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I. INTRODUCTION
II. ARBITRATION: THE PROCESS AND ITS PROGRESS
III. ARBITRATION: THE PERCEPTION
IV. CONCLUSION
OF TEN W RONG, NEVER IN DOUB T: HOW ANTI- ARBITRATION EXPECTANCY BIAS MAY LIMIT ACCESS TO JUSTICE

Becky L. Jacobs*

I. INTRODUCTION

It is an honor to be a part of the Maine Law Review’s “Accessing Justice in Hard Times: Lessons from the Field, Looking to the Future” symposium issue. Not only is the symposium’s theme particularly relevant in our current economic environment, it also provides those of us in the “Alternative Dispute Resolution” (ADR) field with an opportunity to reflect upon and return to the roots of our movement and to advance our cause and encourage others to join us.

While there long have been “alternatives” to the traditional trial for those seeking to resolve disputes, the so-called “litigation explosion” in the 1970s inspired a campaign for reform of the administration of justice that resulted in the modern ADR movement. The movement had many disparate goals, not the least of which was to improve public access to justice. At the historic 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference), Harvard Law Professor Frank E.A. Sander first posited the concept of a “comprehensive justice center,” more famously referred to as a “multi-door courthouse,” in which a grievant’s dispute would be evaluated and directed to the most appropriate process or sequence of processes. “Room 3” in Professor Sander’s Multi-Door Courthouse/Dispute Resolution Center was listed in the lobby’s directory as Arbitration, the alternative process on which this Article will focus.

The question that I pose herein is whether popular (mis)conceptions about

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1. “Alternative Dispute Resolution” is a phrase most commonly associated with the acronym “ADR.” There are those, however, who have suggested that the more accurate phrase might be “Appropriate Dispute Resolution,” a more inclusive phrase that describes the full panoply of dispute resolution options, including litigation. See, e.g., LEO NARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 20-21 (4th ed. 2009); DICTIONARY OF CONFLICT RESOLUTION 17-20 (Douglas H. Yarn ed., 1999).

2. For a survey of just a few of these methods, see STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-7 (5th ed. 2007).


7. Sander, supra note 6.
Arbitration may actually be preventing some of those who are most in need from receiving the legal relief they seek. Before I reflect upon that query, however, a bit of background may be in order.

II. ARBITRATION: THE PROCESS AND ITS PROGRESS

Arbitration is a “method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.” The process has a storied historical pedigree, both in the United States and internationally. Most people associate arbitration with the Judgment of Solomon, a reference to the biblical account of King Solomon’s decision to “split the baby” with a sword to settle a dispute between two women claiming to be the child’s mother. Ancient civilizations such as the Greek and Roman empires utilized arbitration to settle internal and external disagreements. It also became popular in the late nineteenth and twentieth centuries for specialized industries to resolve intra-industry disputes with arbitration.

However, while parties, industries, and nations have incorporated arbitration into their dispute resolution practices, courts were not always as receptive to the process. The conventional wisdom is that American courts, like their British common law counterparts, were hostile to arbitration agreements and were reluctant to enforce them. An oft-quoted passage by Justice Story is representative of this period of judicial hostility:

One of the established principles of courts of equity is, not to entertain a bill for the specific performance of any agreement, where it is doubtful whether it may not thereby become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected. Now we all know, that arbitrators, at the common law, are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?

New York was the first state to enact legislation to counter this perceived

8. BLACK’S LAW DICTIONARY 112 (8th ed. 2004).
judicial hostility, and the United States Congress followed shortly with the Federal Arbitration Act of 1925 (FAA). The FAA was the expression of “a national policy favoring arbitration,” and it mandated enforcement of parties’ pre-dispute agreements to arbitrate. Pursuant to the FAA, Congress limited the role of the judiciary in the merits of contractually-agreed arbitration matters. The FAA served as the model for the Uniform Arbitration Act, promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and enacted in some form or in its revised form in nearly every state in the nation.

