Workplace dispute resolution is currently high on the agenda of two of the three branches of the US Federal government. On 12 December 2007, a US Senate Committee held hearings on the Arbitration Fairness Act of 2007. This piece of legislation is an attempt to outlaw mandatory arbitration of individual employment (and consumer) disputes. It is based upon the belief that the current practice of employers requiring employees to agree to submit their claims to arbitration, rather than to a court of law, deprives them of important rights. On 19 February 2008, the US Supreme Court ruled that it will consider a case involving the interface between statutory employment disputes involving individual employees and labor arbitration provisions of collective agreements. Dealing with these issues requires an in-depth inquiry into the law and practice of alternative dispute resolution (ADR) in the employment arena, and a consideration of fundamental issues of workplace rights and responsibilities.

Human dignity at the workplace requires the right to just treatment by those holding authority. At the crux of this is protection from arbitrary action – action that is based upon personality rather than merit – action that is not predictable on any reasoned basis. When a human being is treated as merely a means to an end, a thing to be employed by others, rather than as a person deserving justice, human rights are violated. This is especially vital where a person’s job is at stake. In our society, the job is not only the source of economic goods, but also an important part of how we and others define ourselves and our role in society. Where workers can be terminated from their employment for any or no reason, ‘justice weeps’ and ‘arbitrariness reigns’ (Wolterstorff 2001, p. 17). Yet this is historically the basic principle of the law of employment termination in the United States.

The situation is quite different in Western Europe. In European countries, as well as in many other countries, there is a general principle of law that workers cannot be terminated without cause. This is enforced either in specialized labor courts or in the general court systems.

The American rule of employment-at-will, that a person can be fired at any time for any, or no, reason, has deep roots in the nation’s jurisprudence. It was announced in a legal treatise in 1877, and is known as ‘Wood’s rule’, named for the author of the treatise, Horace Gay Wood. He
stated, ‘With us [in America, unlike in England] the rule is inflexible that a general or indefinite hiring is \textit{prima facie} at will’ (Willborn et al. 1993, p. 15). It has remained the general rule ever since. Its practical result is that, absent a statute or contract to the contrary or the application of a limited number of common law exceptions, workers have no right to insist upon a just cause for their termination.

Fortunately since the days when Wood’s employment-at-will principle was adopted by American courts in the late 19th century there has been a considerable erosion of it. Management attorneys have been recently heard to complain that it is gone entirely. The reality is, however, a bit more complicated than that. What has happened over a period of about 90 years is that a patchwork of limitations on employment-at-will has been constructed. This has been aptly described as the gradual slicing away of an entire pie of rights that at one time wholly belonged to employers, until only a remnant of what once was remains (Bennett-Alexander and Hartman 2001). Yet the employer’s portion is still quite substantial. Arguably, it has grown significantly by virtue of some recent decisions of the United States Supreme Court.

Some of the requirements of workplace due process are that there must be a procedure, it must have and follow rules, it must not be arbitrary, it must be known to employees, predictable so that employees know that previous decisions on worker rights will be followed, ‘institutionalized’, easy to use, perceived as equitable, and applicable to all employees (Ewing 1977, p. 156). It must be ‘timely, accessible and inexpensive’, include the right of the employee to be represented by another employee, provide the right to present evidence and rebut charges, have ‘as much privacy and confidentiality as is practicable’, have ‘a fair and impartial fact-finding process and hearing’, provide objective and reasonable decisions with appropriate remedies, and be free from retaliation against the employee (Ewing 1989, pp. 6–7). It has been argued that this should include the right to have outside arbitration or some other mutually agreed upon process (Werhane 1985).

1 The nature of alternative dispute resolution procedures

There is wide variation in the approach to the settling of employment disputes within organizations. In their review of ADR systems, Wheeler et al. (2004) differentiated among employer-sponsored dispute mechanisms by the extent that they intrude upon managerial prerogatives. They labeled as \textit{soft justice} systems those dispute resolution mechanisms that do not produce a decision that is final and binding upon both the employer and the employee. Soft justice systems instead provide a forum for achieving a mutually agreed upon solution to the dispute and often constitute early
stages of more intrusive systems. Among the more prevalent soft justice systems are open-door policies, ombudspersons and mediation. We briefly review the more common soft and hard justice systems currently instituted by US employers.

**Open-door policies** are nearly ubiquitous among US employers and often represent the initial step in a multi-step dispute resolution process (Foulkes 1980). Such policies encourage employees to discuss a wide array of problems with management in an open and informal manner and without fear of reprisal (McCabe 2002). While many open-door policies allow for an employee to go directly to senior management, most require employees first seek resolution at the lowest practicable level of supervision (Mahony and Klaas 2008a).

As a dispute resolution mechanism, the effectiveness of open-door policies remains uncertain. Indeed, Foulkes (1980) found a wide range of opinions from strong approval to a belief that the policy is a myth. Several possible explanations exist for this variation. For instance, the considerable social distance between employees and senior management may itself serve as a deterrent. Lipsky et al. (2003) note that both managers and front-line supervisors typically lack the time, motivation or training to adequately address employee disputes. And, while the door is open, few walk through it (McCabe 2002), and when they do, often only trivial questions are raised. This reluctance to utilize the system to its fullest extent may stem from broader concerns over fairness, particularly when an employee goes over their bosses’ head (McCabe 2002). The efficacy of open-door polices remains questionable, particularly in cases involving terminations of employment. This is in part because many managers feel a necessity to support the actions of lower-level managers, or at least their employees may believe this to be the case (Wheeler et al. 2004).

A handful of organizations utilize an **Ombudsperson** as part of the dispute resolution process. The ombudsperson serves as a neutral person to facilitate the resolution of employees’ workplace disputes (Kandel and Frumer 1994; McDermott and Berkeley 1996). One significant benefit this process enjoys over open-door systems is that the Ombudsperson acts as a ‘go-between’ between management and the disputant. The use of an ombudsperson is a soft justice system in so much as the ombudsperson lacks decision-making authority over the resolution of employee disputes. The role of the ombudsperson is one of facilitator with the intention of helping both sides achieve a mutually acceptable settlement. Their effectiveness lies in confidentiality and in their potential to remove barriers to communication during the dispute resolution process. As an employee of the organization, ombudspersons may fear reprisals themselves as they come into conflict with management. Thus, the benefits derived from
utilizing an ombudsperson may be obviated by employee concerns over their perceived independence from management (Cooper et al. 2000).

Mediation utilizes the services of a neutral third party to help the parties to a dispute resolve it. This is a soft justice system as mediators are not empowered to issue final or binding decisions. Rather, they employ a ‘win-win’ bargaining approach and aim to provide opportunities for the parties to identify a mutually agreeable solution to an employment problem in a relatively non-adversarial setting (McDermott and Berkeley 1996).

A sizable number of organizations have adopted mediation as part of their overall dispute resolution strategy (Feuille 1999). One survey found close to 40 per cent of respondents indicated that they use mediators in employment disputes (GAO 1995). Mediation, like use of open door policies and ombudpersons, is often implemented as part of an organization’s overall dispute resolution system and is typically the last step prior to adjudication or arbitration. Normally, those who serve as mediators are external to the organization; recently however, a growing number of organizations are training and developing internal mediators to facilitate the resolution of employment disputes (Lipsky et al. 2003). What impact the use of internal mediators has on the parties’ willingness to explore settlement ranges and ultimately resolve disputes remains unresolved.

By utilizing a neutral third party, mediation provides a confidential and less formal venue for resolving disputes. Moreover, it may lead to early settlement while serving to redirect emotions (Harkavy 1999); this is particularly beneficial for disputants who remain employed by the organization (Mahony and Klaas 2008a). Proposals offered during mediation are non-precedent-setting; this, in conjunction with the confidentiality of the process, may prompt greater flexibility in settlement proposals and lead to options that are suited to the idiosyncrasies of each case (Cooper et al. 2000). While an oft-admired process, mediation may be difficult to employ in the emotionally charged atmosphere of a discharge case, particularly when undertaken subsequent to the termination (Mahony and Klaas 2008b). Nevertheless, mediation is a widely admired dispute resolution process that has great potential to foster workplace justice.

