relatively small damage awards obtained through arbitration are better than receiving nothing.⁹² By way of comparison, in seventy-nine state court trials from 1996 involving non-civil rights employment disputes, they

90. See Eisenberg & Hill, *supra* note 48, at 48-50; see also Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1467-86 (2003) (examining accuracy of reported win rates and awards in federal courts in 2000).

91. Eisenberg & Hill, *supra* note 48, at 50.

92. See *id.* at 53.

find a median award of \$68,737 (\$85,560 in 2005 dollars) and a mean award of \$462,307 (\$575,453 in 2005 dollars).⁹³ This is somewhat lower than the median award of \$296,991 (\$355,843 in 2005 dollars) that Oppenheimer found for sixty-nine common law discharge case verdicts in California in 1998 and 1999, reflecting higher damage awards in that state.⁹⁴ Eisenberg and Hill also examined civil rights based claims in employment arbitration, however here their findings were limited by their only being eight civil rights based cases among the AAA awards from 1999 and 2000. Among these awards, they found a median and mean award of \$32,500 (\$38,099 in 2005 dollars) for claims under individually negotiated agreements and a median award of \$56,096 (\$65,760 in 2005 dollars) and a mean award of \$259,795 (\$304,550 in 2005 dollars) for claims under employer promulgated agreements. By comparison, they found that among 408 federal court employment discrimination trials in 1999-2000, the median award was \$150,500 (\$176,426 in 2005 dollars) and the mean award was \$336,291 (\$394,223 in 2005 dollars). Meanwhile, for 68 state court employment discrimination trials from 1996, they reported a median award of \$206,976 (\$257,632 in 2005 dollars) and a mean award of \$478,488 (\$595,594 in 2005 dollars).⁹⁵ Similar to this result, Oppenheimer found a median award of \$200,000 (\$239,632 in 2005 dollars) in 136 employment discrimination case verdicts from 1998 and 1999 in California.⁹⁶ Including the cases where there were no damages awarded, following the approach used by Bingham described above, the mean awards for Eisenberg and Hill's samples were \$122,410 (\$143,497 in 2005 dollars) in federal court trials and \$209,578

93. *Id.* at 50.

94. Oppenheimer, *supra* note 54, at 535.

95. Eisenberg & Hill, *supra* note 48, at 49.

96. Oppenheimer, *supra* note 54, at 535.

(\$260,871 in 2005 dollars) in state court trials.⁹⁷ As Eisenberg and Hill argue, it is important to separate out civil rights and non-civil rights claims due to the different character of the cases involved in each category and their results show some differences in the patterns of outcomes for the different categories of cases. However, arguably the most striking result of dividing the cases into these categories is the relatively small number of civil rights based claims in their AAA awards sample, whereas the proportion of civil rights based claims in employment litigation is much larger.

The data on litigation outcomes reflect the conventional wisdom that there are a small number of large verdicts, with the result that the studies find much higher mean than median award amounts. However, in litigation there also exists the ability to appeal the verdict and many larger damage awards are reduced on appeal. Even in the absence of an appellate hearing, the employer may be able to get the employee to accept a lower amount than the damages award in settlement to avoid the possibility of appeal. Lewis Maltby has estimated that this may reduce the amount ultimately received by employees from jury awards by half.⁹⁸

What do the AAA C-filings data indicate on the question of the damages from employment arbitration? Including only cases in which the employee was awarded some amount of damages, out of 165 cases the median damage award was \$40,624 and the mean award was \$117,715. As with employee win rates, the outcomes for damage awards from the AAA C-filings data are substantially less favorable to employees than in many of the previous

97. Eisenberg & Hill, *supra* note 48, at 47.

98. Maltby, *supra* note 65, at 115; see also Lewis Maltby, *Employment Arbitration: What Does the Data Show?*, available at <www.workrights.org/current/cd_arbitration.html> (last visited Aug. 17, 2007).

studies. The relatively lower salary levels of employees involved in these cases, with 77.4 percent of those receiving awards making less than \$100,000 a year, are a factor likely to contribute to this difference in outcomes. When we include the cases where no damages were awarded in the calculation of the mean outcome, the mean award drops to \$23,233, reflecting the relatively low employee win rate in these arbitration cases as well as the lower award amounts. This mean outcome is much lower than those found for federal and state court employment discrimination trials in the Eisenberg and Hill study described above, which is based on the best available data on employment litigation outcomes. Including the zero damage award cases, the mean arbitration award in the AAA C-filings cases is 16.2 percent of the mean award in federal court employment discrimination trials and only 8.9 percent of the mean award in state court employment discrimination trials. One should recognize that these are not identically matched samples, which may account for some part of the difference. The AAA C-filings cases may include some nondiscrimination cases where damages may be lower, which could be increasing the observed differences. Overall, however, the very large magnitude of the differences suggests that even taking these differences into account we are seeing major differences in the outcomes of arbitration and litigation in this area. If an employee is considering filing a case in arbitration or in the courts, these results indicate that the anticipated recovery, taking into account the likelihood of winning the case, will be much lower in arbitration than in litigation.

C. Arbitrator Fees

An important due process issue in debates over employment arbitration has been whether employees are being required to pay a significant portion of arbitrator fees, which

might serve as a barrier to access to the system. What does the empirical data tell us about arbitrator fees in employment arbitration? The AAA C-filings data include information on the allocation and amount of arbitrator fees. In 96.6 percent of the cases in this sample the employer paid 100 percent of the arbitrator fees. Although imposition of arbitrator fees on employees is an important issue in principle, these results suggest that it is in practice relatively rare. In this respect, we are likely seeing the impact of key legal decisions on this topic, particularly the longer term effect of *Cole v. Burns International Security Services*,⁹⁹ where concerns about imposition of substantial arbitrator fees on employees were most prominently raised. It should be noted however that this is a sample of AAA cases. It may be that practices such as imposition of arbitrator fees on employees in mandatory arbitration procedures are more common among arbitration cases that are not administered by major, reputable service providers. Indeed we know relatively little about the world of such ad hoc arbitrations beyond the occasional court case involving a challenge to one of these procedures.¹⁰⁰

Beyond the allocation of arbitrator fees, another interesting issue is what the arbitrator fees are in employment arbitration. In her sample of 200 AAA awards from 1999 and 2000, Hill found median (typical) arbitrator fees of \$2,712 (\$3,179 in 2005 dollars) and mean (average) fees of \$4,159 (\$4,875 in 2005 dollars).¹⁰¹

99. 105 F.3d 1465, 1485 (D.C. Cir. 1997) (holding that an employee cannot be required to arbitrate a civil rights claim as a condition of employment if the agreement requires him to pay all or part of the arbitrator fees and expenses).