Following the enactment of these affirmatory legislative developments and following a series of United States Supreme Court cases that expanded the scope of the FAA, arbitration clauses requiring that parties submit their disputes to binding arbitration became customary in contracts in a broad spectrum of settings. For example, standard consumer contracts for credit cards and other consumer loans, product purchases, real estate, construction, utilities, auto and home insurance, and health care contain mandatory arbitration clauses. Sherman Act antitrust claims are arbitrable, as are disputes between and among investors, securities firms, and

25. Mitsubishi Motors Corp., 473 U.S. at 616, 640.
individual investment advisors. Franchise contracts also frequently demand that disputes be resolved by arbitration. In the workplace, mandatory pre-dispute resolution clauses often require that employees submit all claims arising from or related to their employment to compulsory arbitration, including statutory discrimination claims. In unionized workplace environments, arbitration has long been a fixture in dispute processing. Collective bargaining agreements specify multi-step grievance procedures to resolve disputes, the vast majority of which culminate in binding arbitration. Non-union employees also have been required by their employers to sign contracts containing pre-dispute arbitration clauses as a condition of their employment.

In spite, or perhaps because, of its pervasiveness, however, arbitration has become the focus of renewed hostility in the public, in courts, and in legislatures.


28. See Leona Green, Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution, 12 NOTRE DAME J.L. ETHICS & PUB. POL‘Y 173, 173 (1998). In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991), the United States Supreme Court held that an employee's age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA) was subject to mandatory arbitration pursuant to an arbitration clause set forth in the employee's New York Stock Exchange registration application. This holding has been expanded to require arbitration of employee federal discrimination claims pursuant to Title VII, section 1981, of the Americans with Disabilities Act, and various other anti-discrimination laws, including the Equal Pay Act, the Fair Labor Standards Act, and the Rehabilitation Act. Steven M. Warshawsky, Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims, 19 LAB. LAW. 285, 294-95 & nn.79-85 (2004). “Indeed, it is now well-established that all federal laws prohibiting workplace discrimination may be the subject of compulsory arbitration agreements.” Id. at 295.


This dissatisfaction with the process is not new; opponents of arbitration have lobbied for changes to the FAA or for “reform” legislation for many years. These efforts have been focused on so-called “mandatory”32 pre-dispute arbitration agreements in contracts between parties with unequal bargaining power, for example, employment and franchising agreements and those for consumer goods and services.33

Reform legislation generally prohibiting enforcement of mandatory pre-dispute arbitration agreements in the context of all employment discrimination and other federal employment statutory claims has been proposed,34 as have bills that would specifically amend a number of federal civil rights statutes to preclude the enforcement of pre-mandatory arbitration provisions in pre-dispute agreements relating to claims arising under these statutes.35 Courts also have begun to more aggressively review arbitration agreements, using concepts such as unconscionability or public policy to refuse to enforce mandatory pre-dispute arbitration clauses.36

These efforts to limit or restrict the imposition of mandatory pre-dispute arbitration, however, have been “largely perfunctory.”37 It is only recently that they have gained traction, attributable, some have opined, to the composition of the new administration.38 As one Commentator so poetically described, “What otherwise might have been a tempest in a teacup has grown into a full fledged tornado.”39 Fueled by the rising tide of public anger in the wake of the economic crisis, opponents of arbitration forcefully have made their case, arguing, among

32. Some find the adjective “mandatory” to be inaccurate:
   What [others] call[ ] mandatory arbitration is better called contractual arbitration because it, unlike some other arbitration, does not occur unless the parties to the arbitration have previously formed a contract stating their agreement to arbitrate the dispute. Arbitration is not mandatory when it arises out of a contract, because contracts are formed voluntarily. The rare cases in which consent to a contract is involuntary—as when “A grasps B's hand and compels B by physical force to write his name” to the signature line of a contract, or when A puts a gun to B's head and says “sign or I'll shoot”—result in contracts that are voidable on the ground of duress. In the absence of duress, it is inaccurate, as well as overly dramatic, to say that a contract containing an arbitration clause results in arbitration that is involuntary or mandatory.