The above systems of dispute resolution each represent non-binding and less adversarial approaches to resolving employment disputes. However, many organizations have turned to hard justice systems such as peer review and employment arbitration. These systems represent the final step in the organization’s dispute resolution process and are labeled hard justice systems because they typically produce final and binding rulings. We next turn to a review of two of the more common hard justice systems. It should be noted that we are limiting our discussion at this point to employer-instituted systems, and do not include collectively bargained labor arbitration.
Peer review, as an alternative dispute resolution mechanism, came into prominence in the mid 1980s, initially as part of an organization’s union avoidance strategy (Grote and Wimberly 1993). Presently approximately 20 per cent of US firms have peer review as part of their dispute resolution procedure. It is often linked with other high performance high involvement work practices (GAO 1995, 1997). A recent study of the telecommunications industry found that approximately 16 per cent of those organizations had adopted peer review practices (Colvin 2003). While peer review procedures vary considerably, they are all designed to move some employee-relations decisions to a committee comprised of an employee’s peers (Cooper et al. 2000). Typical peer panels are made up of five to seven trained panelists and often include members of management.

A majority of peer panels are charged with making a final and binding decision; hence they are a hard system of justice. Indeed, those that lack the authority to make final and binding decisions may be declared a labor organization by the National Labor Relations Board and thus violate the Section 8(a)(2) of the National Labor Relations Act (see Keeler Brass Automotive Group 1995 and Sparks Nugget, Inc. 1977).

In a hearing-like setting, these panels are charged with interpreting and applying employer policies within the context of an employee dispute. They are not, however, allowed to consider the reasonableness of a policy. Rather, fairness is determined by whether the employer followed their own procedures and rules (Ewing 1989). Despite these restrictions, anecdotal evidence suggests that both managers and employees like peer review (Wilensky and Jones 1994). Employees perceive peer review as a process that delivers fair and objective outcomes, while managers believe such systems help employees to understand their point of view (Wilensky and Jones 1994; Cooper et al. 2000).

Perhaps the hardest employer-instituted justice system currently in use is employment arbitration. It is an employer-promulgated arbitration process for resolving employment disputes with their nonunion employees. Organizations that adopt this process do so as an alternative to litigation and at times as part of their overall union avoidance strategy. In this latter sense, some view employment arbitration as an alternative to labor arbitration which is available to unionized workers. Since the early 1990s employers in the US have been turning toward employment arbitration at a hastening pace (Howard 1995). While most estimates of the incidence of adoption are somewhat dated, the picture they provide is one of a practice that continues to gain in popularity. For example, in their 1997 study of corporate attorneys, Lipsky and Seeber (1999) found that employment arbitration was used to resolve 62 per cent of employment disputes. Galle and Koen’s (2000–1) survey of US business reported that 19 per cent of
respondents covering an array of industries had employment arbitration. According to the American Arbitration Association (AAA), employment arbitration procedures have been adopted by more than 500 employers employing a total of 5,000,000 employees (LeRoy and Feuille 2001).

Broadly, employment arbitration procedures vary widely across organizations. At one extreme they can encompass a process that is clearly stacked against the employee. At the other end of the spectrum is a relatively balanced process that affords the employee a high degree of due process. Between these extremes, arbitration agreements may be included as part of individual contracts of employment, and are thus intended to resolve all disputes arising under the terms of that particular contract. Alternatively, some employees establish procedures that are intended to cover whole classes of employees (Lipsky and Seeber 1999). Some arbitration procedures will limit claims to those for which the law already provides a remedy, such as statutory claims of discrimination; whereas other procedures apply to any dispute arising out of the employment relationship.

Perhaps the most controversial distinction between arbitration procedures is between those that are voluntary and those that are mandatory. Post-dispute voluntary arbitration systems are widely hailed as a beneficial and viable alternative to litigation (Wheeler et al. 2004). However, pre-dispute mandatory agreements require employees to waive their rights to sue their employer as a precondition of employment, and instead require employees to agree to arbitrate employment disputes. Binding mandatory employment arbitration agreements are generally seen as contracts of adhesion because they are presented to the employee on a take it or leave it basis. They are either required to be signed at the time of hire as a requirement for being hired, or required of current employees as a condition of keeping the job.

Despite these differences there are several features that are common to all employment arbitration procedures. First, unlike labor arbitration, these procedures are initiated and created solely by the employer. As such, they generally can be unilaterally modified or abandoned at any time at the employer’s discretion, with the exception of arbitration agreements embedded within individual contracts of employment. Second, the employer and employee both agree that the employee’s claims against their employer shall be addressed though an arbitration tribunal rather than adjudicated through the courts. Lastly, the decisions are made by a neutral third person that is chosen by the parties.

2 Employment arbitration and the law
The most powerful stimulus to the adoption of the employment arbitration has come from two decisions of the United States Supreme Court that made it clear that pre-dispute mandatory employment arbitration agreements
are enforceable. These are *Circuit City Stores v. Adams* (2001a), and *Gilmer v. Interstate/Johnson Lane* (1991).

In the *Circuit City* case, by a five to four vote, the court reversed a decision of the Ninth Circuit Court of Appeals that had held that a mandatory employment arbitration clause in an employment contract was unenforceable. The employee, Adams, had signed an employment application that contained a provision stating that he agreed to take all claims arising from his employment, including statutory ones, to arbitration rather than to court. He later filed a suit against his employer for violating the California fair employment act.

The Supreme Court ruled that the arbitration agreement was enforceable by finding that the Federal Arbitration Act (FAA) covered such contracts of employment. The FAA makes agreements to arbitrate enforceable in Federal courts. The Supreme Court construed the FAA’s exclusion of ‘contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce’ to exempt only transportation workers. The primary rationale of the court in so construing the FAA exclusion was the legal principle of *ejusdem generis*, which holds that ‘where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words’ (pp. 114–15). Applied to the language of the FAA, this meant that only workers similar to seamen and railroad employees, that is, transportation employees, were covered by the exclusion from the FAA.

Because Federal law is supreme, the FAA as construed by the Supreme Court controls litigation in state courts as well as Federal courts, meaning that the authority of the Federal government prevents the states from making these agreements unenforceable (*Southland Corp. v. Keating* 1984). The only basis for an arbitration agreement being unenforceable under the FAA is ‘such grounds as exist at law or in equity for the revocation of any contract’ (FAA). So, a contract to arbitrate could be set aside, but only for the same reasons that would make any other contract unenforceable. This would generally be a matter of state law.

Under the FAA, arbitration awards are not subject to meaningful judicial review. They can be set aside only ‘where the award was procured by corruption, fraud, or undue means’, ‘where there [existed] evident partiality or corruption [by] the arbitrators’, where there was misconduct by the arbitrators, or where ‘the arbitrators exceeded their powers’ (9 USC §510; Cooper et al. 2000). Courts have stated that an arbitration award can also be set aside if the arbitrator acted in ‘manifest disregard of the law’ (*Halligan v. Piper Jaffray, Inc.* 1998). It has been held that manifest disregard of the law exists where the award is: ‘unfounded in reason and fact;
based on reasoning so faulty that no judge, or group of judges, ever could conceivably have made, such a ruling; or mistakenly based on a crucial assumption that is concededly a non-fact (Advent, Inc. v. McCarthy 1990, p. 8). This decision was based on a dictum in a US Supreme Court decision, Wilko v. Swan (1953).

The stage for Circuit City was set by the earlier case of Gilmer v. Interstate/Johnson Lane (1991). In that case the court upheld an arbitration agreement contained in Gilmer’s application for registration as a securities representative on the New York Stock Exchange. The application provided that he agreed to ‘arbitrate any dispute, including employment disputes’. He was required, as a condition of his employment, to be registered. Interstate/Johnson Lane terminated him several years later when he had reached the age of 62. Gilmer sued in Federal court under the Age Discrimination in Employment Act. The employer defended on the ground that Gilmer was compelled to arbitrate the matter. The Supreme Court held that the agreement to arbitrate a statutory claim was enforceable. It said that this did not involve Adams giving up substantive statutory rights, but only an agreement on his part to enforce these rights in a different forum. It cited the strong Federal policy favoring arbitration that was reflected in the FAA.

Gilmer did not involve an agreement between an employee and an employer, but rather one with the stock exchange. Therefore, the FAA exemption of employment contracts did not apply. However, the court’s reasoning and approach to this case strongly indicated that employment contracts to arbitrate would be enforceable. This decision had the effect of encouraging employers to experiment with mandatory arbitration clauses in their agreements with employees. Indeed, subsequent to the Gilmer case, all of the Circuit Courts of Appeals except the Ninth Circuit had reached the conclusion that such clauses were enforceable even before Circuit City was decided.