100. The most well-known of these cases is likely the challenge to the procedure in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir., 1999), where the wide range of due process defects in the procedure led to the arbitration agreement being held to be unconscionable.

101. Hill, *supra* note 45, at 12.

In the AAA C-filings, the median arbitrator fee among all cases was \$2,472 and the mean fee was \$6,105. However, this includes cases that were settled at some point in the proceedings. Among cases that involved a hearing and an award, the median arbitrator fee was \$6,710 and the mean fee was \$10,351. As with damage awards, the distribution of arbitrator fees was skewed by a small number of cases with relatively large fees. In particular, at the upper end of the distribution, in 5 percent of the cases, arbitrator fees were over \$40,000.

D. Time to Hearing

An advantage of arbitration compared to litigation that has been widely acknowledged is the relatively speedy time to hearing and a final decision in arbitration cases. The empirical research confirms the relative efficiency of employment arbitration in this regard. Eisenberg and Hill found that the mean time to final disposition for 172 noncivil-rights-based AAA employment arbitration cases in 1999-2000 was 250 days, whereas the mean time to final disposition for 170 non civil rights based state court cases from 1996 was 723 days.¹⁰² Similarly, whereas the mean time to final disposition for forty-two civil rights based AAA employment arbitration cases in 1999-2000 was 276 days, the mean time to final disposition was 709 days for 1,430 federal court employment discrimination cases from 1999-2000 and 818 days for 163 state court employment discrimination cases from 1996.¹⁰³

102. Eisenberg & Hill, *supra* note 48, at 51.

103. *Id.*

In their study of securities industry arbitration, Delikat and Kleiner also find a speed advantage to arbitration over litigation, though the difference is of smaller magnitude than in Eisenberg and Hill's study.¹⁰⁴ Whereas the median time from filing to judgment in securities industry employment arbitration cases was 16.5 months, with a mean time of 20.5 months, in employment discrimination cases in the Southern District of New York the median time from filing to judgment was twenty-five months and the mean time was 28.5 months.¹⁰⁵

The results from the AAA C-filings data also suggest shorter time periods to obtain a hearing in arbitration than is typical in litigation. Among 849 cases that involved an award, the mean time to a decision was 332.2 days. It is noteworthy that whereas in other respects the California-AAA filings suggest a different set of characteristics to the emerging system of employment arbitration than the earlier studies, they confirm the relative speed of employment arbitration for obtaining a hearing compared to the litigation system.

In general, faster proceedings will be to the advantage of an employee claimant in an employment dispute.¹⁰⁶ If the employee has lost his or her job and potentially had to take alternative employment at a lower salary level, the longer it takes to receive compensation, the greater will be the personal economic impact of the loss. However it should also be recognized that even with the relatively shorter time period to resolve disputes in arbitration, at around a year, the time elapsed since the employment dispute arose will be such that a continuation of the employment relationship will be increasingly unlikely even if the employee is successful in

104. Delikat & Kleiner, *supra* note 61, at 9.

105. *Id.* at 10.

106. Colvin, *Arbitration and Workplace Dispute Resolution*, *supra* note 76, at 656.

arbitration. The greater speed of arbitration is clearly an advantage for employment disputes compared to litigation, but it is still not clear that it is fast enough to produce effective remedies for many employees.

E. Repeat-Player Effect Studies

An issue that has received particular attention in empirical research on employment arbitration is the question of whether there is a repeat player bias. The concept of repeat player bias is that a party that participates in a conflict resolution process multiple times, the "repeat player," will have an advantage over a party that only participates in it a single time, the "one shot player." More specifically with regard to employment arbitration, the concern has been raised that some employers will have an advantage as repeat players because they are likely to participate in multiple employment arbitration cases whereas almost all employees will be likely to be one shot players in employment arbitration, only ever participating in a single case. Given that employment arbitrators rely on being selected to decide cases for their livelihood, the danger is that arbitrators will have a bias in favor of the repeat player employer in the hope of being selected by the employer to hear future cases. By contrast, in labor arbitration repeat player bias is avoided because both the employer and the union are repeat players and likely to be involved in future arbitrator selection decisions.

The first empirical evidence suggesting a concern about repeat player bias in employment arbitration came from a series of studies conducted by Lisa Bingham in the 1990s.¹⁰⁷ In a study of 203 AAA employment arbitration awards from 1993 to 1995, Bingham

107. Lisa Bingham, *Is There a Bias in Arbitration of Non-Union Employment Disputes?*, 6 INT'L. J. CONFLICT MGMT. 369, 371(1995) [hereinafter Bingham, Bias in Arbitration]; see also Lisa Bingham, *On Repeat Players*,

found that employers who participated in multiple arbitration cases were significantly more likely to win their cases than employers who only participated in a single case. Whereas for this type of repeat-player employer the employee win rate was only 23.3 percent, for the non-repeat-player employer the employee win rate was 67.0 percent.¹⁰⁸ While this result is consistent with a repeat-player bias, it could also be that employers who are involved in multiple cases could have other advantages than arbitrator bias, such as greater familiarity and expertise in dealing with the arbitral forum. To more directly test for repeat-player bias, in the same study Bingham looked at situations where the employer was involved in more than one case before the same arbitrator. She found that in these repeat-employer/repeat arbitrator cases, the employee win rate was 25 percent, which was significantly lower than the employee win rate of 55.5 percent in other cases.¹⁰⁹

The repeat player effect question was also examined by Elizabeth Hill in her sample of 200 AAA employment arbitration awards from 1999-2000.¹¹⁰ She found that in her sample of awards only two cases featured the same employer and arbitrator combination, making it impossible to investigate the question of a repeat employer/repeat-arbitrator bias statistically. However, there were thirty-four cases in her sample involving a repeat-player employer, i.e. one that was involved in more than one case in the sample. Similar to Bingham's results. Hill found a lower employee win rate where a repeat-player employer was involved in the case. Hill

Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards, 29 MCGEORGE L. REV. 223-259 (1998) [hereinafter, Bingham, On Repeat Players], Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189-220 (1997); [hereinafter Bingham, Repeat Player Effect]; Lisa Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L. J. 108,115 (1996).

