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6 Reasons Why Arbitration Offers Equitable Resolutions

Law360 on **March 26, 2025**

On the 100th anniversary of the Federal Arbitration Act, it is worth recalling that the law was enacted in 1925 in response to what the U.S. Supreme Court later called, in its 2011 opinion in AT&T Mobility v. Concepcion, "widespread judicial hostility" to arbitration.[1]

A century later, arbitration is still controversial, and remains the focus of enmity from various courts, legislatures and, in particular, those whose economic interests are threatened by such proceedings.

According to a 2022 study by the U.S. Chamber of Commerce Institute for Legal Reform, arbitration provides a cost-effective alternative for employees and consumers. The study found that, in both consumer and employment disputes, arbitration was often faster and resulted in lower overall legal expenses than traditional litigation.[2]

A Feb. 26 Law360 guest article, "At 100, Federal Arbitration Act Is Used To Thwart Justice," argues that arbitration is a "rigged system" that unfairly favors corporations that "use the FAA to sidestep accountability." We disagree.

In fact, arbitration provides numerous benefits to employees, consumers and businesses alike, ensuring fair and efficient dispute resolution without the excessive fees, costs and delays associated with traditional litigation. Below, we explore six key points that highlight why arbitration is a viable and often preferable option to court proceedings.

1. Both sides have equal input in the selection of arbitrators.

A persistent canard surrounding arbitration is that corporations unilaterally choose the arbitrator, creating an unfair playing field from the outset. The fact is that the leading alternative dispute resolution providers in the U.S., such as JAMS and the American Arbitration Association, specifically prohibit this in consumer and employment-related arbitrations.

For example, JAMS Consumer Minimum Standard No. 4 specifies that "([t]he consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)." And JAMS Employment Arbitration Rule 15(b) and AAA Employment Arbitration Rule 12.c specify that both sides participate equally in the selection of the arbitrator.[3]

The selection process is designed to eliminate bias and ensure neutrality, allowing both sides to have confidence in the arbitrator's impartiality. This safeguards the integrity of arbitration proceedings, and directly contradicts the notion that corporations have unchecked control over the process.

2. Both plaintiff and defense counsel are repeat players.

Another common myth is that corporations hold an unfair advantage in selecting arbitrators because they alone are repeat players, which allegedly encourages the arbitrator to favor a corporation over the individual consumer or employee.

In reality, counsel for each side, rather than the parties themselves, must mutually agree on the arbitrator, and, of course, plaintiffs lawyers participate in arbitration just as frequently as defense lawyers do. Therefore, to the extent it exists at all, the repeat player dynamic applies equally on both sides.

If a particular arbitrator displays bias in favor of one side, that arbitrator will surely land on the other side's "do not use" list the next time around. This self-regulating mechanism ensures that arbitrators remain neutral and committed to fairness.

3. Employers and corporations bear most of the costs of arbitration.

Critics of arbitration often argue that it imposes excessive costs on employees and consumers. However, the major ADR providers' rules prove that this, too, is false. Under both the JAMS and AAA rules, consumers and employees are at most required to pay a small initial filing fee, comparable to what they would have been obligated to pay if they had filed in court.

The employer or business pays the remainder of the fees and costs of arbitration, including the arbitrator's fees.[4] Hardship waiver applications are also available for consumers in certain jurisdictions.[5]

Similarly, in many jurisdictions, the law requires that the business or employer pay the costs and fees unique to arbitration. For example, California's laws mandate that if an employer imposes mandatory arbitration as a condition of employment, the employer must cover all or most of the associated costs and fees.

In consumer arbitration, many agreements similarly place the burden of paying for arbitration on the business, rather than the consumer.

4. Confidentiality in arbitration is a double-edged sword.

One of the most frequently cited criticisms of arbitration is that it unfairly shields corporations from public scrutiny as a result of contractual confidentiality provisions. While it is true that arbitration proceedings are often confidential, confidentiality is neither required in arbitration, nor inherently disadvantageous to plaintiffs.

Not all arbitration agreements include confidentiality provisions. And in some instances, confidentiality benefits plaintiffs as much as, if not more than, defendants.

For example, some employees may wish to keep their claims — and even the fact that they are challenging a termination or other adverse job action — confidential, and thus relatively undiscoverable by the public, as well as by prospective future employers, who may look askance at such proceedings.

Moreover, in many cases — especially those involving high-profile defendants — plaintiffs lawyers do not hesitate to file their complaints in court, notwithstanding the existence of an enforceable arbitration agreement, usually claiming the agreement is procedurally or substantively unconscionable.

While many of these cases are ultimately compelled to arbitration, the allegations themselves will have in the meantime become a matter of public record, if not a splashy press release. Once the arbitration is completed, the parties often return to an open court proceeding to have the arbitration award confirmed.

Even in court, it is generally standard practice for the parties to enter into a stipulated protective order, wherein the parties agree to keep certain communications, documents and discovery materials confidential. If matters are particularly sensitive, courts can also seal records and even exclude the public from the courtroom during certain portions of the trial.

When a matter ultimately settles, as they most often do, confidentiality provisions relating at the very least to the settlement amount are also commonplace.

5. The EFAA is being abused.

The federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, enacted in 2022, was designed to allow victims of sexual harassment and assault to bring claims in court rather than arbitration.

While this law was intended to protect victims, some plaintiffs attorneys have begun exploiting it by inserting tenuous sexual harassment or assault claims into lawsuits that are mostly about something else — e.g., unrelated whistleblower, wage and hour, or wrongful termination claims.