Subsequent to Circuit City, the Ninth Circuit overruled its decision in Duffield v. Robertson Stephens Co. (1998), in which it had held that a mandatory employment arbitration provision covering statutory rights was unenforceable, thus bringing this Circuit into line with the others on this point. However, on the Circuit City case itself, which was remanded to the Ninth Circuit, the court held that the agreement in that case was unenforceable because it was ‘unconscionable’ under California law. It based this decision on the facts that the agreement was offered on a take-it-or-leave-it basis, did not require the company to arbitrate its claims against the employee, provided for only limited relief to the employee, and required the employee to pay half of the costs of arbitration (Circuit City Stores, Inc. v. Adams 2001b).
As is indicated by the Ninth Circuit’s ruling in the *Circuit City* remand, there remain a number of questions to be answered with regard to the enforcement of mandatory employment arbitration agreements. Given that these clauses are enforceable as a general proposition, what, if anything, is required of particular agreements in order for them to survive judicial scrutiny under state law or under a developing Federal common law?

Partly because the author of the opinion is Harry Edwards, a well-respected authority on employment law, the decision of the District of Columbia Court of Appeals in *Cole v. Burns International Security Services* (1997) has been widely cited on the subject of the standards that must be met by employment arbitration agreements. In this case, the court held that it would enforce an agreement to arbitrate, but only because it did not impose on the employee the obligation to pay all or part of the costs of the arbitration. Judge Edwards stated:

> Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge . . . [yet] arbitration is supposed to be a reasonable substitute for a judicial forum. (p. 1484)

In *Cole*, the court also stated that *Gilmer* required five safeguards for a pre-dispute employment arbitration clause to be enforceable: (1) an arbitrator who is neutral; (2) discovery that is more than minimal; (3) a written award; (4) the availability of all remedies that would be available in court; and (5) the absence of a requirement for the employee to pay either costs that are unreasonable, or any part of the arbitrator’s fees.

There have been a number of court decisions on the effects on enforceability of an employee obligation to share in the costs of the proceedings. Some have agreed with *Cole* that any sharing of cost renders the agreement unenforceable (*Shankle v. B-G Maintenance Management of Colorado, Inc.* 1999; *Paladino v. Avnet Computer Technologies, Inc.* 1998; *Haro v. NCR Corp.* 2006; *Sherwood v. Blue Cross* 2007; *Mazera v. Varsity Ford Services, LLC* 2008; *Morrison v. Circuit City Stores* 2003). Others have viewed the question on a case-by-case basis to see if the particular cost-sharing arrangement is reasonable under the circumstances of the case (for example, *Bradford v. Rockwell Semiconductor Systems, Inc.* 2001; *Midworm v. Ashcroft* 2002; *Baugher v. Dekko Heating Technologies* 2002). An Appeals Court in Florida has held that a provision that the employer and the employee share equally in the costs rendered the agreement unenforceable (*Flyer Printing Co. v. Hill* 2001). The Ninth Circuit has held that excessive costs being imposed on the employee, along with other ‘oppressive’ provisions, can render the arbitration agreement unconscionable (see below for further discussion of this criterion), and therefore unenforceable...
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(Ferguson v. Countrywide Credit Industries, Inc. 2002). The Sixth Circuit has held that cost-splitting agreements are unenforceable, but severed them from the balance of the arbitration agreement, making it otherwise enforceable (Morrison v. Circuit City Stores 2003). Other courts have refused to sever unconscionable cost provisions, causing them to invalidate the entire agreement to arbitrate (Plaskett v. Bechtel International, Inc. 2003). An interesting analysis of this issue has been written by LeRoy and Feuille (2002).

The California Supreme Court in Armendia v. Foundation Health Psychcare Services (2000) held that in order to be consistent with the state anti-discrimination statute and therefore enforceable, an agreement needed to contain the Cole safeguards: (1) provide for a neutral arbitrator; (2) not limit statutory remedies; (3) provide for some discovery; (4) require written awards; and (5) not impose limits on the employee’s remedies without imposing the same limits on the employer’s. Armendia has also been applied to common law claims of termination in violation of public policy (Little v. Auto Stiegler 2003).

In Hooters of America, Inc. v. Phillips (1999), the Fourth Circuit Court of Appeals held that the employer had made its agreement to arbitrate invalid by setting up a process that was ‘utterly lacking in the rudiments of even-handedness’, and, therefore, could not force the employee to submit to the employer’s process (p. 933). Hooters’ system required the employee, but not the employer, to provide the specifics of the claim at the outset of the proceeding. The employee was also required to provide the employer with a list of witnesses and a summary of the facts known by each. Here, also, there was no such requirement for the employer. The arbitrator was to be chosen from a panel selected by the employer. The employer, but not the employee, could add claims during the course of the proceeding, move for summary dismissal, record the hearing, and vacate or modify the award. The employer could cancel the arbitration process on 30 days notice, and change the rules without notice at any time. The court characterized this as a ‘sham system unworthy even of the name arbitration’ (p. 940).

To the extent that employment arbitration agreements are adhesive, that is, form contracts presented on a take-it-or-leave-it basis, they may be unenforceable under state law if the terms are ‘not within the reasonable expectation of the weaker party and . . . are unduly oppressive or unconscionable’ (Cooper et al. 2000, p. 560; see also, Graham v. Scissor-Tail, Inc. 1981). Unconscionability is said by the courts to have two dimensions: substantive and procedural. To be unenforceable a contract must be unconscionable on both dimensions. Substantive unconscionability ‘refers to contract terms that unreasonably favor one party over another’ (Cooper et al. 2000, p. 560). Procedural unconscionability ‘refers to the process of
contract formation, and encompasses the inequality of bargaining power and ability, and the use of fine print and convoluted language’ (Cooper et al. 2000, p. 560). It has been held that an adhesive agreement – one that is ‘drafted or otherwise proffered’ by the stronger of two contracting parties is unenforceable ‘if two conditions are present: (1) the contract is the result of coercive bargaining between two parties of unequal bargaining strength; and (2) the contract unfairly limits the obligations and liabilities of, or otherwise unfairly advantages, the stronger party’ (Brown v. KFC National Management Co. 1996, p. 167; see, also Stirlen v. Supercuts 1997). The US Supreme Court, in Doctor’s Associates, Inc. v. Casarotto (1996), held that defenses generally applicable in contract cases, such as unconscionability, can be applied without violating the FAA. Some practical guidance for employers drafting agreements that are fair and defensible exists in the literature (Dichter and Ballard 2000–2001). More recently, the Ninth Circuit held an arbitration agreement to be both procedurally and substantively unconscionable (Ingle v. Circuit City Stores, Inc. 2003).

Arbitration agreements have been found to be unenforceable on a few other counts. The Ninth Circuit has held that an arbitration clause buried in a handbook does not constitute a ‘knowing waiver’ of statutory rights, and is therefore unenforceable (Nelson v. Cyprus Bagdad Copper Corp. 1997). But another Circuit has held that an arbitration clause contained in a handbook is enforceable where it is separate from other parts of the handbook and signed separately (Patterson v. Tenet Healthcare 1997). A few other courts have refused to enforce an arbitration clause that they deemed to be ‘illusory’ because it permitted the employer to change it at any time (Dumais v. American Golf Corp. 2002; United States of America ex rel. Robert Harris v. EPS, Inc. 2006; McDaniels v. Hospice of Napa Valley 2006; Salazar v. Citadel Communications Corp. 2004). A Federal District Court in Ohio has held an agreement to be unenforceable because it favored the employer on procedural matters, and required the Ohio resident employee to travel to San Francisco for the arbitration proceeding (Hagedorn v. Veritas Software Corp. 2002).

An agreement that provides that the employee waives the right to legal counsel 15 days after initiating arbitration has a shorter time limit than the statutory limitation, and fails to guarantee more than one deposition was held to be substantively unconscionable (Lambright v. Federal Home Loan Bank of San Francisco 2007). The availability of class actions in arbitration proceedings has been a particularly difficult question. A few courts have found that the failure to provide for a class action, or a one-sided provision in this regard, will render a clause substantively unconscionable (Skirchak v. Dynamics Research Corp., Inc. 2007; Murphy v. Check’N’ Go of California, Inc. 2007; Ingle v. Circuit City Stores 2003).
Procedural unconscionability has been found on a number of grounds. Courts applying California law, for example, *Sherwood v. Blue Cross* (2007); *Lambright v. Federal Home Loan Bank of San Francisco* (2007); *McDaniels v. Hospice of Napa Valley* (2006); *Davis v. O’Melveny & Myers* (2007), consistently find that the contract being one of adhesion, where the employee has no realistic opportunity to bargain over its terms, renders it procedurally unconscionable. If it is also found to be substantively unconscionable, the agreement will be held to be unenforceable. It should be noted that the California courts and Federal courts applying California law have been more willing to strike down arbitration agreements than have courts applying the law of other states.