108. Bingham, *Bias in Arbitration*, *supra* note 107, at 371.

109. Bingham, *supra* note 36, at 15.

110. Hill, *supra* note 45, at 15.

argued that there was an alternative explanation for this finding other than repeat-player bias. She argued that there was an "appellate effect" in which the repeat-player employers tended to be larger companies with well-developed internal dispute resolution procedures that filtered out and resolved meritorious cases before they got to arbitration, leaving only the weaker employee cases to go to arbitration. In support of this argument, she noted that in twenty-five of the thirty-four repeat-player cases the employer had an in-house dispute resolution program and that in these cases the employer win-loss ratio was 3.2:1. By contrast, in the remaining nine repeat-player cases where the employer did not have an in-house program, the employer win-loss ratio was only 1.25:1, similar to the employer win-loss ratio of 1.3:1 in the non-repeat-player cases. Based on this evidence, Hill concluded that the repeat-player employer advantage was due to the internal procedures, not due to arbitrator bias.¹¹¹ Hill did not provide any tests of the statistical significance of the difference between the in-house program and no in-house program groups, however a simple chi-square test on the results presented indicates that the difference is not statistically significant.¹¹² Of course, the lack of statistical significance does not mean there is no difference, merely that the evidence is not conclusive either way. An additional piece of information that would have strengthened the evidence for this argument is the rate of success for non-repeat-player employers that had internal dispute resolution procedures; however, this is not reported in Hill's study.

I have some sympathy for the appellate effect theory, having myself also advanced the argument that employment arbitration often serves as an appellate stage of review for multi-

111. *Id.*

112. My own calculations based on the results Hill reports indicate a Chi-square of 1.33 (df=1), which is not significant at the $p < .10$ level.

step internal dispute resolution procedures.¹¹³ My own research has shown that employees tend to make greater use of internal dispute resolution procedures that feature employment arbitration as the final appeal step compared to procedures that do not feature this final step.¹¹⁴ In my organizational case study based research, I have also found examples of systems that appear to be filtering out some of the more meritorious claims by identifying and resolving them at earlier stages in the procedure, particularly through the use of mediation as a settlement stage prior to arbitration.¹¹⁵ However, I do not think the evidence yet shows that this explains the repeat-player employer effect. In particular, we do not yet have direct evidence indicating that the cases going to arbitration out of internal procedures are actually weaker. More generally, even if it can be shown that there is an appellate effect, we should not jump to the conclusion that this is the entire explanation for the repeat-player employer effect. In practice, there may be multiple factors involved. One could be arbitrator bias in favor of the repeat-player employer. So far, the evidence indicating such bias is relatively limited, though suggestive enough in this direction to warrant further investigation. It is also possible that other processes could be involved in producing the repeat-player employer effect. One possibility is that there may be an experience effect in which employers who are repeatedly involved in arbitration develop greater expertise in regard to the forum and this puts them at advantage.

What do the AAA C-filings data tell us about the possible existence of a repeat employer or a repeat employer-arbitrator effect? In the sample, a relatively high proportion of cases

113. Colvin, *Arbitration and Workplace Dispute Resolution*, supra note 76, at 662-63.

114. Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712,715 (2003) [hereinafter, Colvin, *Dual Transformation*]

115. Colvin, *Adoption and Use*, supra note 34, at 71-97.

(1,751 out of 2,763 cases, or 63.4 percent) involved employers who were involved in more than one arbitration cases. This is unsurprising given that larger employers who have adopted employment arbitration procedures are quite likely to be involved in multiple cases. Usually a procedure will designate a particular arbitration service provider and so with a comprehensive set of cases from a service provider we should expect to see many repeat employer cases. As with the previous studies, analysis of the AAA C-filings data shows that repeat employers, i.e. those involved in more than one case, tend to be more successful than one-shot employers. Out of the sample of 836 awards, the employee win rate was 32.0 percent for one-shot employers versus 13.9 percent for repeat employers, which was a statistically significant difference (Chi-squared(1)=37.47, $p < 0.001$). There was a similar difference in award amounts, with an average damage award (including zero damage award cases) of \$41,199 for one-shot employers versus \$14,710 for repeat employers, which was also a statistically significant difference ($p < .001$). As discussed above, however, we cannot know from this result which of the possible explanations of the repeat employer effect explains these differences.

The AAA C-filings data also allows testing of whether there is a repeat employer-arbitrator effect where the employer does better if it uses the same arbitrator in more than one case. Out of the same sample of 836 awards, employees won only fourteen out of the 124 cases (11.3 percent) involving a repeat employer-arbitrator pair, compared to 151 out of the 712 cases (21.2 percent) that did not involve a repeat employer-arbitrator pair, which was a statistically significant difference (Chi-squared(1)=6.56, $p < 0.01$). Similarly for damage awards, the mean award for cases involving repeat employer-arbitrator pairs, at \$7,183, was significantly lower ($p < .10$) than the mean award for other cases, at \$26,029. To make a

narrower comparison, if we look at just repeat player employers, the employee win rate of 11.3 percent where there was a repeat employer-arbitrator pairing was lower than the employee win rate of 14.7 percent for non-repeat pairings, but this difference is not statistically significant. Similarly, the mean award of \$7183 for repeat employer-arbitrator pairs was substantially lower than the mean award of \$16,816 for other cases involving repeat employers, but this difference was also not statistically significant. So whereas we can be confident that employees do worse with a repeat employer-arbitrator than in cases in general, we cannot statistically reject the possibility that random chance explains employees fairing worse with repeat employer-arbitrator pairings than with repeat employers in general. Thus, although these results suggest a repeat player effect, we cannot rule out the lower win rate in these cases being a result of other effects associated with the repeat employer phenomenon. However, it is important to remember that the finding of a lack of statistical significance is not a finding of the lack of an effect. The best estimate based on this data is that employees fair worse where there is a repeat employer-arbitrator pairing than when there is simply a repeat employer; however, we would need a larger sample size to be statistically confident of this conclusion.