33. See, e.g., Sternlight, supra note 32, at 82-84.


37. Carbonneau, supra note 31, at 984.

38. Id.

other negative consequences, that mandatory pre-dispute arbitration clauses in “adhesion” consumer product and services contracts and employment agreements are not the product of voluntary bargaining; that private arbitration is not a proper forum for the resolution of disputes implicating important civil rights; that arbitration requires individuals to surrender their right to a jury trial; and that arbitrators are captive to “repeat players” and produce unfair results.40

The first proposal in response to this highly publicized anti-arbitration campaign was the Arbitration Fairness Act of 2007,41 a “radical” amendment to the Federal Arbitration Act that would virtually eliminate the binding effect of pre-dispute arbitration clauses in contracts involving consumers, employees, and, to some degree, franchisees.42 More recently, two other proposals have surfaced. The first, the Arbitration Fairness Act of 2009 (AFA), would render pre-dispute arbitration agreements unenforceable for “an employment, consumer, or franchise dispute[]” or “a dispute arising under any statute intended to protect civil rights.”43 The second, the Consumer Fairness Act of 2009, would make pre-dispute arbitration agreements in consumer contracts unenforceable as “an unfair and deceptive trade act or practice.”44

Who could argue against such reforms, one might ask? “As the bill’s title suggests, this reform movement is ultimately about fairness, and who can be against fairness?”45 Most certainly, these concerns not only are valid, but also are, on the whole I believe, well-intentioned,46 and it seemingly has been difficult for arbitration’s defenders to mount an effective rebuttal without appearing to be out to get the “little guy”47 and to

42. See Rutledge, supra note 40, at 267-68.
45. Rutledge, supra note 40, at 267.
46. But see Carbonneau, supra note 31, at 984-85. Professor Carbonneau asserts that some arguments posited by anti-arbitration advocates are disingenuous:

[T]he anti-arbitration sentiment in the U.S. Congress has been fueled and financed by the American Trial Lawyers’ Association (ATLA) and encouraged by other lobbyist groups, like Public Citizen. While all the opponents of arbitration pay reverence to the Constitution and to the sanctity of legal rights, . . . [and] a proclaimed concern for disadvantaged parties and their plight in society[,] . . . [t]he virulence of the critics is motivated by the need to control the measure and implementation of the rule of law; it is not a concern about the rule of law itself. In the final analysis, the interests of the average citizen are irrelevant; what is truly important is who decides how society is governed and who controls the administration of justice.

Id. (footnotes omitted).
47. Professor Jean R. Sternlight has used the phrase “little guys” to describe “consumers, lower level employees, and perhaps certain franchisees and small businesses that could not be expected to knowingly and voluntarily negotiate arbitration clauses in advance.” Sternlight, supra note 32, at 82 n.3 (citing Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 WASH. U. L. QUARTERLY. 637, 637-39 (1996)).
be wholly biased in favor of “big business.” Yet, one must ask whether these very passionate anti-arbitration claims are as clear cut as those making them would have the public believe. Are they supported by overwhelmingly irrefutable data demonstrating the nefariously inflicted harm to the “little guys” that the legislation is designed to protect?

III. ARBITRATION: THE PERCEPTION

To be clear, I am not advocating for or against the reforms embodied in the AFA. However, I would like to take a step back from the inflammatory rhetoric with which we all are being bombarded and consider whether at least some of the arbitration reform advocacy may be based upon the expectancy bias of the advocates. In psychology and cognitive science, expectancy bias, a form of confirmation or confirmatory bias, is the tendency to search for or interpret data in such a way that supports one’s preconceptions, beliefs, expectations, or hypotheses and to discount information that would disconfirm these existing opinions.

Studies indicate that the public generally has a strongly negative opinion of arbitration and perceives it to be an unfair process. Yet, this perception does not appear to be unequivocally supported by available empirical data on arbitral results across a variety of subject matter disputes and disputants, including those involving consumers, individual investors, and employees.


49. Consider, for example, the language of Public Citizen’s advocacy: “Forced arbitration creates a systemic bias in favor of businesses while offering few, if any, meaningful deterrents against negligence or even foul play.” ZACHARY GIMA ET AL., PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 4 (2009), http://www.citizen.org/documents/UnfairAndEverywhere.pdf [hereinafter PUBLIC CITIZEN, FORCED ARBITRATION].