Where an arbitration agreement is found to be unconscionable in some, but not all, respects the possibility of severance of the unconscionable clause arises. The standard would appear to be whether severance and enforcement of the remainder of the agreement is in the interests of justice. This in turn depends upon whether the unconscionability permeates the entire contract (*Sherwood v. Blue Cross* 2007). Severance has been refused
where procedural unconscionability is especially egregious (Sherwood v. Blue Cross 2007), there is a denial of the rights to an attorney and adequate discovery, and a shortening of the statute of limitations (Lambright v. Federal Home Loan Bank of San Francisco 2007), or a requirement for the employee to pay half the costs of arbitration (McDaniels v. Hospice of Napa Valley 2006). However, courts have severed a shortened statute of limitations (Jackson v. Cintas Corp. 2005), provisions for cost splitting and limits on remedies (Morrison v. Circuit City Stores 2003), and limits on punitive damages (Gannon v. Circuit City Stores 2001).

Whether a particular agreement is unconscionable or, in terms of the analysis in the Hooters case, is an agreement to arbitrate at all, probably depends upon whether it meets accepted norms of fairness and due process. A broad set of standards for fairness was laid down by the Dunlop Commission in its 1994 report. According to the Commission, arbitration systems should provide: (1) a neutral arbitrator knowledgeable about the law and the concerns of the employer and the employee; (2) a method that is both fair and simple by which the employee can secure the necessary information to prosecute the claim; (3) a method of sharing costs that is fair and ensures affordable access of the employee to the process; (4) the right to an independent representative; (5) the same remedies available in litigation; (6) a written opinion explaining the arbitrator’s reasoning; and (7) sufficient judicial review to ensure that the arbitrator’s decision is consistent with the law (Commission on the Future of Labor-Management Relations 1994).

Probably the most influential set of standards for employment arbitration is the Due Process Protocol created and agreed to in 1995 by the National Academy of Arbitrators (NAA), the American Arbitration Association (AAA), the American Bar Association (ABA), the American Civil Liberties Union (ACLU), the Federal Mediation and Conciliation Service (FMCS), the National Employment Lawyers Association (NELA), and the Society of Professionals in Dispute Resolution (SPIDR) (Zack 1999).

The Protocol calls for: (1) a neutral agency to develop a roster of neutrals who are demographically diverse; (2) neutrals who are trained in the statutes involved; (3) joint selection of the arbitrator from the panel of arbitrators; (4) access by both parties to the names of parties who had recently presented cases to the neutrals; (5) discovery procedures allowing for a reasonable number of depositions; (6) a representative of the employee’s choosing; (7) a written decision consistent with the law; (8) a remedy consistent with the statute; and (8) limited judicial review (Zack 1999). Interestingly, the National Academy of Arbitrators, one of the parties to the Protocol, has taken the position that it is opposed in
principle to mandatory pre-dispute employment arbitration, although its members may ethically hear such cases. The NAA is joined in its opposition to pre-dispute employment arbitration by the Equal Employment Opportunity Commission (Equal Employment Opportunity Commission (EEOC) 1997).

In two 1995 cases, the National Labor Relations Board (NLRB) issued unfair labor practice complaints based on employees being terminated for refusing to sign or abide by employment arbitration agreements (*Bentley’s Luggage Corp. 1995; Great Western Financial Corp. 1995*). However, it is not possible to know the NLRB policy at the present time. In our view, it is likely that the present (2008), Republican-appointed, version of the Board would look more favorably upon employment arbitration.

Two of the major agencies that administer employment arbitration cases, the American Arbitration Association and JAMS/Endispute, have adopted the Protocol and announced that they will handle cases only if they are based on agreements that comply with the Protocol. In addition, in November 2002, the American Arbitration Association announced that it had changed its rules to provide that the cost of the administrative filing fee that could be charged to the employee was capped at $125, and that the arbitrator’s fee must be paid in full by the employer.

In our view, in order to be enforceable, pre-dispute employment arbitration agreements will have to meet the requirements of the Protocol. In addition, an agreement that imposes more than *de minimus* costs on the employee is highly likely to run afoul of the *Cole* standards, and therefore be unenforceable. Requiring the employer to foot the bill for arbitration does seem eminently reasonable, given that it is the employer’s process that is substituted for court proceedings at the employer’s insistence.

Having spoken to the ability of the employee to assert his/her claim for employment discrimination, there remains the question of what, if any, effect does an employment arbitration agreement have on the ability of the EEOC to enforce the statutes under its purview. One of the many arguments against employment arbitration is that it consigns a matter of public law and policy to a private justice system. That is, it is not just the individual right of the claimant that is involved, but rather, the public interest in the elimination of discrimination. An answer to this criticism of employment arbitration is the continued ability of the EEOC to enforce the law when it believes this to be necessary.

In *EEOC v. Waffle House, Inc.* (2002), the US Supreme Court held that an employee’s agreement to arbitrate did not preclude the EEOC from bringing an action of its own to enforce the law. What’s more, the EEOC can recover judicial victim-specific relief for the employee, including backpay, reinstatement and money damages. However, if the
employee has failed to mitigate his/her damages (for example, by attempting to find interim employment) or has accepted a monetary settlement from the employer, this would limit the amount that the EEOC could recover from the employer. This was followed by a Sixth Circuit Court of Appeals decision (EEOC v. Circuit City Stores, Inc. 2002), holding that an arbitration agreement did not prevent an employee from filing a charge with the EEOC, or the EEOC from proceeding with a lawsuit seeking victim-specific relief.

This limit on the effects of an arbitration agreement may not be as important as one might think, since the EEOC brings few lawsuits (in 2000 only 291 of the 21 032 discrimination lawsuits were brought by the EEOC). The EEOC, with its limited budget and staff, can take only cases with high publicity potential or where a very large amount of money is at stake.

3 Employment arbitration and collective bargaining

The interface between, on the one hand, collective bargaining agreements and the National Labor Relations Act and, on the other hand, employment arbitration agreements, is still unclear. There are three questions that arise in this context. First, does the agreement of a union to arbitration of employee grievances bind the individual employee in the same manner that an individual’s agreement does? That is, can an employee covered by a collective bargaining agreement be thereby barred from bringing a lawsuit for violations of employment discrimination laws? Second, is requiring employees to individually agree to arbitration of statutory claims in an employer-established system a mandatory subject of collective bargaining? If it is not, an employer could set up a parallel arbitration system to handle statutory claims not covered by the collective bargaining agreement. Third, what should be the effect of an arbitration clause on an employee’s ability to file charges under the National Labor Relations Act? These are questions that were believed to be settled, but have been given new life by Circuit City.

As to the first question, it has long been the law that neither the existence of a collectively bargained right to arbitration nor an employee pursuing arbitration under a collective bargaining agreement bars a lawsuit under the Federal anti-discrimination statutes (Alexander v. Gardner-Denver Co. 1974; Barrentine v. Arkansas-Best Freight System 1981). An employee can pursue a Title VII claim even after losing in arbitration.

The decision in Gardner-Denver was based in part on the view that the statutory claim and the claim under the collective bargaining agreement were separate. The fact that the same events gave rise to both claims did not prevent the employee from pursuing them both. The court also held that ‘there can be no prospective waiver of the employee’s rights under Title
VII’ (p. 51) and that, in any event, the collective processes of collective bargaining could not waive the individual rights of an employee under the law. In addition, the court held that the arbitral forum was ill-suited to dealing with questions of public law because the arbitrator’s duty was to enforce the contract, not to enforce public law. Furthermore, the lack of legal training of many arbitrators, and the differing procedures in arbitration, caused the arbitral forum to be inadequate.