On measuring the repeat employer-arbitrator effect, Sherwyn, Estreicher, and Heise raise some interesting methodological issues.¹¹⁶ One is whether the first time the employer-arbitrator pair is involved in a case it should be coded as a repeat employer-arbitrator case.

116. David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557,1570-71 (2005).

They argue it should not given that at that point it is not know for certain whether this employer-arbitrator pairing will be repeated. However, subsequent selection of the arbitrator by this employer will be based in part on how the arbitrator decided this first case. If there is a repeat employer-arbitrator effect we would expect arbitrators in these first cases to be issuing more employer-favorable decisions in hope of being selected in future cases. So, if in fact such an effect does exist, we would expect to see it reflected in the first as well as subsequent cases involving the employer-arbitrator pairing, which is the approach I have taken in analyzing the AAA C-filings data.

A factor that should reduce the likelihood of a repeat employer-arbitrator effect emerging is the potential role of plaintiff's counsel as a repeat player in the system. Although individual employees will almost always be one-shot players in employment arbitration, plaintiff's counsel will generally be involved in multiple cases. Given the availability of information about the arbitrators on the list for selection, plaintiff's counsel should be able to ensure that overly employer-favorable arbitrators are not repeatedly selected. The ability to do this will be enhanced where the arbitration service provider supplies information about past decisions of the potential arbitrator in accordance with the Due Process Protocol. This should be the situation for the arbitration cases in the AAA C-filings dataset and the filings themselves should also assist plaintiff's counsel in identifying potential arbitrator bias.

F. Employee Self-Representation

Representation of employees by counsel plays an important role in ensuring due process in employment arbitration. As discussed, plaintiff's counsel can play an important role

in arbitrator selection, reducing the danger of repeat player bias emerging. More generally, representation by counsel increases the effectiveness of presentation of the employee's case and helps ensure that procedural fairness is observed in the hearing of the case. There has been limited research to date on the role of plaintiff's counsel in employment arbitration. Hill compared employee win rates for claims based on employer promulgated agreements and found a 34.6 percent win rate for employees represented by an attorney versus a 32.5 percent win rate for unrepresented employees, which was not a statistically significant difference.¹¹⁷

The AAA C-filings provide some evidence in this regard by including information on whether the employee was self-represented. Overall in the sample of 2,760 cases, employees were represented in 2,066 cases (74.9 percent) and self-represented in 694 cases (25.1 percent). The fact that employees are able to bring many cases without representation suggests on the positive side that employment arbitration is accessible in this manner. On the other hand, it raises the concern that many employees may not have enough access to representation to ensure that their legal rights are properly recognized. Employment arbitration may be relatively accessible to self-represented employees since under procedures where the employer is paying the arbitrator fees, employees do not have to pay any significant amounts to file a claim. By contrast, employees will generally have to pay for their own representation. In litigation, plaintiff's counsels are typically willing to represent employees under contingency fee arrangements. It is unclear to what degree counsel are willing to accept

117. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 820 OHIO ST. J. ON DISP. RESOL. 777, 820 (2003).

employment arbitration cases on a contingency fee basis or if they are more likely to charge based on hourly fees and/or demand larger retainers before accepting cases.

The differences in mean outcomes between arbitration and litigation discussed above are likely to have a major impact on the ability of employees to obtain representation by counsel. Under a contingency fee arrangement where plaintiff's counsel receives a percentage of the damages if any are recovered but nothing if zero damages are awarded, counsel will have to take into account both the chances of winning the case and the anticipated amount of damages if the case is won in calculating the likely outcome from taking the case. As a result, the key outcome of interest for plaintiff attorneys in considering case outcome likelihoods will be the mean damage awards in the system including the zero damage award cases. As discussed above, based on the best data available on employment discrimination trials, reported by Eisenberg and Hill,¹¹⁸ the mean award including zero damage cases was \$122,410 (\$143,497 in 2005 dollars) in federal court trials and \$209,578 (\$260,871 in 2005 dollars) in state court trials, but only \$23,233 in the arbitration cases in the AAA C-filings data. This disparity in the anticipated outcomes between the systems is likely to reduce substantially the willingness and ability of plaintiff's counsel to represent employees in arbitration under contingency fee arrangements compared to litigation.

Representation by counsel appears to have an effect on case outcomes. Among 836 awards in the AAA C-filings data, the employee win rate was 22.6 percent where represented by counsel and only 13.7 percent where the employee was self-represented, a statistically

118. See Eisenberg & Hill, *supra* note 48.

significant difference (Chi-square(1)=9.16, $p < 0.01$). The mean damage award for self-represented employees, at \$13,222, was also significantly lower ($p < .05$) than the mean award for employees represented by counsel, at \$28,009. These differences may partly reflect the effectiveness of representation by counsel; however they also may reflect a case selection effect in that plaintiff's counsel may be more likely to recognize when cases are too weak to justify bringing to an arbitration hearing. By contrast, self-represented employees may lack the legal knowledge or experience to recognize when a case is marginal or even hopeless, or for that matter may wish to proceed to a hearing in any event.

As discussed earlier, a major benefit of representation by counsel is reducing the danger of repeat player bias as experienced plaintiff counsel can themselves serve as repeat players in employment arbitration, identifying and preventing the selection of arbitrators with undue pro-employer bias. To investigate this empirically using the AAA C-filings data, we can look at the relationship between representation and repeat employer-arbitrator pairings in affecting employee win rates. In cases involving employees who are represented by counsel, the employees won 115 out of 491 cases (a 23.4 percent win rate) where there was no repeat employer-arbitrator pairing, compared with thirteen out of seventy-five cases (a 17.3 percent win rate) where there was a repeat employer-arbitrator pairing, which was not a statistically significant difference. Among self-represented employees, the employees won thirty-six out of 221 cases (a 16.3 percent win rate) where there was no repeat employer-arbitrator pairing, but only one out of forty-nine cases (a 2.0 percent win rate) where there was a repeat employer-

arbitrator pairing, which was a statistically significant difference (Chi-square(1)=6.89, $p < 0.01$).¹¹⁹ This last win rate for unrepresented employees whose cases are decided by arbitrators who are involved in multiple arbitration cases with that same employer is strikingly low and raises particular concerns about the danger of repeat player bias for the more vulnerable employee who does not have representation by counsel.

