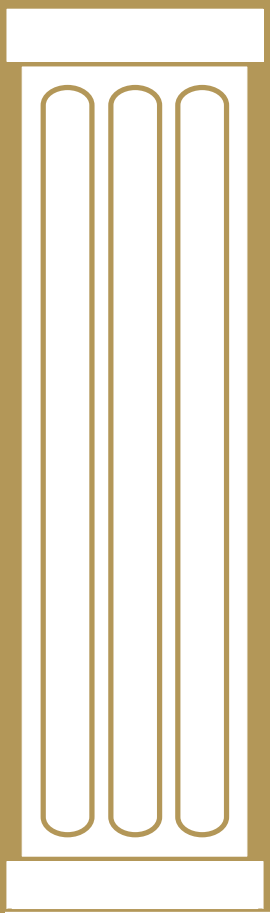
American Journal of Mediation

VOLUME 12 2019

A Publication Dedicated to the Profession of Alternative Dispute Resolution



AJM

American College of Civil Trial Mediators

MISSION STATEMENT

The ***American College of Civil Trial Mediators*** is a non-profit organization of dispute resolution professionals who are distinguished by their skill and professional commitment to civil trial mediation.

Membership is limited to active mediators, program administrators, and academics who have achieved substantial experience in their field as well as professional recognition for their accomplishments.

The Fellows of the College are dedicated to improving ethical and professional standards of mediation practice while fostering the growth of alternative dispute resolution systems throughout the country.

In fulfilling its mission, the College conducts advanced ADR education programs, supports ADR research, and encourages the growth of ADR systems. In addition, it is a principal objective of the College to publicly recognize those persons making major contributions to the ADR movement nationwide.

October, 1995

AMERICAN JOURNAL OF MEDIATION
Editorial Board Introduction

"Ideas are a dime a dozen. People who execute them are not."
Dave Ramsey

The quote above is especially apropos to this edition of the American Journal of Mediation – Volume 12. The first Journal was published in 2007 as the brainchild of several people who did not simply have an idea but were willing to execute upon it. The one person who was indefatigable in his efforts to ensure the continued success of the Journal was **Lawrence M. Watson, Jr**. At the 2019 National Conference of the American College of Civil Trial Mediators, Larry was named Editor Emeritus of the Journal. A well-deserved honor for sure.

Fast forward to 2019 where our gratitude goes out to the current Editorial Board members: **Lawrence M. Watson, Jr., Rev. Wendy Trachte-Huber, J. Joaquin Fraxedas, J. Allen Schreiber, Donald R. Philbin Jr., Richard B. Lord,** and **Stephen C. Sawicki**. A stalwart group of individuals unmatched in their commitment to the College and the mission of this Journal.

This edition of the Journal contains six of the top articles from our successful partnership by the College with the ADR Section of the New York State Bar Association in the *NYSBA/ACCTM National Championship ADR Law Student Writing Competition* which once again offered perhaps the richest prize of any law school writing contest in the United States. This year we had 46 entries from nineteen law schools across the country.

A truly dedicated group of judges from across the country including Fellows of the College and members of the ADR Section of the New York State Bar Association joined the Editorial Board in reading and ranking the entries. Many thanks to **Charles W. Crumpton**, **Jill R. Sperber**, **Jay H. Sandak**, **David A. Thorner, John Wilkinson**, **Abigail Pessen**, **David Singer**, **Bill Barrett**, **Deborah Masucci** and our Editorial Board for a job well done.

My sincere appreciation as well to **John Wilkinson, Jackie Nolan-Haley** and **David Singer** from the New York State Bar Association who worked together with **Lawrence M. Watson, Jr., Lela Love, Joseph B. Stulberg** and me as members of the joint planning committee for this year's contest. All should be proud of the product of our endeavors.

The winning article for 2019 was submitted by **Marsha Levinson**, a student from Santa Clara University School of Law. Her article is titled: *"Mandatory Arbitration: How the Current System Perpetuates Sexual Harassment in the Workplace."* Ms. Levinson presents a scholarly analysis of an issue that you will find exceptionally timely and interesting.

The winner of the New York competition is **Rachel Schwartzman** of the Benjamin N. Cardozo School of Law. Her article*, "Using Final Offer Arbitration to Settle Divorces: A Proposal and Analysis",* suggests an innovative methodology to resolving difficult divorces.

The remaining four articles were among the top submissions as chosen by the judges. Each is introduced by a member of the Editorial Board as one of their favorites of the competition.

The College and the ADR Section of the New York State Bar Association are pleased that law students throughout this country and Canada are diligently preparing their entries for the Fourth Annual NYSBA/ACCTM National Championship ADR Law Student Writing Competition. If the quality of articles submitted in 2020 continue to show the level of academic scholarship as in years past, we expect that *lucky* volume 13 of the Journal will be one to remember.