Obviously, Circuit City plays havoc with the rationale of Gardner-Denver. Although this decision has not yet been overruled, the reasoning of the court in Gardner-Denver is no longer subscribed to by the Supreme Court. Title VII rights (or at least the forum to pursue them) can now be waived by an individual. The question is what, if anything, can constitute such a waiver in a collective bargaining agreement. In Wright v. Universal Maritime Service Corp. (1998), the Supreme Court held that an arbitration clause did not bar an action under the Americans with Disabilities Act in the absence of a clear and unmistakable waiver of the right to access to court. However, the court expressly avoided taking the next step of saying whether if there were such a clear and unmistakable waiver by the union, it would be binding on the employee. This left Alexander v. Gardner-Denver still standing, if much weakened.

Although, as is noted below, the Supreme Court should soon clear this up, it is still unclear at this writing whether a union can waive the employee’s right to pursue statutory rights in court if there is a clear and unmistakable waiver in the collective agreement. There may be two ways that a collective bargaining agreement can meet the standard of having a clear and unmistakable waiver. First, the collective agreement’s arbitration clause could specifically provide that employees agree that they will submit to arbitration all claims that arise out of their employment. Second, the collective bargaining agreement could state that the obligation to arbitrate applies to ‘all disputes’, or ‘all disputes concerning the agreement’, while at the same time incorporating the discrimination statutes into the agreement (Hodges 2001, p. 515). The courts have tended to be rather strict in their requirements for such waivers (see Brown v. ABF Freight Sys., Inc. 1999; Kennedy v. Superior Painting Co. 2000; Quint v. A. E. Staley Manufacturing Co. 1999).

There is disagreement among the Circuits as to whether a waiver in a collective agreement is enforceable, even if it is clear and unmistakable. The Fourth Circuit has held that a provision in a collective bargaining agreement that arbitration would be the exclusive remedy for ‘all claims regarding equal employment opportunities’ barred a suit under the Americans with Disabilities Act (Singletary v. Enersys Inc. 2003). In several of its decisions (Austin v. Owens-Brockway Glass Container, Inc.
Adjudication of workplace disputes

(1996; Brown v. ABF Freight Systems, Inc. 1999; Carson v. Giant Food, Inc. 1999; Safrit v. Cone Mills Corp. 2001) the Fourth Circuit has made it clear that it holds that a clear and unmistakable waiver in the collective agreement is enforceable against an employee who attempts to bring a suit in Federal court.

Other Circuits have held that union waivers of statutory claims of individual employees are unenforceable (Rogers v. New York University 2000; Pryner v. Tractor Supply Co. 1997; Pyett v. Pennsylvania Building Co. 2007; Air Line Pilots Ass’n v. Northwest Airlines Inc. 1999; Bratten v. SSI Services, Inc. 1999; Albertson’s, Inc. v. United Food & Commercial Workers Union 1998; Brisentine v. Stone & Webster Engineering Corp. 1997; Varner v. National Super Markets, Inc. 1996). Their rationale has generally been that Alexander v. Gardner-Denver has not yet been overruled, and stands as controlling law until the Supreme Court overrules it (see also Woodson v. Mississippi Space Services 2006). The Third Circuit has decided that a collective bargaining agreement arbitration clause does not bar a lawsuit if the employee cannot demand arbitration without the consent of the union (Martin v. Dana Corp. 1997). The Eleventh Circuit has set out a three-part test for a collective bargaining agreement barring an employee from litigation. Under this test, a suit is barred only if: (1) the employee has individually agreed to arbitrate; (2) the arbitrator is authorized to resolve federal statutory claims; and (3) the employee had the right to insist upon arbitration (Brisentine v. Stone & Webster Engineering Corp. 1997). Another Circuit has held that the award of an arbitrator against the employee is strong evidence that Title VII has not been violated and, in the absence of a showing of new evidence or partiality on the part of the arbitrator, the employee fails to make out a prima-facie case of discrimination (Collins v. New York City Transit Authority 2002).

One powerful point against the collective bargaining agreement waiving the individual’s right to sue is the fact that the grievance pursued under a collective agreement belongs to the union, not the employee. Barring court action by the employee would leave the case entirely in the hands of the union, with the union, not the employee, deciding whether the case would go to arbitration. As one court noted, it may be too optimistic to assume that there will be a ‘harmony of interests’ between the union and the employee (In re American National Insurance Co. 2007). Unions do have a statutory duty of fair representation, but this is not the same thing as employees being able to decide for themselves whether to have their claims adjudicated.

Fortunately, the disagreement among the Circuits should soon be resolved. On 19 February 2008, the US Supreme Court granted an application to hear an appeal of Pyett v. Pennsylvania Building Co. (2007),
under the label of *14 Penn Plaza LLC v. Pyett*. Hopefully, the court will resolve the confusion that has resulted from its earlier unwillingness in *Wright* to resolve the question of whether a collective agreement’s waiver of individual statutory rights can be enforceable.

Another troubling question is whether the waiver of individual rights to go to court on discrimination claims under a collective bargaining agreement, if such a waiver would be valid, would be a mandatory subject of collective bargaining under the National Labor Relations Act (NLRA). If it is not a mandatory subject of bargaining, then neither party can insist on their position to the point of impasse. Also, it may be possible for the employer to bypass the union and require employees to sign individual agreements to employment arbitration (Hodges 2001). One Circuit Court of Appeals has held that the right of an employee to pursue an individual claim in court in the presence of an arbitration clause in a collective bargaining agreement is not a mandatory subject of bargaining under the Railway Labor Act. It concluded that an employer can, therefore, require an employee covered by a collective bargaining agreement to sign an agreement compelling him/her to arbitrate a discrimination claim (*Air Line Pilots Association v. Northwest Airlines, Inc.* 1999).

Another area of difficulty lies in the policies of the National Labor Relations Board (NLRB) with regard to arbitration of cases that may involve violations of the NLRA. At present the NLRB will defer to arbitration. It will generally overturn an arbitration award only if the award is ‘clearly repugnant’ to the NLRA (*Spielberg Manufacturing Co.* 1955; *Collyer Insulated Wire* 1971; *United Technologies Corp.* 1984). However lenient the NLRB’s standard of review, it still involves a review of an arbitrator’s decision on the merits. This would seem to be a more severe review than a court would give an employment arbitrator’s decision under the NAA. Yet here the employee’s claim is likely to get at least as good representation as it would get under employment arbitration. Here then is another area of uncertainty in the law that will have to be resolved, probably by the Supreme Court, in order for the law to have the necessary degree of predictability.

### 4 The evidence on employment arbitration

**A Who prevails?**

What are the implications of employment arbitration for workplace justice? There are myriad approaches to addressing this question. Perhaps the most fundamental approach is through a comparison of win rates and the amounts recovered by employees in employment arbitration as compared to litigation. Additional bases for comparisons include cost to
the parties, elapsed time to resolution, and standards for decision making across different forums. In this chapter we will focus on win rates, amounts recovered and standards for decision making.

In the wake of the *Gilmer* decision, several researchers have examined employee win rates in employment arbitration by utilizing data from the American Arbitration Association. Maltby’s (1998) widely cited study, for example, reported that employees prevailed in 63 per cent of the cases over the period of 1993–95. Similarly, Howard (1995) found employees won 68 per cent of the cases. In several separate studies, Bingham has reported employee win/loss percentages in employment arbitration. Analyzing cases decided under the AAA Commercial Arbitration Rules in 1992, she found no systematic bias in favor of employers (Bingham 1995). Her subsequent study of 270 AAA cases in 1993 and 1994 showed employees winning 63 per cent of the time (Bingham 1997). When the case involved an individual contract of employment, the employee prevailed 69 per cent of the time as compared to only 21 per cent of cases involving the provisions of a personnel manual (Bingham 1998).

While these early studies produced a largely consistent pattern of results, two separate studies show that employee outcomes vary with the characteristics of the case. In their sample of 297 AAA arbitration awards from 1999 and 2000, Eisenberg and Hill (2003) found differences between civil rights cases and non-civil rights cases. Specifically, employees earning less than $60,000 annually won 24.3 per cent of civil rights cases and 39.6 per cent of non-civil rights cases. In contrast, higher pay employees won 40 per cent of cases involving civil rights allegations and 64.9 per cent of all other cases. Wheeler et al.’s (2004) study of published employment arbitration reports covering the years 1999 to 2001 found that in statutory discrimination cases employees prevailed in just 22 per cent of the cases, whereas they won 56 per cent of all cases involving explicit employment contracts.