In general, representation of employees is an area that deserves greater attention in future empirical research. For example, one of the key features of the well-established system of labor arbitration is the structural role of the union in representing employees at all steps of the grievance procedure. One of the most important differences with grievance procedures in nonunionized workplaces is that these tend to lack similar structures of representation for employees in bringing cases. Plaintiff's counsels are playing an important role in representing employees in employment arbitration. However, it is worth considering whether there could be a broader system for representation for employees, perhaps including non-attorneys providing lower cost, more accessible assistance in nonunion grievance procedures prior to arbitration or in lower value cases in arbitration itself.

G. Policy Capturing Experimental Designs

A fundamental problem in comparing the outcomes of employment arbitration and litigation is selection effects that produce different distributions of case types in each system. For example, if a higher quantum of damages is necessary to finance taking a case to litigation compared to arbitration, this will result in the litigation system having a relatively greater

¹¹⁹ Given that there was only one case in this last category where an employee won, calculating a mean damage award here does not make sense and could be misleading.

proportion of cases with higher potential damages and as a result likely involving a higher proportion of employees with higher income levels. Conversely, one of the concerns with employment arbitration cases being heard in the securities industry system was that the typical arbitrator was an older white male who might be less sympathetic or sensitive to discrimination claims brought by younger female or minority claimants. This perception might result in a lower proportion of employment discrimination claims being brought in arbitration compared to in the litigation system.

To address the problem of case selection bias in comparisons between different dispute resolution systems, two important recent studies have used policy-capturing experimental designs to investigate the employment dispute decision-making process. In policy-capturing studies, hypothetical scenarios are presented to decision-makers, whose response to these scenarios is then examined statistically. Responses can be compared across different decision makers and variations on the hypothetical scenarios can be used to investigate the influence of different factors on the decision-making process. Policy-capturing studies are a well-developed research methodology in the field of psychology that has been used to investigate a number of employment related issues.¹²⁰

In the first major policy-capturing study of employment arbitration, Lisa Bingham and Debra Mesch presented a sample of employment and labor arbitrators with a hypothetical

¹²⁰ 120. See, e.g., Mario Rotundo & Paul Sackett, The Relative Importance of Task, Citizenship, and Counter-Productive Performance to Global Ratings of Job Performance: A Policy-Capturing Approach, 87 J. APPLIED PSYCHOL. 66, 70 (2002).

dismissal case.¹²¹ Of the participants in their study, 161 were National Academy of Arbitrators members who were labor arbitrators, 210 were other labor arbitrators, 188 were employment arbitrators who had been listed on the AAA commercial panel before the AAA Employment Disputes Panel was established, and 184 were students. The participants were asked to decide a hypothetical case that was based on actual unpublished arbitration case. Variations of the case presented to the participants included versions with male and female grievants and versions involving a labor arbitration setting and a nonunion employment arbitration setting.¹²² Among the key findings from the study was that overall employment arbitrators were significantly less likely than labor arbitrators to order reinstatement or to award back pay when presented with the same hypothetical cases.¹²³ However, when other arbitrator characteristics were included in the model, the differences were no longer statistically significant. Instead, arbitrator occupation was a significant predictor of outcomes, with attorney arbitrators significantly less likely to rule in favor of employees than full-time arbitrators or professors who were arbitrators.¹²⁴ Since 80 percent of the employment arbitrators in their sample were attorneys, this is correlated with the overall lower employee win rate with employment arbitrators.¹²⁵ This is not to say, however, that this finding renders the differences in outcomes unimportant, given that one of the concerns raised about employment arbitration is precisely the tendency for employment arbitrators to be employment attorneys, particularly those who

121. Lisa B. Bingham & Deborah J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671, 681(2000).

122. *Id.* at 681-82.

123. *Id.* at 683.

124. *Id.* at 686.

125. *Id.* at 688.

have focused on representing management and may tend to be more sympathetic to employer arguments.

In the second major policy-capturing study, Brian Klaas, Douglas Mahony, and Hoyt Wheeler adopted a similar approach to Bingham and Mesch, but extended it by including a more diverse set of decision-makers and using a broader range of alternative case scenarios.¹²⁶ In their sample, Klaas, Mahony, and Wheeler included: 140 employment arbitrators from the AAA employment arbitrators list; eighty-two labor arbitrators identified from the National Academy of Arbitrators directory; and eighty-three former jurors who had participated in Federal employment discrimination cases.¹²⁷ Their sample of employment arbitrators was further divided by giving seventy-two the instruction that the arbitration agreement specified that statutory claims were to be submitted to arbitration and that the employer had an employment-at-will policy.¹²⁸ The other sixty-eight employment arbitrators were given the instruction that the arbitration agreement provided that statutory claims had to be submitted to arbitration and terminations had to be "for-cause."¹²⁹ Participants in the study were asked to decide thirty-eight different hypothetical cases that included various different employee claimant and dispute characteristics.¹³⁰ The first key finding from this study is that jurors and employment arbitrators, either with statutory-only or just-cause standard instructions, were significantly less likely to rule in favor of the employee than were labor arbitrators. Among the

126. HOYT N. WHEELER ET AL., *WORKPLACE JUSTICE WITHOUT UNIONS*, 195(2004); *see also* Brian Klass et al., *Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators and Jurors*, 45 *INDUS. REL.* 68-95(2006).

127. WHEELER ET AL., *supra* note 126, at 195-96.

128. *Id.* at 195.

