Enforcing Employment Rights through ADR Systems: 
An Empirical Examination of Employment Arbitration

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One of the central changes in contemporary employment relations is the growing individualization of the employment relationship. In the area of legal rights, this shift is manifested in the relative decline of collective rights embodied in labour law and the growth of individual rights embodied in employment law. This shift reflects the decline in levels of collective representation by unions across many countries and the growth in recognition of individual employment rights. However the increasing emphasis on individual employment rights poses a series of question about the nature and effectiveness of employee voice in enforcing these rights.

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

In this paper, we describe the results of an empirical study of a leading example of ADR procedures being used in the enforcement of employment rights: the system of mandatory arbitration of employment law claims in the United States. Mandatory arbitration refers to the practice in the U.S. where employers require employees to agree to private arbitration of any future legal claims against the employer as a mandatory term and condition of employment. Under U.S. law, these mandatory arbitration procedures are enforceable and effectively bar access to the public courts for legal claims, including those under statutes such as the Civil Rights Act. Although only originating in the early 1990s, mandatory arbitration has now expanded to the point where these procedures cover substantially more employees than are represented by unions in the U.S. The rise of mandatory arbitration lies at the intersection of a series of developments in employment relations: the growing individualization of employment; the increasing dominance of employer interests; and the relative weakness of the state in comparison to private economic actors. As a result, it is important to understand the nature and impact of this new type of ADR mechanism for enforcement of employment rights.

In our study, we examine data on 452 employment arbitration cases administered under the auspices of the American Arbitration Association (AAA) in 2008. The AAA is a private arbitration service provider that is the largest organization administering employment arbitration cases in the U.S. It provided us access to its complete files on all of the employment arbitration cases it administered during 2008. We were able to analyze and code key information about these cases that allow us to address a number of important issues in employment arbitration.

One of the central questions in employment arbitration is what are the outcomes for employees of these cases? Our data allow us to analyze the amounts claimed and the
amounts awarded, if any, by the arbitrators in these cases. We investigate whether arbitrators tend to favor employees, or employers, or do they tend to “split the baby” by making compromise awards between the two parties positions. How large are the awards that arbitrators do make and how do they compare to awards in the court system? We also look at what variables are associated with outcomes in employment arbitration. Does employee success vary depending on the nature of the rights claim being asserted? Do different groups of employees have differing degrees of success? One of the common critiques of individual employment rights systems is that they tend to be more accessible to higher income, professional and managerial employees who have the personal resources and legal sophistication to be able to effectively pursue claims in these systems. An argument commonly made by advocates of employment arbitration is that these procedures can provide greater accessibility to lower income employees than the court system. We are able to assess this claim empirically.

Although our empirical analysis focuses on an institution particular to the U.S., our findings have potential relevance to a broader audience. Many countries are struggling with the question of how to effectively enforce employment rights in a context of declining reach of institutions of collective representation. ADR procedures have been offered as one solution to this problem in a number of different contexts. There is also a growing role of private dispute resolution mechanisms in the international context. For many transnational organizations, there is an attraction to ADR procedures that allow for more uniform and private enforcement of individual rights across different international contexts. If ADR is to play this type of role, however, it is important to critically evaluate the impact of moving towards private justice systems, such as the type we profile in this study.