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

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ADR and Individual Employment Rights

- Growing individualization of the employment relationship:
  - Declining coverage of collective representation.
  - Growth of individual employment rights and claims.
- Expanded use of alternative dispute resolution (ADR) to resolve individual rights claims.
- Study examines mandatory arbitration of employment law claims in the U.S.
The Rise of Mandatory Arbitration in U.S. Employment Relations

- Growth of statutory employment rights and high risk/reward litigation:
  - Employment discrimination statutes (e.g. Title VII) as broadest exception to employment-at-will.
  - Federal courts study: 36.4% employee win rate; $150,500 median, $336,291 mean damages.
  - CA State courts study: 59% employee win rate; $296,991 mean damages.

- Expanded deferral by courts to private ADR mechanisms:
  - *Gilmer v. Interstate/Johnson Lane (1991)*: Statutory claims subject to arbitration.
  - *Circuit City v. Adams (2001)*: Arbitration clauses can be part of individual employment contracts.
The Data

- Employment arbitration cases administered by the American Arbitration Association (AAA) in 2008.
- 440 total cases terminating in an award (all employment cases administered nationally by AAA in US); detailed analysis of 217 arbitration case files.
Sample Characteristics

- **Employer-promulgated procedures: 320 cases.**
  - Most (82.4%) employees earn less than $100,000; minority are professionals (36.1%).
  - About half of cases (51%) involve discrimination claims.
  - Employer pays 100% of arbitration fees in over 95% of cases.

- **Individually-negotiated agreements: 117 cases.**
  - Most (60.5%) involve employees making between $100,000 and $250,000; most are professionals (72.1%).
  - Few (11%) claims allege discrimination.
  - Either employer pays all fees (58% of cases) or fees split between employer and employee (35% of cases).
## Employment Arbitration Case Outcomes

<table>
<thead>
<tr>
<th>Employer-Promulgated Procedures (Mandatory)</th>
<th>Plaintiff Win Rate</th>
<th>Average Damages (plaintiff wins)</th>
<th>Average Damages (all cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee Plaintiff</td>
<td>23.9% (n=293)</td>
<td>$82,648 (n=70)</td>
<td>$19,745 (n=293)</td>
</tr>
<tr>
<td>Employer Plaintiff</td>
<td>55.6% (n=27)</td>
<td>$39,002 (n=15)</td>
<td>$21,668 (n=27)</td>
</tr>
<tr>
<td>Individually-Negotiated Agreements</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Employee Plaintiff</td>
<td>65.3% (n=98)</td>
<td>$220,376 (n=64)</td>
<td>$143,919 (n=98)</td>
</tr>
<tr>
<td>Employer Plaintiff</td>
<td>63.2% (n=19)</td>
<td>$152,947 (n=12)</td>
<td>$96,598 (n=19)</td>
</tr>
<tr>
<td>Litigation studies (Eisenberg et al., 2003)</td>
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<tr>
<td>Federal courts</td>
<td>36.4%</td>
<td>$336,291</td>
<td>$143,497</td>
</tr>
<tr>
<td>State courts</td>
<td>57%</td>
<td>$462,307</td>
<td>$328,008</td>
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</tbody>
</table>
Percentage of Claims Awarded

![Bar chart showing the percentage of claims awarded across different categories. The categories are Zero, >0-20%, 20-40%, 40-60%, 60-80%, and 80+. The bars are color-coded: Employer-Promulgated Procedures in blue and Individually-Negotiated Agreements in maroon.}]
Percentage of Claims Award
(.Claims over $500,000)
Conclusions

- Mandatory arbitration an important new institutional structure for enforcement of individual employment rights.
  - Covers around twice as many employees (20-30%) as collective bargaining (12.3%) in the U.S. today.
- Complexities in analyzing cases and outcomes: differentiate types of cases.
- Fewer employee wins and lower damages under employer-promulgated arbitration than in litigation.
- Not characterized by ‘split-the-baby’ compromise decision-making sometimes seen in arbitration.
- Employment arbitrators tend to reject or reduce large damage claims: ‘trimming-the-tall-daisies’.