129. *Id.*

130. *Id.* at 196-207.

other categories of decision-makers, jurors were significantly more likely to rule in favor of the employee than either group of employment arbitrators. Between the two groups of employment arbitrators, those who were given just-cause standard instructions were more likely to rule in favor of employees than those given statutory claim only instructions. Thus, employment arbitrators using statutory claim only instructions, the situation following from the Gilmer and Circuit City cases, were significantly less likely to rule in favor of employees than all the other categories of decision-makers examined in this study.¹³¹

The policy-capturing studies raise important concerns about the decision-making of employment arbitrators. It appears that employees are less likely to be successful when the same case is being decided by an employment arbitrator than by other decision-makers. Now, it is certainly possible to argue that labor arbitrators are overly generous to employees in their decision-making process and therefore we should not view negatively the lesser willingness of employment arbitrators to rule in favor of employees compared to labor arbitrators. However, the additional finding in Klaas, Mahony, and Wheeler's study that employment arbitrators are less likely to rule in favor of the employee than are members of juries from federal court employment discrimination cases, when presented with the same cases, raises the concern that employee cases will not receive similar consideration in arbitration and litigation. One still could argue that juries are overly receptive and favorable to employee claims in litigation, but these findings are more problematic if the argument in favor of employment arbitration is that employees will receive the same ability to have their claims heard in arbitration as they would

131. *Id.* at 91-92.

have in litigation, just in a different forum. These research findings suggest that this simple equation of the arbitration and litigation forums is not an accurate characterization.

IV. EMPIRICAL RESEARCH ON EMPLOYMENT ARBITRATION IN THE ORGANIZATIONAL CONTEXT

A. Employment Arbitration as a Step in the Organizational Dispute Resolution Processes

The empirical research described so far has examined employment arbitration as a dispute resolution procedure. The studies have investigated the process and outcomes of arbitration itself, as well as comparisons to the outcomes of the litigation process. These studies reflect the reality that employment arbitration was developed as and serves the function of an alternative to the litigation system for resolving employment law claims. Yet employment arbitration is also frequently adopted by organizations as part of their internal dispute resolution procedures used to resolve the conflicts that inevitably arise in work and employment relations.¹³² In addition to serving as the mechanism for resolving potential employment law claims, in this role employment arbitration serves as the final appeal stage for complaints or grievances brought by employees through the earlier stages in the internal procedures. For this reason, employment arbitration can also be viewed as part of what have been described as Organizational Dispute Resolution (ODR) systems, including various other dispute resolution procedures the organization may have adopted, such as peer review panels,

132. Colvin, *Arbitration and Workplace Dispute Resolution*, *supra* note 76, at 644.

internal or external mediation, management appeal boards, or ombudspersons.¹³³ Where employment arbitration is introduced as the final step in an ODR system for nonunion employees, it is fulfilling a structural role more akin to that of labor arbitration in the grievances of union procedures. Although we should not jump to the conclusion that employment arbitration does, or perhaps even should, function similarly to labor arbitration, this shift in perspective poses different questions about how we evaluate the operation and impact of employment arbitration. While the research in this area is more limited, some studies have begun to address these issues.

How often are employment arbitration procedures introduced in conjunction with other elements of ODR systems, as opposed to as Stand-alone procedures? Data from a 2003 survey of establishments in the telecommunications industry that I conducted with Rosemary Batt, Harry Katz, and Jeffrey Keefe provide some evidence on this question.¹³⁴ As noted earlier, in that study 14.1 percent of the establishments had mandatory employment arbitration procedures. Of those establishments that had employment arbitration, 90 percent also had some type of formal internal grievance procedure for nonunion employees. Notably, this rate was significantly greater than the 68 percent of establishments without employment arbitration that also had internal grievance procedures.¹³⁵ This suggests both that employment arbitration is most commonly operating in conjunction with other elements of an ODR system and that it is associated with a greater likelihood of having adopted formal internal dispute resolution

133. Julie B. Olson-Buchanan & Wendy R. Boswell, *Organizational Dispute Resolution Systems*, in *THE PSYCHOLOGY OF CONFLICT AND CONFLICT MANAGEMENT IN ORGANIZATIONS* (Carsten K.W. DeDreu & Michele J. Gelfand, eds., forthcoming 2007).

134. Batt et al., *supra* note 18.

135. Pearson chi-square (1)=8.11, p<.001, N=290.

procedures. One reason for this positive association between employment arbitration and internal dispute resolution procedures may be that the adoption of employment arbitration serves as an impetus for a general re-evaluation of dispute resolution procedures by the organization.¹³⁶

How does the adoption of employment arbitration in conjunction with internal dispute resolution procedures affect the operation of each of these parts of an ODR system? Some research has examined the impact of the existence of internal procedures in the organization on the outcomes of arbitration. As discussed above, Hill found that employee win rates in arbitration were lower where the employer had some type of internal grievance procedure steps prior to arbitration.¹³⁷ She ascribed this reduced employee win rate to more meritorious claims being resolved at earlier stages in these procedures, leaving only the weaker claims to proceed to arbitration.

Sherwyn, Estreicher, and Heise examine data on the operation of an internal dispute resolution procedure culminating in employment arbitration as its final step that was adopted by a major employer in the restaurant industry.¹³⁸ They find that the large majority of complaints brought through this internal dispute resolution procedure were resolved quickly, with 81 percent being resolved in less than a week.¹³⁹ They also report that less than 5 percent of complaints ultimately resulted in arbitration. Importantly, over 75 percent of employees who

136. Colvin, *Adoption and Use*, *supra* note 34, at 69-95.

137. Hill, *supra* note 45, at 13.

138. Sherwyn et al., *supra* note 116, at 1581.

139. *Id.* at 1589.

used this system remained employed with the same firm after the case was resolved.¹⁴⁰ This is a significant outcome since a weakness of the litigation system is that cases tend to be brought after dismissals and it is relatively rare that the employment relationship can be continued after the case is resolved.¹⁴¹

The patterns of usage described by Sherwyn, Estreicher and Heise are similar to the findings reported in my own study of the dispute resolution procedures used by TRW, which had also received prominent attention when profiled in a GAO report.¹⁴² The employment arbitration procedure adopted at TRW was unusual in that it was nonbinding for the employee, allowing appeal to the courts if the employee was dissatisfied with the decision at arbitration. However, in practice relatively few complaints proceeded to the arbitration stage due to the highly developed internal dispute resolution procedure used at the company. This procedure included a number of steps prior to arbitration, including external mediation as the step prior to arbitration. Mediation was highly successful, with the majority of the cases that reached this step being settled prior to arbitration.¹⁴³ Notably in this system as well an important outcome was that a high proportion of complaints were resolved with continued employment of the complainant, an outcome that is rare in litigation and perhaps also relatively uncommon in employment arbitration itself. One of the interesting issues that arose in the TRW case study was the question of representation of employees. Once complaints reached the external

140. *Id.* at 1587.