In my introduction to Volume 11 of the Journal, I set forth the words below from Volume 1. I do so again as they remain quite appropriate.

"Our editorial philosophy will reflect the goal of professional service. Each issue of the American Journal of Mediation will feature carefully selected articles researched and written by members of the nation's ADR academic community – scholarly articles dealing with important concepts of ADR one generally expects to see in publications of this nature. In each issue, however, we will also be publishing pragmatic and practical contributions from leading ADR practitioners – features having an immediate application to a dispute resolution professional practice. As opportunities arise, we will highlight and discuss the latest developments in ADR theory and practice; we will weigh in on where our profession is going and the challenges it meets along the way."

We welcome your submissions that further this philosophy.

John W. Salmon
Editor In Chief

AMERICAN JOURNAL OF MEDIATION

Articles:

Introduction

When we publish the criteria for law students to enter our annual writing contest co-sponsored by the Dispute Resolution Section of the New York State Bar Association we ask for articles on the following topics:

Any aspect of alternative dispute resolution including reconciliation systems (negotiation, mediation), consensus based adjudicative systems (arbitration, private judging) or mixed processes (med-arb, arb-med), ADR process design, ADR practice techniques, case studies, ADR related legislation, ethical issues and standards, as well as the application of ADR processes to specific areas of law.

It is so interesting to me the depth and more importantly, the breadth of the articles received ranging from how to handle disputes in space to divorce mediation to international methods of conflict resolution to classic law review articles delving into specific ADR methodologies.

Our winning article this year is an exceptional example of a scholarly discussion on a highly relevant and timely topic: how mandatory arbitration clauses apply to sexual harassment claims in employment settings.

Marsha Levinson takes an in-depth critical look at the interrelationship between Title VII and the #MeToo movement in the context of the Fox News scandal. Her research is impeccable. Her inciteful proposals to address ways in which the current system might be improved are worth reading her article to its conclusion. Those of us in the ADR universe, practitioners and academics alike, should be pleased with the quality of the young minds poised to lead our practice in the years ahead.

John W. Salmon
Editor in Chief
Distinguished Fellow, American College of Civil Trial Mediators

MANDATORY ARBITRATION: HOW THE CURRENT SYSTEM PERPETUATES SEXUAL HARASSMENT CULTURES IN THE WORKPLACE

Marsha Levinson

I. INTRODUCTION

In 2017, after social media exploded with outrage surrounding the sexual harassment and assault allegations against media mogul Harvey Weinstein, hundreds of women came forward revealing personal stories of harassment in the workplace.[1] The most prominent alleged culprits include NBC News anchor Matt Lauer, television host and journalist Charlie Rose, Senator Al Franken, comedian Louis C.K., and more.[2] This flood of accusations by so many women, many of whom remained silent for years, poses a grim question regarding the effectiveness of current anti-discrimination laws.

Quite conceivably, the failure to adequately protect employees stems from the lack of protection provided by mandatory arbitration agreements. Today, more than sixty million Americans have mandatory arbitration clauses in their employment contracts.[3] These clauses are generally required as a condition of employment and keep legal proceedings between the employer and employee out of the public eye, often allowing the accused to stay in their job while pushing victims out.[4]

Arbitration, generally, is less formal, less expensive, and less time consuming than a court proceeding, partially because it is run by an arbitrator, instead of a judge, who is not required to adhere strictly to the law.[5] It comes as no surprise then that throughout

1. Dan Corey, *Sexual Misconduct: A Growing List*, NBC NEWS (Jan. 10, 2018), https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546.

2. *Id.*

3. ALEXANDER J.S. COLVIN, ECONOMIC POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION (Sept. 27, 2017), http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

4. *See infra* Section IV.A.

5. *See generally* THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 49–51 (stating that arbitration should be more attractive to employers for dispute resolution because it is less costly and less formal than the courts), http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/Dunlop

the last few decades, as the number of employment litigation suits increased, many employers have turned to mandatory arbitration agreements.[6]

Now, much attention is being paid to the expanded use of mandatory arbitration clauses in employment contracts as well as the attendant harms these clauses pose to employees.[7] Some critique mandatory arbitration agreements for stripping employees of their substantive rights and call for their invalidation.[8] In contrast, supporters of mandatory arbitration cite the expediency and simplicity of arbitration as outweighing the inadequacy of judicial review and discovery inherent in the process.[9]

On its face, mandatory arbitration seems to insult public policy. It deprives citizens of a judicial forum provided to them by law.[10] However, perhaps we should judge the validity of mandatory arbitration based on what is to be the best practice for a majority of people, rather than on facets of public policy. In light of the overworked, underfunded, Equal Employment Opportunity Commission ("EEOC"), and backlogged federal courts, both employers and employees may actually be better off with mandatory arbitration. This result, however, depends on whether the mandatory arbitration system can offer due process guarantees and fair resolutions.