52. This Author does not purport to engage in a thorough evaluation of these data, and an exhaustive analysis thereof is beyond the scope of this Article. As the prominent arbitration scholar Professor Peter B. Rutledge has opined, a meaningful analysis of whether arbitration produces “good” results really involves two distinct inquiries. First, how should arbitral outcomes be measured? Once this normative question is resolved, the second question is: What do the data reveal? Email from Peter B. Rutledge, Associate Professor, Univ. of Ga. Law School, to Becky L. Jacobs, Associate Professor, Univ. of Tennessee College of Law (Oct. 26, 2009) (on file with author). My brief discussion conflates these two inquiries, as do many of the available data analyses on arbitral results. This is not a merely academic issue. Not only may expectancy bias influence data interpretation, it also can creep into study design, and it hampers an intelligent and coherent public debate on arbitration’s future.

53. See generally Rutledge, supra note 51.

54. See Cole & Frank, supra note 51, at 33.


56. See Peter B. Rutledge, Arbitration Reform: What We Know and What We Need To Know, 10 CARDOZO J. CONFLICT RESOL. 579, 582-83 (2009).
Consider consumer debt arbitrations, the focus of much recent controversy and study. A widely-cited report by the advocacy group Public Citizen concluded that arbitrators in consumer debt arbitrations are “[b]iased decision-makers” who essentially “rubber-stamp[] corporate claims” and produce “[s]tunning results that disfavor consumers” in 94 percent of cases.57 However, critical analysis of the data presented by Public Citizen to support these conclusions yielded a far different set of statistics, reporting that “consumers had at least partial success in 48.5 percent of the cases in Public Citizen’s data set, a far cry from the [one-sided] business success rate portrayed in Public Citizen’s report.”58 Other data examination support the conclusion that Public Citizen’s report misleadingly overstates the situation,59 including one analysis of 2006 consumer-filed cases administered by the American Arbitration Association (AAA) that calculated an 81 percent favorable outcome for the consumer through either an outright winning award or a voluntary settlement.60

These success rates compare favorably to results in consumer litigation. Comparative data demonstrate that consumers bringing arbitration claims against businesses prevail in 65.5 percent of cases that reach a decision, and the median duration from initial filing to final disposition is 4.35 months.61 In court, buyer plaintiffs litigating contract claims prevailed 61.5 percent of the time, 60.9 percent in cases decided by bench trials, and with a median “filing to final” duration of 19.4 months.62

In securities arbitration, the disparity between perception and “reality” also appears to be prevalent. While investors held strongly negative perceptions of both the arbitration process and of the bias of arbitrators before they even filed a claim leading to arbitration,63 analyses of securities arbitral awards provide that, in 2009, investors were awarded damages in 45 percent of cases.64 According to these data, investors received a monetary or non-monetary recovery in approximately 70 percent of customer claimant cases, through settlements or awards.65 Attempting to compare arbitral and judicial win/loss results in the securities context is difficult for a number of reasons. These reasons include (1) the differences between the

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58. Cole & Frank, supra note 51, at 32.
59. See SIEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 109-13 (2009); Cole & Frank, supra note 51, at 31-34.
62. Id.
65. Id.
arbitration and litigation processes, (2) the limited number of retail investor cases decided through litigation, and (3) the data that demonstrate that 25 percent of all investor claims are for less than $10,000 and, therefore, not cost effective to litigate.66 However, one older study reported that an average of 60 percent of investors received an award in securities arbitration; 39 percent of investors received favorable results in the very few cases that were decided in court.67

Employment cases follow this same expectancy bias pattern. While many believe that “[f]orced arbitration clauses effectively allow employers to shield themselves from the purview [of] employment laws,”68 the data once again do not conclusively support this contention. Data analysis of all of the employment cases administered by the AAA in 2006 yielded a 77 percent success rate for employees.69 While studies of other data sets yielded lower rates,70 the aggregate arbitral data71 compare favorably to the litigation alternative.72 A study by the National Workrights Institute reported that, overall, employees prevailed 62 percent of the time in arbitration, while they had a 43 percent win rate in court.73

While you know what they say about statistics,74 and about how reactive devaluation might impact what they say about these statistics,75 these data do suggest that expectancy bias plays at least some role in the overwhelmingly negative perception that many have of the arbitration process.