141. *Id.* at 1589.

142. Colvin, *Adoption and Use*, *supra* note 34; see also U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE, GAO/GGD-97-157 ADR (1997).

143. Colvin, *Adoption and Use*, *supra* note 34.

mediation step representation of employees by attorneys was common, with about half of the employees having counsel. Interestingly, a number of other complainants also brought non-attorney representatives to mediation and to other steps in the procedures. Some of these non-attorney representatives included friends or family of the complainant, but sometimes also included company human resource representatives acting on the employee's behalf.¹⁴⁴ In the context of a legal proceeding, this type of representative might seem unusual and/or inappropriate, however in the context of an internal conflict management process they may perform a useful function. To the degree that a complaint is concerned with internal organizational processes, then these types of representatives may be relatively effective at articulating an employee's needs and achieving a resolution that involves a successful continued employment relationship with the organization.

Some broader evidence of the impact of employment arbitration on internal dispute resolution procedures is provided by a study in which I analyzed usage of procedures among establishments in the telecommunications industry.¹⁴⁵ In this study, I compared usage and outcomes of grievance procedures in unionized and nonunion workplaces. Among the nonunion workplaces, I distinguished between procedures that included employment arbitration as a final step, those that used peer review (constituting another type of non-managerial decision-maker), and other nonunion grievance procedures. The results of this study showed significant impacts of use of employment arbitration as the final step on the operation of internal grievance procedures in nonunion workplaces. Whereas nonunion

144. *Id.*

145. Colvin, *Dual Transformation*, *supra* note 117, at 713.

grievance procedures that featured employment arbitration as a final step had an average grievance rate of 3.2 grievances annually per 100 employees and on average 34 percent of disciplinary decisions being grieved, other nonunion procedures had an average grievance rate of only 1.3 per 100 employees and only 11 percent of disciplinary decisions on average being grieved.¹⁴⁶ Interestingly, whereas in unionized workplaces both average grievance rates, at 5.3 per 100 employees, and percentages of disciplinary decisions grieved, at 55 percent, were higher, in nonunion procedures using peer review the grievance rate, at 2.9 per 100 employees, and the percentage of discipline grieved, at 30 percent, were similar to those of nonunion procedures ending in employment arbitration.

In this study, employee win rates across the four different categories of procedures were less different than might be expected: 36.4 percent in unionized workplaces; 36.4 percent in nonunion procedures with employment arbitration; 30.0 percent in nonunion procedures with peer review panels; and 46.4 percent in other nonunion procedures.¹⁴⁷ One should be cautious however in drawing too strong a conclusion from these simple employee win rate comparisons, since they do not reflect differences in judgments by employees about whether it is worthwhile to file a grievance. If the employees perceive that a grievance procedure is one with relatively weak due process protections and a high risk of retaliation against complainants, they may be unwilling to lodge a grievance unless they have a particularly strong, clear-cut case. By contrast, under procedures that provide better protections against retaliation and stronger due process features, employees may be more willing to file weaker cases with less

146. *Id.* at 727; see also Colvin, *From Supreme Court to Shop Floor*, *supra* note 22, at 593-94.

147. Colvin, *Dual Transformation*, *supra* note 114, at 730.

compelling supporting evidence. Adjusting the win rates to account for the likelihood of filing a grievance yields a different picture. Across the four different categories of procedures, the percentages of all disciplinary decisions that were subsequently overturned through grievances filed by employees were: 17.3 percent in unionized workplaces; 11.1 percent under nonunion procedures with employment arbitration; 9.9 percent under nonunion procedures with peer review panels; and 2.7 percent under other nonunion grievance procedures.¹⁴⁸

The key conclusion in regard to employment arbitration is that use of it as the final step of internal grievance procedures in nonunion workplaces is associated with greater usage of the procedures by employees and a greater likelihood of getting managerial disciplinary decisions reversed than under other types of nonunion procedures. This does not mean that employment arbitration itself is directly responsible for this effect. It could be that organizations are more likely to upgrade their nonunion internal grievance procedures when they are adopting employment arbitration and that it is these enhanced internal dispute resolution procedures that are responsible for the improved outcomes for employees. This effect was what I found in my case study research at TRW and some other organizations that had adopted employment arbitration.¹⁴⁹ This suggests a more complex picture in which the spread of employment arbitration may be associated with a general strengthening of internal dispute resolution procedures in nonunion workplaces, however the use of employment arbitration itself as the final step is not necessarily what is having the direct impact on the operation of these procedures.

148. *Id.*

149. Colvin, *Adoption and Use*, *supra* note 34; *see also* Colvin, *Citizens and Citadels*, *supra* note 32.

B. Employment Arbitration and HR Outcomes

How do prospective employees view the adoption of mandatory employment arbitration policies by potential employers? In their general survey of worker attitudes towards representation and participation, Richard Freeman and Joel Rogers presented evidence suggesting that arbitration was viewed favorably in comparison to litigation as a method of resolving employment disputes.¹⁵⁰ While this result suggests interest in arbitration as a general concept, the initial description of employment arbitration in their survey did not indicate that it was mandatory and was arguably couched in relatively positive terms which may have induced positive responses. Interestingly, when Freeman and Rogers conducted a follow-up survey asking more specific questions about what characteristics workers would like to see in an arbitration system, 78 percent responded that the system should not bar employees from going to court, but rather allow them to go to court or arbitration.¹⁵¹ In addition, 95 percent of respondents felt that the system should be set up jointly by employees and management and 82 percent felt the system should provide expert advice/assistance to employees.¹⁵² What the Freeman and Rogers results indicate is openness among workers to arbitration as an alternative to the litigation system for resolving employment disputes, but also a desire for a system with characteristics that differ in some important respects from the current system of employment arbitration.

Two other studies have investigated the impact of mandatory arbitration on potential job applicants. In two rounds of an experimental study, Richey, Bernardin, Tyler, and McKinney

150. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 160 (1999).

151. *Id.* at 164.