In a slightly more controversial comparison, Bingham (1995, 1998) found a divergent pattern in award outcomes that appeared to be related to the level of experience the employer has with arbitration. In a more recent study, Bingham and Sarraf (2004) found the employees won only 29 per cent of the cases where the employer was a repeat user of employment arbitration. When the employer had no prior experience, employees won 62 per cent of the time. Most recently, Colvin (2007) found a similar bias against employees who went up against employers who were repeat users of arbitration. Labeled the ‘repeat player effect’, this pattern of results suggests that employers gain an advantage over employees in arbitration hearings because of their repeated usage (Bingham 1997). Bingham (1997, 1998) has argued that this advantage would accrue to employers through their ability to knowingly select more employer-favorable arbitrators.
While the repeat player effect is not without its challenges and criticisms (Hill 2003; Sherwyn et al. 2005), the relatively consistent pattern in the outcomes cannot be ignored. However, the explanation for this advantage remains largely unanswered. As Colvin (2007) notes, there are several alternative explanations, including an experience effect whereby employers gain expertise in the process through repeated usage. Hill (2003) suggests that repeat employers tend to be larger organizations with defined internal dispute resolution mechanisms in place that serve to resolve or screen out meritorious cases.

Studies of employment arbitration cases decided in the securities industry provide a more mixed picture. Kaswell’s (1998) study of arbitration cases between 1992 and 1998 showed those employees registered with the New York Stock Exchange (NYSE) winning in 38.5 per cent of the cases, and those registered with the National Association of Securities Dealers (NASD) winning 32.6 per cent of the time. A study of cases decided between 1990 and 1995 (Bompey and Stempel 1995) found employees winning in NYSE cases 41 per cent of the time and in NASD cases 24 per cent of the time. Other studies have shown employees winning in securities industry cases 43 per cent (Bompey and Pappas 1993–4), 55 per cent (GAO 1994) and 48 per cent (Howard 1995) of the time.

The above literature review shows that the outcomes vary depending on the data set and the period studied. What is clear, however, is that employee’s likelihood of prevailing drops precipitously when the case involves a statutory claim versus an individual contract of employment. Beyond this trend, simply looking at employment arbitration win/loss outcomes in isolation is not particularly instructive. Rather, it is perhaps most useful to compare the above pattern of outcomes to those reached in federal courts and also in labor arbitration tribunals, particularly given the role employment arbitration has played either as a substitute for litigation and/or as part of an organization’s union avoidance strategy (Colvin 2003).

In their review of published labor arbitration reports from 1994 to 2002, Wheeler et al. (2004) found that employees were reinstated with or without back pay in just over half of the cases (52 per cent). In an earlier review, the aggregate pattern of wins for the employee was slightly less at 50.1 per cent (Dilts and Deitsch 1989). As with employment arbitration awards, the likelihood of the employee prevailing varied considerably with the characteristics of the case. For example, employees were least likely to prevail (43 per cent) when the case involved a promotion or demotion decision, while they were most likely to prevail in wage and hour cases (58 per cent), discharge cases (60 per cent) and cases involving terms and conditions of employment (62 per cent) (Haber et al. 1997).

There is some limited evidence with respect to state court outcomes in
wrongful termination cases. Two studies in California concluded that employees were winning between 68 per cent (Dertouzas et al. 1988) and 70 per cent (Jung and Harkness 1988) of the time. Using data from Cornell University including cases terminated between 1 July 1991 and 30 June 1992, state civil court filings were found to be decided in favor of the employee 64 per cent of the time (Estreicher 2001). An analysis of state court claims in 1996 found that the employee prevailed in 56.6 per cent of non-civil rights cases and 43.8 per cent of cases involving civil rights violations (Eisenberg and Hill 2003).

As might be expected, the greatest amount of scholarly attention has been paid to the outcomes in Federal courts. An early study of employment discrimination cases in Federal courts found that employees received at least a partial remedy in 24 per cent of the cases (Burstein and Monaghan 1986). Maltby (1998) reported employees winning 14.9 per cent of their cases in 1994. A study of Federal District Court cases decided in 1992–4 found that only 8 per cent of the cases filed went to trial. On the other hand, where there was a disposition of the case, employees got ‘some recompense’ 71 per cent of the time. However, when the case went to trial, employees won only 28 per cent of the time, although they did better when a jury decided the case, winning 38 per cent of these cases (Howard 1995). A later study (Litras 2000) found that employees won 23.8 per cent of the discrimination cases terminated by trial verdicts in 1990, and 35.5 per cent in 1998. Research reported in the Wall Street Journal in 2001 found that employees won in Federal District Court in about 30 per cent of discrimination cases (Bravin 2001). In their review of Federal District-Court Civil Cases (1987–2000), Wheeler et al. (2004) found that the employer prevailed in 84 per cent of the cases. This rate increased slightly to 88 per cent when looking just at the period between 1996 and 2000. Eisenberg and Hill (2003), examining Federal court discrimination trials from 1999–2000, found a much lower win rate for employers at 63.6 per cent.

Lastly, there have been a few studies comparing outcomes in specific kinds of employment discrimination cases. An analysis of Age Discrimination in Employment Act cases found that employees won 25 per cent of the time. On appeal the employer won 68 per cent of the time (Eglit 1997). An American Bar Association study of Americans with Disabilities Act cases between 1992 and 1998 showed employees winning in only 8 per cent of cases (Parry 1998).

While reliance on published rulings provides an accurate picture of the absolute number of times employees prevail in employment disputes, caution must be used when directly comparing the experiences of employees in employment arbitration to their experience in the courts. A major problem is that there are no reliable data on the proportion of cases that are
settled favorably to employees prior to going to court. There is anecdotal evidence that as many as 64 per cent of employment discrimination cases handled by lawyers are settled favorably to the employee (Bell 2002). One survey found that between 79 and 84 per cent of the court cases were settled prior to final adjudication (Howard 1995). Settlements of arbitration cases were not as common – between 31 and 44 per cent of the cases. It is believed that this is because arbitration is but the final step in a process in which most claims are resolved, which makes it likely that the possibilities for settlement have been fully explored prior to filing for arbitration (Howard 1995).

Since many of these cases may never get to court, it must be kept in mind that it may well be that litigation or its threat may be much more powerful than available statistics can show. On the other hand, it seems that only a small proportion of claimants are able to secure a lawyer to handle their claim. There is evidence that only about 5 per cent of the cases brought to employment lawyers are accepted by them (Howard 1995; Meeker and Dombrink 1993).

For cases that do reach adjudication either in the court system or before an arbitrator, the decision outcomes are heavily influenced by the idiosyncratic aspects of the individual circumstances. Simple comparisons of win rates, however, cannot adequately account for these differences beyond rudimentary classifications such as statutory claims versus disputes over contracts of employment. Thus it is highly problematic to reach conclusions regarding outcomes and then to try and discern patterns in decision making from these simple comparisons of win rates. To overcome this weakness, some researchers have turned to experimental simulations to capture differences between the varied categories of decision makers.

In an early study, Bingham and Mesch (2000) compared the evaluative decisions regarding an employment dispute of: (i) employment arbitrators, (2) labor arbitrators, (3) arbitrators drawn from the National Academy of Arbitrators, and (4) a student population. Each decision maker was given one hypothetical case to evaluate where an employee was challenging their termination. Within the context of this study, the frequency of ruling in favor of the employee was far greater for NAA arbitrators or labor arbitrators than it was for employment arbitrators. While this pattern of results may not be surprising, Bingham and Mesch (2000) conclude that employment arbitrators take a much more narrow view of their remedial powers when compared to labor arbitrators. In a more recent study, Wheeler et al. (2004) posed a more comprehensive set of cases to a wider array of decision makers. Specifically, they compared the decisions of employment arbitrators, labor arbitrators, jurors, peer review panelists, human resources managers and labor court judges from several other countries. They found that labor arbitrators (55 per cent) and labor courts judges (51 per cent)
were the most likely to rule in favor of the employee. A summary of their findings is set out in Table 13.1. Interestingly, the two categories of decision makers that were members of the organization, human resource managers and peer review panelists, were nearly identical in their responses, with both being more likely than jurors or employment arbitrators to rule in the employee's favor. Employment arbitrators evaluating statutory only cases, followed by employment arbitrators deciding under a just cause standard, were the least likely to find for the employee. And lastly, jurors fell in between employment arbitrators and peer panelists.

Together, these findings suggest that employees are likely to prevail less often under these alternative dispute forums, particularly employment arbitration, than they would had they been able to adjudicate their case in courts system. Thus, they call into question the claims by some that employment arbitration is a viable substitute for litigation. However, simply examining who prevails in these tribunals ignores the component of justice process and that is the amount awarded. We next turn to a comparison of award amounts across the various dispute resolution forums.

