Arbitration also largely takes place in secret, with most arbitration clauses and the rules of most arbitration providers requiring that all parties to a dispute keep all facts about both the dispute and the arbitrator’s resolution of the dispute “confidential.” In addition, “[a]rbitrators have no obligation to the court to give their reasons for an award,” and it is common for arbitrators to provide no written explanation for their decisions.

This secrecy tends to reduce the ability of consumer attorneys to effectively represent their clients. Secrecy also makes it harder to evaluate whether a given arbitration service provider is exhibiting bias in favor of corporate defendants or not. One federal court has given a concrete illustration of the social significance of such a confidentiality provision:

The implications of such secrecy to society are troubling. Among many others, they mean that if consumers obtain determinations that a particular AT&T practice is unlawful, they are prohibited from alerting other consumers. Since the AAA does not require the arbitrator to state reasons for the award and does not provide a public record of arbitrator rulings, this confidentiality provision means that a contract that affects seven million Californians will be interpreted largely without public scrutiny. This puts AT&T in a vastly superior legal posture since as a party to every arbitration, it will know every result and be able to guide itself and take legal positions accordingly, while each class member will have to operate in isolation and largely in the dark.

Secrecy also undermines the public function of litigation: “By closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society’s role in setting the terms of justice.” Secret dispute resolution therefore harms the free market, because market participants—like shareholders, investors, and large corporate consumers—do not have an opportunity to learn about how the companies with which they do business resolve disputes with consumers and employees.

Footnotes

53 [53] See § 8.7.10 [1], infra.


55 [55] See Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 397–398. See also Richard C. Reuben, Democracy and Dispute Resolution: Systems Design and the New Workplace, 10 Harv. Negot. L. Rev. 11 (2005) (“[T]ransparency and rationality are not essential values of arbitration. Arbitrators are generally not required to articulate reasons for their decisions in the form of written opinions, effectively precluding substantively judicial review of arbitral awards. Moreover, arbitrators do not have to make their decisions according to rules of law . . . .” (citations omitted)).

56 [56] See Marcus Nieto & Margaret Hosel, Arbitration in California Managed Health Care Systems 22 (2000) (“[P]laintiffs in California health care claims generally do not have information about arbitrators’ decision records before selecting a neutral arbitrator. In contrast, health care plans do have information about the win-lose decisions of arbitrators. This information gap may favor health care plans.”); Jean Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 683–684 (1996) (“[A] consumer’s attorney often relies on public information gained from other lawsuits to build her own claims of negligent or intentional misconduct. Repeat-player companies can gain similar information through private channels. Thus, by requiring private arbitration the company may again deprive the consumer of certain relief she might have obtained through litigation.” (citations omitted)).

57 [57] E.g., Elizabeth Rolph, Erik Moller & John E. Rolph, Arbitration Agreements in Health Care: Myths and Reality, 60 Law & Contemp. Probs. 153, 158 (1997) (“The effects of private, binding arbitration are even more difficult to
In affirming the holding of the trial court that this confidentiality provision was unconscionable, the Ninth Circuit reiterated that such confidentiality provisions contribute to an unfair repeat-player effect: by imposing a "gag order," the court said, "AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract." Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003).

See also Sprague v. Household Int'l, 473 F. Supp. 2d 966, 974 (W.D. Mo. 2005) (secrecy terms in arbitration clauses are substantively unconscionable because they ensure that companies "reap[] the advantages of repeatedly appearing before the same group of arbitrators, while consumers do not"); Luna v. Household Fin. Corp., 736 F. Supp. 2d 1166, 1180–1181 (W.D. Wash. 2002) (secrecy clauses have the effect of "magnify[ing] the effect of [the] advantages" that "repeat arbitration participants enjoy . . . over one-time participants"); ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) ("By keeping all awards confidential, any advantages that inure to Defendants as repeat participants are effectively concealed, thereby preventing the scrutiny critical to mitigating those advantages."); Kinkel v. Cingular Wireless L.L.C., 857 N.E.2d 250, 275 (Ill. 2006) (confidentiality provision unconscionable when "Cingular . . . can accumulate experience defending these claims" while consumers have no access to precedent); Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1183 (Ohio Ct. App. 2004) ("[T]his confidentiality clause on its face brings about a result that the [consumer protection statute] seeks to prevent, namely the failure to inform the public about suppliers' deceptive and unconscionable acts in an effort to correct these wrongs."); Zuver v. AirTouch Communications, Inc., 103 P.3d 753, 765 (Wash. 2004) (confidentiality provision substantively unconscionable because it "hammers [the] ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations").


59 [59] Jean Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 695 (1996) (citations omitted). See also Michael A. Satz, How the Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices, 20 Temp. Pol. & Civ. Rts. L. Rev. 123, 151–152 (2010) ("The strongest argument against allowing the arbitration of payday loan disputes is the public justice critique, which essentially argues that society benefits as a whole from the discussion of the law. . . . When claims against payday lenders are taken private, society does not gain the benefit of learning about what these actors are doing and thereby loses, to a certain degree, its ability to determine the validity or invalidity of such conduct and whether to take collective action against it."); Elizabeth G. Thornburg, Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims, 67 Law & Contemp. Probs. 253, 272 (2004); Arbitration: Happy Endings Not Guaranteed, Bus. Wk., Nov. 20, 2000 ("[E]ven when both sides walk away ‘winners,’ the public may lose by failing to hear about cases that involve product safety, anticompetitive behavior, or intellectual-property theft. But privacy is part of arbitration’s appeal to companies. ‘Companies don’t have to worry about disputes showing up in the paper,’ said William K. Slate II, AAA’s president and CEO.").

60 [60] A recent scandal involving sexual harassment problems at the clothing manufacturer and retail store American Apparel illustrates the problem. For decades, American Apparel’s chief executive officer had been the subject of sexual harassment claims and accusations on the part of employees, but he remained in control of the company until 2014. In July 2014, The New York Times’ Dealbook asserted that “if American Apparel hadn’t been able to use arbitration and confidentiality clauses to keep investors and the public in the dark over those accusations, [the CEO] would most likely have been shown the exit some years earlier.” Steve Davidoff Solomon, ArbitrationClauses Let American Apparel Conceal Misconduct, DealBook, N.Y. Times (July 15, 2014).
1.4.5 Secrecy in Arbitration

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