152. *Id.*

presented groups of students with alternative dispute resolution policy statements from a firm and investigated the impact of variations in the policy on applicant intentions toward the firm as a potential employer.¹⁵³ In the first phase of the study involving 124 students, the presence or absence of a policy involving voluntary, nonbinding arbitration had no significant impact on intentions toward a potential employer. However, in the second phase of the study involving 273 student participants, the presence of mandatory and binding characteristics to the arbitration policy was associated with less favorable intentions toward the firm as a potential employer.¹⁵⁴

Mahony, Klaas, McClendon, and Varma looked at the impact on job applicants of mentioning a mandatory arbitration policy in employment brochures.¹⁵⁵ They had 389 professional and executive MBA students read simulated employment brochures, which contained mention of one of a series of different types of procedures.¹⁵⁶ They found that the participants viewed the attractiveness of these potential employers as higher where they had voluntary as opposed to mandatory arbitration procedures and where the procedures had higher rather than lower due process protections.¹⁵⁷ The due process features of procedures were found to be of greater concern to applicants where the procedure in question was mandatory.¹⁵⁸ In addition, existence of mandatory arbitration procedures was viewed more

153. Brenda Richey et al., *The Effect of Arbitration Program Characteristics on Applicants' Intentions Toward Potential Employers*, 86 J. APPLIED PSYCHOL. 1006, 1009 (2001).

154. *Id.*

155. Douglas M. Mahony et al., *The Effects of Mandatory Employment Arbitration Systems on Applicants Attraction to Organizations*, 44 HUM. RESOURCE MGMT. 449, 456 (2004).

156. *Id.* at 455.

157. *Id.* at 459.

158. *Id.*

negatively by minority participants, suggesting potentially greater concerns about diminution of civil rights protections.¹⁵⁹

The context presented in these experimental studies is somewhat artificial in that it is unlikely that a potential employer would give such prominence to an employment arbitration procedure in an employment brochure, as opposed to presenting the procedure to employees at the hiring point. However, they do provide some additional insight into the views of potential employees on the characteristics of different types of dispute resolution procedures where these are presented to them for their evaluation. The results suggest that while employees may be open to arbitration as a mechanism for resolving employment disputes, the present common form of employment arbitration as a mandatory, binding procedure is not yet something that has received general acceptance.

V. CONCLUSION

What does the body of empirical research on employment arbitration conducted to date suggest about the characteristics of this rising system of employment dispute resolution? First, the evidence suggests that employment arbitration has expanded since its introduction to cover a substantial and growing segment of the workforce. Perhaps most indicative of the significance of employment arbitration for the nature of employment relations are the indications that this system of dispute resolution now likely covers more workers than union representation in the United States.

159. *Id.* at 463.

Second, the empirical research on outcomes of employment arbitration suggests changing patterns over time. The initial body of research tended to show relative similarity in outcomes between employment arbitration and litigation in the areas of employee win rates and damages awarded. However, the more recent data on cases deriving from employer-promulgated agreements in the AAA C-filings dataset suggest that employee win rates and damage awards are lower than indicated by the earlier studies and lower than those in litigation. There is still a danger of comparing apples and oranges in comparing litigation and arbitration outcomes given that the types of cases that reach hearings in each system may differ and the greater prevalence of employer success in preliminary dismissals and appeals of cases in litigation. However, recent studies using more sophisticated policy-capturing methodologies that control for the type of case decision-makers are presented with, ensuring an apples to apples comparison, have found lower likelihoods of employment arbitrators ruling in favor of employees than other decision-makers when presented with the same cases.

The area of greatest due process concern emerging from analysis of the AAA C-filings data are the significantly lower employee win rates where the employee is unrepresented and there is a repeat employer-arbitrator pairing. These employees are in the most potentially vulnerable position from a due process perspective and the results indicate that they experience the least favorable outcomes from employment arbitration. By contrast, one area where the empirical research is relatively consistent is in indicating the speediness of employment arbitration compared to litigation. That said, at a little under a year, the typical time to a hearing in employment arbitration may still be too slow for most employment disputes, where time is at a premium in attempting to effectively resolve the dispute with at

least the hope of a continuation of the employment relationship. In this respect, the research showing the potential efficacy of internal dispute resolution procedures, including those involving steps such as mediation prior to employment arbitration, suggest a focus on the enhancement of these procedures as a route to more effective workplace dispute resolution.

Lastly, it should be noted that the results from analysis of the AAA C-filings data represent cases handled by a particularly prominent, well-respected arbitration service provider. Although some particular due process concerns have been identified in the analysis of this data, one could also argue that in other respects the results show more positive outcomes of the system. We should be careful, however, in extrapolating from these more positive aspects of the AAA results to assume that the same outcomes will hold for systems operated by other service providers or for ad hoc arbitrations in which there is no arbitration service provider involved.

Bitter controversies have raged over the use of employment arbitration to resolve legal claims in the workplace. Strong policy arguments on either side of this issue have been intensified both by the identification of participants with the oft-opposing interests of employees and employers and by the high stakes involved in employment disputes. Empirical research is helping to shed some light on the critical issues involved in these debates over the development and future course of employment arbitration. Yet efforts to extend the empirical research in this area are also fraught with challenges. One is a conflict in disciplinary approaches between legal perspectives emphasizing forceful advocacy of policy positions and adversarial determination of correctness of arguments and social science perspectives emphasizing, perhaps excessively, natural science like researcher neutrality and incremental

accumulation of knowledge on topics. This tension has perhaps most been evident in the controversies that have raged over the question of a repeat player effect in arbitration. My own judgment is that there was both an overly quick policy conclusion that a repeat player bias had been established based on some interesting initial research and overly strong responses to the empirical research that had been conducted in this area, which from a social science perspective should still best be viewed as some initial pieces of evidence gradually enhancing our understanding of a complex issue. Another challenge is the problem of access to data in a context of private dispute resolution processes and organizational reluctance to open internal procedures to outside scrutiny.¹⁶⁰ On a personal note, I have always been enormously grateful to organizations that have allowed me access to them to conduct research in this area, but have often worried that this leads one to follow the trail from one best case scenario to another while missing the darker cases that are hidden from public scrutiny. If we wish to encourage and extend the empirical research on employment arbitration we will need researchers willing to engage the challenging issues in conducting research in this area, an openness to scientific inquiry on important questions, and the support and participation of the key actors in this emerging system of workplace governance.