### B Amounts recovered

There have been several empirical examinations of the amounts awarded in employment arbitration. Comparing award outcomes provides a constructive dimension along which to evaluate the efficacy of differing dispute resolution forums. The results of these studies, however, are often confounded by unmeasured idiosyncratic differences between the cases. For example, a substantial portion of the available cases involve individual

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**Table 13.1  Percentage of rulings likely to be in favor of the employee across all cases: by decision maker**

<table>
<thead>
<tr>
<th>Decision Maker</th>
<th>% of Cases Where Likely Ruling in Favor of Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labor Arbitrator</td>
<td>55</td>
</tr>
<tr>
<td>Employment Arbitrator: Statutory Claims</td>
<td>25</td>
</tr>
<tr>
<td>Employment Arbitrator: For Cause Requirement</td>
<td>33</td>
</tr>
<tr>
<td>Peer Review Panelist</td>
<td>45</td>
</tr>
<tr>
<td>Juror</td>
<td>38</td>
</tr>
<tr>
<td>HR Manager</td>
<td>46</td>
</tr>
<tr>
<td>Labor Court Judge</td>
<td>51</td>
</tr>
</tbody>
</table>

Note: A ruling was classified as likely to be in favor of the employee when a decision maker selected response of 5 or higher on the 7 point response scale. Scale value 5 was anchored with ‘likely to rule in favor of the employee.’
contracts of employment covering individuals with significant incomes. Nevertheless, such comparisons are meaningful.

In her survey of 91 AAA cases, Bingham (1998) found a mean award amount of $49,030; this amount increased to $94,288 when cases where the employer won were excluded (Colvin 2007). In their examination of AAA employment arbitration cases decided between 1999 and 2000, Eisenberg and Hill (2003) reported a median award amount of $13,450 (mean award of $30,732) for lower-paid employees (those earning less than $60,000) in non-civil rights cases. Among higher-paid employees in non-civil rights cases the median award jumped to $94,984 (mean award of $211,720). In contrast, the median award arising from non-civil rights cases adjudicated at the state court level in 1996 (adjusted to the dollar value in the year 2000) was $68,737 (mean award amount of $462,307). As Eisenberg and Hill note, the difference between verdicts at the state court level and at the arbitrator level were not statistically different for high-paid employees; however, among low-paid employees these differences are significant.

Although plagued by data errors and by the dearth of available cases, Eisenberg and Hill (2003) show substantially higher award amounts at the federal and state trial level when the cases involve civil rights claims. Likewise, in AAA cases involving civil rights claims, the median award increased to $56,096 for low-paid employees and decreased to $32,500 for high-paid employees. In their review of employment discrimination claims decided at the federal level between the years 1994–2000, Eisenberg and Schlanger (2003) calculated the median jury award to be $110,000. This amount is substantially higher than the median award of $42,624 given by employment arbitrators (Colvin 2007).

A few studies examined differences in decision-maker characteristics and backgrounds and the amount of damages awarded in employment dispute cases. In one of the earlier studies, Bingham and Mesch (2000) found no differences between labor arbitrators and employment arbitrators in the amount of compensatory damages awarded. The hypothetical case used in this study clearly indicated that the employer did not engage in willful discrimination; consequently, the decision makers could only choose the amount of back pay awarded and could not assess punitive damages. Using a policy-capturing approach, Mahony and Klaas (2008b) compared how jurors and employment arbitrators use information about both the employer and employee in determining damages in wrongful termination cases involving allegations of statutory discrimination. The cases presented in this study varied in the strength of evidence suggesting the employer was willfully engaging in discrimination. The decision makers were therefore able to choose between finding for the employer, finding the employer engaged in discriminatory conduct but not willfully, and willful
discrimination. Their results show that decisions to award compensatory damages were influenced by both the extent to which blame could be attributed to the employee and information about employee wrongdoing. While the statute would appear to dictate that only information that demonstrates willful intent on behalf of the employer should be used when determining award punitive damages, this decision was often influenced by the employee’s background and behavior. For example, the decision maker’s willingness to provide punitive damages increased in cases where the employee was seen as less to blame or when he/she had a long and positive work history.

In direct comparisons between jurors and employment arbitrators, this same study found that jurors were two times more likely than employment arbitrators to award both punitive and compensatory damages (Mahony and Klaas 2008b). Jurors further differed from employment arbitrators in the weight assigned to employee characteristics. Specifically, when compared to employment arbitrators, jurors were more likely to award damages when the employee had a history of sustained contributions to the organization or when the employee reported a recent adverse personal event.

Overall, these studies reveal a persistent pattern of differences that exist in both the absolute amounts recovered by the employee and in the probability of the employee prevailing. Broadly speaking, when challenging discharge cases, particularly statutory claims, employees appear disadvantaged when they are required to use employment arbitration. However, to some extent these differences may be attributable to the characteristics of those who utilize these systems. For example, a benefit often associated with employment arbitration is its relatively low cost and greater accessibility to lower-income employees. Thus, damage amounts, which are often calculated as a proportion of the employee’s income, will be lower in employment arbitration precisely because more lower-income employees are using it versus litigation in the courts. Lastly, comparing differences between jury verdicts and employment arbitration awards does not account for settlements prior to litigation or settlements after appeals litigation – both of which are less likely to occur when the employer adopts employment arbitration.

C Why outcomes vary
Klaas et al. (2006) found stable differences existed across types of decision makers in the willingness to both rule in favor of the employee and in the weights assigned to differing case characteristics. Some of the observed differences are due to structural differences between the various forums, such as the presence of codified norms within labor arbitration that support consideration of mitigating circumstances that do not exist in employment
arbitration (Cooper et al. 2000). However, they found further differences in overall evaluative tendencies between labor arbitrators and employment arbitrators judging cases with a for cause provision and again between jurors and employment arbitrators judging cases only with statutory elements (Klaas et al. 2006). Differences between jurors and this same category of employment arbitrators were magnified when the employee had a long and positive record of employment or if the employee revealed evidence of recent personal difficulties. Together, these pairwise differences suggest that the outcomes from employment disputes are impacted by the backgrounds of the decision makers.

There are several possible reasons for employment arbitrators deciding against the employee more frequently. For example, in responding to our survey, only 46.6 per cent of employment arbitrators said that they would overturn a termination for violating a rule that was clearly unreasonable. We believe that all labor arbitrators would do this. Also, 33.3 per cent of employment arbitrators stated that they would uphold a termination so long as the employer acted in good faith. We believe that virtually no labor arbitrators would do this. Also, in labor arbitration cases, the burden of proof is always on the employer to prove that the employee committed the offense that led to the termination. This is ordinarily not the case in employment arbitration.

One concern that has received some attention is the repeat player effect. While empirical evidence of this effect remains unclear, the belief is that employers and not individual employees will be multiple users of the procedures. Hence, an advantage will be given to employers who are repeat users (Bingham 1995). In part, this advantage is derived from the differences in the selection of labor arbitrators versus employment arbitrators. To be selected, a labor arbitrator must be acceptable to both management and the union. In employment arbitration, the employee is not likely to be a repeat player; however, the employee’s counsel may be (Colvin 2007). Proponents of the repeat player effect argue that the concern to remain acceptable to employers will bias employment arbitrators and lead to fewer employee-favorable outcomes.

A number of scholars have examined relationships between the decision outcomes in arbitration tribunals and the backgrounds and characteristics of the arbitrators. Particular attention has been given to the decision maker’s prior experience (expressed as years or number of cases), occupation, gender and whether or not they held a law degree (see, for example, Bemmels 1997; Nelson and Curry 1981; Oswald and Caudill 1991; McCammon and Cotton 1990; and Thornton and Zirkel 1990). However, these studies focused exclusively on labor arbitrators and have yielded a pattern of mixed or contradictory results.
Among the first to focus on employment arbitrators, Bingham and Mesch (2000) compared the responses of labor arbitrators and employment arbitrators to a hypothetical case. As discussed earlier, employment arbitrators were significantly less likely than labor arbitrators to rule in favor of the employee; however, the statistical significance of this difference disappeared when background characteristics of the decision makers were added to the analysis. Lastly, in their survey of employment arbitrators, Wheeler et al. (2004) reported that a significant percentage (48 per cent) of employment arbitrators had previously served as an advocate for the employer. In contrast, only 18 per cent indicated previously serving as an employee advocate. This prior professional experience may increase the extent to which arbitrators identify with the interests of the employer, thus lowering the probability of employee-favorable outcomes (Klaas et al. 2006). However, little evidence has been examined regarding differing arbitrator backgrounds and experiences within employment arbitration. To examine the effects of arbitrator characteristics and prior experiences on decision outcomes we matched the results from a policy-capturing exercise with the responses to a separate survey on employment arbitrator background and perceptions.

