There are good reasons to be concerned about an arbitrator’s potential bias in favor of companies and against individual consumers. Private arbitration companies compete to be selected by corporations in their standard form contracts with consumers and employees. Arbitration work is often very lucrative, and arbitrators know that if they rule against a corporate defendant too frequently or too generously (from the standpoint of that corporation), they will lose the work.

There is evidence and a good deal of commentary suggesting that arbitrators do, in fact, have a tendency to favor “repeat player” clients. For disputes involving consumer transactions, the repeat player will be the corporate defendant.

A study of cases filed with the American Arbitration Association (AAA) found that consumers “won” only 35% of cases filed with AAA, but even when they did prevail their recoveries were limited to, on average, just 19% of the monetary demand. Private arbitration companies are subject to financial pressures if they irritate corporate clients. One action by a major arbitration provider demonstrates how providers may face market pressure to give companies what they want:

Declaring that contractual restrictions on class suits are “inappropriate,” JAMS announced in 2004 that it would start to “ensure fairness” by ignoring such prohibitions and letting class arbitrations go forward. But then Citibank, Discover Card and American Express fought back, writing JAMS out of their arbitration accords. Within months, JAMS reversed itself.

Not only do arbitrators have strong incentives to rule in favor of companies, but the arbitrators themselves are drawn from a pool altogether different than the jury pool, which consumers lose access to as a result of binding arbitration. Juries often sympathize with a victimized consumer, and so access to a jury may be the difference between winning and losing the case and may also substantially affect the amount of any award.

Arbitrators, on the other hand, typically handle disputes between two businesses, and are most frequently drawn from law firms that largely represent corporate defendants. While most arbitration service providers are quite secretive about the identity and background of their arbitrators, there is some evidence that arbitrators are overwhelmingly older white men. Furthermore, they often are unfamiliar with consumer protection laws, and may be unsympathetic to consumers. As one commentator concluded: “Sending a case to arbitration not only deprives the claimant of a jury trial but also deprives society of the jury’s role as enunciator of behavioral norms.”

Some commentators suggest that arbitrators—who may tend to look for split-the-difference compromises of the sort that work well in many types of commercial disputes—are not effective in enforcing consumers’ legal rights. The California Supreme Court expounded on this point, noting that arbitration has the result of “lowering damages awards for plaintiffs.”

Footnotes

35 [35] See § 8.7.8 [1], infra.

37 [37] See Kirby Behre, *Arbitration: A Permissible Or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 Pub. Cont. L.J. 66 (1986) (discussing possibility “that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties—that is, an arbitrator’s decision might be influenced by the desire for future employment by the parties”); Ellen Dannin, *Employers Can Just About Bank on Winning in Arbitration*, L.A. Times, Dec. 24, 2000 (“Arbitrators are hired by private parties. They know that whether they get picked to work in the next case may depend on how their current case is decided. They also know that most employees will only be involved in one case, but the odds are that an employer will be involved in others.”); James L. Guill & Edward A. Slavin, Jr., *Rush to Unfairness: The Downside of ADR*, Judges’ J., Summer 1989, at 8.


41 [41] See Gen. Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes 2 (1994) (“We estimate that most of the NYSE New York Arbitrators (about 89 percent of 726 at the end of 1992) are white men, averaging 60 years of age.”).

42 [42] A prominent academic has thus concluded that “the [Supreme] Court’s espousal of largely unregulated and unregulable mandatory arbitration appears likely to harm the poorest and least educated members of society.” Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 683–684 (1996).


44 [44] Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 346 (“[T]here is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights rigorously.”). See also Gregory T. Higgins & William D. O’Connell, *Mediation Arbitration Square Off: The Majority of In-House Counsel Surveyed Prefer Mediation to Binding Arbitration, A Significant Change from Three Years Ago*, The Nat’l L.J., Mar. 24, 1997 (“ ‘Arbitrators or mediators are perceived as having the sole goal to compromise a result rather than determine whether a party wins or loses,’ commented one participant, who added, ‘Some disputes must be resolved in a win/lose posture due to potential damage exposure; ADR is seen as a “split the baby” process with no legal integrity and thus clients fear to use it.’ ”).

1999) (“a company that believes it has a strong legal and factual position may want to avoid arbitration, with its tendency to ‘split the difference,’ in favor of a judicial forum where it may be more likely to win a clear-cut victory”)).


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