70. Studies demonstrate that employee win rates in all fora, both judicial and arbitral, are highly dependent upon the legal theory of the claim and were much lower when the case involved a violation of a civil rights statute. Lewis L. Maltby, Employment Arbitration and Workplace Justice, 38 U.S.F. L. REV. 105, 111 (2003).
71. Low-income employees appear to have much lower success rates in arbitration than higher earners. Rutledge, supra note 56, at 583.
72. Id. at 582-83.
74. “Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force: ‘There are three kinds of lies: lies, damned lies, and statistics.’” MARK TWAIN’S OWN AUTOBIOGRAPHY: THE CHAPTERS FROM THE NORTH AMERICAN REVIEW 185 (Michael J. Kiskis ed., 1990). For a critique of the value of “win rate” statistics in the context of securities arbitration, see Laurence S. Schultz, Storm Clouds in Arbitration, 1685 PRAC. L. INST./CORP. 351, 353-54 (2008) (cautioning that “annual win rates do not necessarily reflect true economic victories for the claimant,” and that “what is fair, and what is a reasonable win rate or a reasonable recovery rate, are subjective and may be argued at length”).
75. “Reactive evaluation,” also sometimes referred to as source devaluation or opposition bias, is a psychological process by which information is devalued, discounted or ignored, or perceived as inaccurate simply because it was proposed or produced by an “opponent.” See Lee Ross, Reactive Devaluation in Negotiation and Conflict Resolution, in BARRIERS TO CONFLICT RESOLUTION 28-29 (Kenneth J. Arrow et al. eds., 1995).
IV. Conclusion

Regardless of the “objective” reality of the fairness or lack thereof of arbitration, negative perceptions of the process already are “transform[ing] the reality faced by policy-makers”76 and influencing the development of the law regarding arbitration. For example, the AAA no longer will accept certain new consumer debt collection arbitration filings,77 and, as part of a settlement with the Office of the Minnesota Attorney General, the National Arbitration Forum will stop accepting or participating in the processing or administration of any new consumer arbitrations.78 Additionally, Bank of America and J.P. Morgan Chase have dropped mandatory arbitration for credit card customers, and, in Bank of America’s case, for bank account holders.79 Other credit card companies, such as American Express, have indicated that they are monitoring their arbitration practices.80

While anti-arbitration advocates cheer these developments and continue their campaigns to further restrict the use of arbitration, others predict that limiting access to arbitration may in some instances be limiting access to justice for many claimants, in many settings.81 Consumers and employees with modest financial claims may find it impossible to afford or locate counsel willing to represent them, and they may not have the time or funding for lengthy court proceedings.82 Furthermore, even if arbitration remains a viable dispute resolution option, negative public expectancy bias may prevent consumers, employees, and other similar disputants from even considering its use.

As Voltaire warned, perfect is the enemy of good, and, in this situation, a favorable result in a “good” process for a consumer, employee, or franchisee may be infinitely better than little or no recourse at all.83 If prohibitions or sweeping restrictions on pre-dispute arbitral requirements have even the potential to harm the very parties that anti-arbitration advocates claim to be seeking to protect, must reform be an all or nothing proposition? Even its most staunch and persistent

76. Gross & Black, supra note 63, at 350.
77. Notice on Consumer Debt Collection Arbitrations, http://www.adr.org/sp.asp?id=36427 (last visited Jan. 23, 2010) (“Matters included in this moratorium are: consumer debt collections programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves a credit card bill or, the case involves a telecom bill or the case involves a consumer finance matter.”).
80. Id.
81. See, e.g., Cole & Frank, supra note 51, at 34; Gross & Black, When Perception Changes Reality, supra note 63, at 354; Maltby, supra note 70, at 118; Rutledge, Who Can Be Against Fairness?, supra note 40, at 280-81.
83. See, e.g., id.
critics do not recommend that arbitration be abandoned under all circumstances. The process for reform should model the very values that arbitral reformists claim to seek and should provide an objective, unbiased, and deliberate evaluation of all available data, regardless of its source. Decision-makers should eschew, even denounce, the polemic rhetoric lest it reinforce any public negative expectancy bias and potentially deny access to justice to those most in need.

84. See, e.g., Sternlight, supra note 32, at 105-06.