Respondents for both surveys were randomly selected from (1) National Academy of Arbitrator members who identified themselves as practicing employment arbitrators; (2) a list of employment arbitrators provided by the American Arbitration Association; and (3) employment arbitrators identified from published sources, including those listed with the Judicial Arbitration and Mediation Service. The employment arbitration questionnaire was sent to 807 employment arbitrators. As a second step, we randomly selected 550 employment arbitrators and sent them a decision-making exercise that consisted of 32 cases where an employee was challenging their termination. They were each asked to make their decisions as they would when the arbitration agreement stipulated that all statutory employment disputes claims must be submitted to employment arbitration. Half of the respondents received instructions that the employer adhered to their employment-at-will policy, while the latter half received instructions that all terminations must be ‘for-cause’. We received 72 completed instruments in the at-will condition for a 32 per cent response rate and 68 completed instruments in the for-cause condition for a 30 per cent response rate. Overall, we were able to match 116 of arbitrator responses to the decision-making exercise (54 in the at-will condition) with their responses to the arbitrator questionnaire.

If the respondent indicated that they had served as an advocate in employment tribunals in which a majority of the work was on behalf of the employer, their response on the variable ‘Advocate’ was coded 1, and 0
otherwise. If the respondent indicated that they previously served as a judge, their response on the variable ‘Judge’ was coded 1, and 0 otherwise. If they indicated that they had previously served as a labor arbitrator under a collective bargaining agreement, their response on the variable ‘Labor Arbitrator’ was coded 1, and 0 otherwise. If the respondent indicated that in the absence of an express provision regarding the burden of proof they would find for the employer if the employee failed to show that the termination was not for cause, their response on the variable ‘Burden of Proof’ was coded 1. If they responded that they would find for the employee if the employer failed to show that the termination was for cause, their response on this variable was coded 0. If the decision makers’ instructions on the survey instrument indicated that terminations must be ‘for cause’ their response on the variable ‘For Cause’ was coded 1. If the instructions stated the employer has a policy of at-will employment, their response on this variable was coded 0. The remaining variables (Evidence, Discrimination, Compliance, Provocation Work History and Mitigating Circumstances) each reflect characteristics about the case as presented to the decision makers and are treated as control variables (see Klaas et al. 2006 for a more complete description).

The results from the regression analysis are presented in Table 13.2. The dependent variable, Decision, measured the likelihood that the decision maker would rule in favor of the employee. It was coded on a seven-point Likert-type scale where 1 equaled ‘Highly unlikely’ and 7 equaled ‘Highly likely’.

Having prior experience as an employer advocate was negatively related to ruling in favor of the employee ($\beta = -0.195, p < 0.05$). Employment arbitrators who have previously served as an employer advocate are less likely to rule in favor of the employee than those who either have never served as an advocate, or if they have, then the majority of that time was spent representing the employee. Prior experience as a judge was also negatively associated with ruling in favor of the employee ($\beta = -0.187, p < 0.10$). The arbitrator’s latent perceptions regarding the burden of proof falling upon the employee was negatively associated with a ruling in favor of the employee ($\beta = -0.280, p < 0.05$). The amount of prior experience as an employment arbitrator as measured by the number of cases heard was not statistically significant. Likewise, the relationship between the decision outcome and the employment arbitrator having prior experience as a labor arbitrator in collective bargaining agreements was not statistically significant.

From the above analysis, it appears that the background characteristics of the decision maker influence their decision outcomes in a meaningful way. The apparent pro-employer bias found among those employment arbitrators with little or no prior experience representing employees
may serve to further exacerbate the already significant advantage that employers enjoy in this process. Unlike an employee’s union-provided representative in a labor arbitration hearing, those representing employees in employment arbitration are less apt to be repeat customers. Thus,

### Table 13.2  Regression analysis for the effects of arbitrator characteristics on decision outcome (standard errors in parentheses*)

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficients</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Independent</strong></td>
<td></td>
</tr>
<tr>
<td>Employer Advocate</td>
<td>−0.195**</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
</tr>
<tr>
<td>Judge</td>
<td>−0.187*</td>
</tr>
<tr>
<td></td>
<td>(0.11)</td>
</tr>
<tr>
<td>Burden of Proof on Employee</td>
<td>−0.280**</td>
</tr>
<tr>
<td></td>
<td>(0.12)</td>
</tr>
<tr>
<td>Labor Arbitrator</td>
<td>0.050</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
</tr>
<tr>
<td>Number of Employment Arbitration Cases</td>
<td>0.040</td>
</tr>
<tr>
<td></td>
<td>(0.034)</td>
</tr>
<tr>
<td><strong>Control</strong></td>
<td></td>
</tr>
<tr>
<td>Strength of Evidence Presented</td>
<td>−0.943***</td>
</tr>
<tr>
<td></td>
<td>(0.07)</td>
</tr>
<tr>
<td>Evidence of Procedural Compliance</td>
<td>−0.746***</td>
</tr>
<tr>
<td></td>
<td>(0.07)</td>
</tr>
<tr>
<td>Evidence of Discrimination</td>
<td>0.669***</td>
</tr>
<tr>
<td></td>
<td>(0.06)</td>
</tr>
<tr>
<td>Evidence of Supervisory Provocation</td>
<td>0.154***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
</tr>
<tr>
<td>Prior Positive Work History</td>
<td>0.591***</td>
</tr>
<tr>
<td></td>
<td>(0.05)</td>
</tr>
<tr>
<td>Evidence of Mitigating Personal Circumstances</td>
<td>0.106***</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
</tr>
<tr>
<td>For Cause Instructions</td>
<td>0.346***</td>
</tr>
<tr>
<td></td>
<td>(0.10)</td>
</tr>
<tr>
<td>Constant</td>
<td>40.44***</td>
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<tr>
<td></td>
<td>(0.18)</td>
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<tr>
<td><strong>R</strong>²</td>
<td>0.351</td>
</tr>
<tr>
<td><strong>N</strong></td>
<td>3238</td>
</tr>
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</table>

Notes:  * A modified Huber/White Sandwich estimate of the variance was used to produce coefficients that are unbiased for cluster-correlated data.  † Number of observations based on 112 arbitrators each responding to 32 cases.  
* p < .10; ** p < .05; *** p < .01
this lack of *a priori* knowledge about the arbitrator’s background and decision-making history may potentially garner the employer a further unfair advantage.

5 Conclusions

Some seven years after the US Supreme Court’s decision in *Circuit City v. Adams*, it appears that alternative dispute resolution procedures, particularly employment arbitration, have become a part of the American legal landscape. Although the law is not completely settled, the courts have pretty well established the requirements of an employer-promulgated employment arbitration system that will pass legal muster, not be viewed as unconscionable and therefore be enforceable. Yet, if the aim of the Supreme Court in *Circuit City v. Adams* was to limit litigation, the large number of cases reported in the last three or four years would seem to indicate that this goal has not yet been reached. Instead of litigating the merits of statutory cases, the parties are litigating the enforceability of employment arbitration clauses in employment policies. As can be seen from the activity in Congress regarding the Arbitration Fairness Act of 2007, the idea of mandatory employment arbitration is still a matter of concern to makers of American public policy. Yet, this and similar pieces of legislation have so far not gained much traction. As suggested by one of the witnesses before the US Senate Committee, a more realistic approach might be to regulate this process rather than to destroy it.

Lastly, a number of significant questions remain regarding the ability of employment arbitration to serve the needs of employers while providing employees with an equitable system of workplace justice. If employment arbitration is indeed litigation by another forum, then are employees really better off or is justice being denied? The empirical evidence seems mixed in large part due to differences in the types of cases being arbitrated. One potentially disturbing trend is nevertheless emerging; employees involved in statutory claims fare less well when the outcome is determined by an arbitrator than when the outcome is determined by a jury. Arguably, however, employees have greater opportunity, particularly lower-wage employees, to pursue a claim through arbitration compared to litigating their claim through the more costly and formal court systems.

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