This tactic effectively circumvents arbitration clauses and forces the case into court, even when the gravamen of the claims has little or nothing to do with alleged sexual misconduct. Plaintiffs lawyers may thus be able to evade arbitration agreements and increase the likelihood of securing a jury trial — where, in some jurisdictions, damage awards tend to be significantly higher.

Misuse of the EFAA dilutes the law's intended purpose, and introduces unnecessary complexity into the legal system.

6. Plaintiffs lawyers profit by opposing arbitration.

Perhaps the most revealing, but rarely conceded, aspect of the opposition to arbitration is the financial angle.

It is well known that plaintiffs attorneys typically work on a contingency basis — meaning they receive a percentage of any settlement or award received by their clients. In some cases, this percentage can be as high as 50% of the client's recovery.

Some recent jury trials, particularly in states like California, New York and Illinois, have produced so-called nuclear verdicts in employment and consumer cases — sometimes including incredibly high punitive damage awards.

For example, Martinez v. Southern California Edison Co., an employment case decided by the Los Angeles Superior Court in 2022, resulted in a jury verdict of more than $464 million for just two plaintiffs.[6] There is a reason that some plaintiffs lawyers refer to the Los Angeles Superior Court as "the bank."

Such catastrophic outcomes for defendants are far less common in arbitration, where awards tend to be more measured and reasonable — something that may not be quite as enticing to a plaintiffs lawyer who will be sharing in the recovery.

It should surprise no one that when plaintiffs lawyers are on the other side of the "v." — e.g., as defendants in malpractice or employment-related actions — they, too, frequently avail themselves of arbitration.[7]

Likewise, plaintiffs attorneys may have a strong financial incentive to push for class or collective actions instead of arbitration. Class and collective actions can result in massive settlements or awards, yielding significant attorney fees that far exceed what could be obtained in individual arbitration cases, though the recovery to individual class members is likely to remain the same.

Many consumer and employment class actions settle for millions of dollars, with attorneys collecting substantial portions of these settlements. This incentive structure may encourage plaintiffs lawyers to fight arbitration agreements, which often require disputes to be resolved on an individual basis, given that class and collective actions offer the potential for much larger payouts, even though each individual claimant may receive only modest compensation.

Conclusion

Arbitration eliminates the possibility of runaway jury verdicts and excessive class action settlements, making it simply less lucrative for plaintiffs attorneys — even though it remains a fair and highly effective dispute resolution mechanism for everyone else involved in the case.

While no system is perfect, arbitration remains a vital tool for ensuring timely and equitable resolution of disputes, without the excessive costs and unpredictability of jury trials.

[1] AT&T Mobility v. Concepcion, 563 U.S. 333, 339 (2011). On six separate occasions, "[o]ver and again, with determined but unavailing persistence, the Supreme Court of the United States has rebuked California state law that continues to find new ways to disfavor arbitration." Hohenshelt v. Superior Court , 99 Cal. App. 5th 1319, 1327, rev. granted (2024) (Wiley, J., dissenting).

[2] Nam D. Pham and Mary Donovan, Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration, U.S. Chamber of Commerce Inst. for Legal Reform (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf.

[3] JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (eff. May 1, 2024), https://www.jamsadr.com/consumer-minimum-standards/; JAMS Employment Arbitration Rules & Procedures (eff. June 1, 2021), https://www.jamsadr.com/rules-employment-arbitration/english?_gl=1*yeyltx*_up*MQ..*_gs*MQ..&gclid=EAIaIQobChMIvtvlx_L9iwMVxD ; American Arbitration Association (AAA), Employment Arbitration Rules and Mediation Procedures (eff. Jan. 1, 2023), https://adr.org/sites/default/files/EmploymentRules_Web_3.pdf.

[4] See AAA Consumer Arbitration Rules: Costs of Arbitration (eff. Jan. 15, 2024), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_3.pdf; AAA Employment/Workplace Fee Schedule Costs of Arbitration (eff. Jan. 1, 2023), https://go.adr.org/employmentfeeschedule; JAMS Arbitration Schedule of Fees and Costs, https://www.jamsadr.com/arbitration-fees.

[5] In certain states — e.g., California and New Jersey — consumer claimants with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to waiver of the arbitration fee entirely. In those cases, the business must pay 100% of the fees. See JAMS Declaration in Support of Application for Waiver of Fees — Consumers, https://www.jamsadr.com/files/uploads/documents/declaration-in-support-of-application-for-waiver-of-fees-consumers.pdf; AAA Affidavit In Support of Administrative Fee Hardship Waiver,

https://adr.org/sites/default/files/Support_of_Hardship_Waiver_of_Fees_Individual.pdf; AAA Affidavit for Waiver of Fees for Use by California Consumers, https://adr.org/sites/default/files/Waiver_of_Fees_CA_Only.pdf.

[6] Martinez v. Southern Cal. Edison Co. , Los Angeles Superior Court, Case No. BC670461 (June 2, 2022). L.A. Jury Delivers the Mother of All Verdicts — $464 Million to Two Employees!, The National Law Review (June 6, 2022), available at https://www.natlawreview.com/article/la-jury-delivers-mother-all-verdicts-464-million-to-two-employees.

[7] "Plaintiffs attorney groups have for decades lobbied against forced arbitration, saying it strips injured consumers and aggrieved workers of their right to jury trial and hides corporate misconduct from public view. But many plaintiffs lawyers nationwide have subjected their own clients to forced arbitration in their retainer contracts — including leaders of some organizations that forbid the practice, Law360 has found." Plaintiffs Attys Fight Arbitration, While Imposing It On Clients, Law360 (March 20, 2025).

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