This Note will argue for the continued use of arbitration agreements as long as certain safeguards are implemented to preserve individual civil rights. Currently, most employees have limited access to the court system.[11] Arbitration is a supplement to the court system that provides both employees and employers with a fast and relatively inexpensive alternative

CommissionFutureWorkerManagementFinalReport.pdf (last visited Oct. 5, 2018).

6. Elizabeth A. Roma, Note, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 520 (2004).

7. *See, e.g.*, Christine Hines, *Righting a Financial Wrong*, PUBLIC CITIZEN (Feb. 27, 2014), http://www.citizen.org/documents/righting-a-financial-wrong-forced-arbitration-report.pdf.

8. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 643 (1996).

9. *See* Kristen Decker & William Krizner, *The Fallacy of Duffield v. Robertson and Rosenberg v. Merrill Lynch: The Continuing Viability of Mandatory Pre-Dispute Title VII Arbitration Agreements in the Post-Civil Rights Act of 1991 Era*, J. DISP. RESOL. 141, 153 (1998).

10. *See* Roma, *supra* note 6, at 520 (arguing that arbitration circumvents the traditional judicial process).

11. *See* Decker & Krizner, *supra* note 9.

method of dispute resolution.[12] If the entire mandatory arbitration system were to be abandoned, many claims would go unheard. In order to safeguard civil rights, however, the current arbitration system must be modified. Specifically, the procedures currently in place are ill-equipped to resolve disputes involving civil rights claims such as sexual harassment. Therefore, this Note proposes the retention of mandatory arbitration but with specific reforms that must be enacted by Congress in order to be effective.

Section II will provide a history of mandatory arbitration and summarize the common societal perceptions towards mandatory arbitration as well as recent efforts that attempt to address its perceived shortcomings. This section will also discuss recent legislation regarding mandatory arbitration and sexual harassment in the workplace, and the "knowing and voluntary standard"[13] for the fair enforcement of compulsory arbitration agreements.

Section III will identify the issues analyzed in this Note and Section IV will then delve into the legal and sociological literature on mandatory arbitration and sexual harassment in the workplace in order to analyze why existing laws against sexual harassment fail to be preventative. This analysis will also discuss the role of arbitration in perpetuating harassing work environments and will use Fox News as a case study, highlighting some approaches for rectifying the problem.

Finally, this Note will suggest that a more regulated system of arbitration is needed, reformed to serve the needs of employees. In order to resolve the uncertainty surrounding the use of mandatory arbitration, this Note proposes that Congress amend the Federal Arbitration Act to grant States some authority to regulate arbitration and discusses potential strategies for doing so.

II. BACKGROUND

The emergence of mandatory arbitration over the last few decades has changed our legal system considerably.[14] While arbitration has historically been used as an alternative to litigation, in the past it was knowingly and voluntarily agreed upon, often by

12. *See* David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999) [hereinafter Sherwyn et al., *Mandatory Arbitration*] ("For employers, the reduced cost, increased speed, private nature, and elimination of juries make arbitration an attractive option.").

13. *See infra* Section II.F.

14. *See infra* Section II.C.

two or more businesses who had equal bargaining power.[15] With the encouragement of the United States Supreme Court, businesses jumped at the opportunity to mandate arbitration of future employment disputes rather than allow those disputes to be brought in court.[16] Today, the involuntary imposition of arbitration in employment agreements has become a controversial topic.[17]

A. What Are Mandatory Arbitration Agreements?

Throughout the last few decades, mandatory arbitration clauses have become increasingly prevalent in employment contracts.[18] A mandatory arbitration agreement, generally referred to as a pre-dispute arbitration agreement, is an agreement between an employer and employee to resolve future employment disputes by binding arbitration.[19] Employers will include arbitration agreements as a condition of employment, tailoring agreements as they see fit.[20] Mandatory arbitration agreements can be inserted into employment contracts, employee handbooks, or stand-alone agreements.[21] Arbitration agreements can be broad, covering a variety of employment disputes, or can be more limited, covering only particular disputes.[22] Additionally, employers can either adopt rules for the arbitration proceeding from a neutral agency, such as the American Arbitration Association, or may formulate their own rules.[23] Arbitration places total control of a dispute into the hands of a third party by allowing the arbitrator to render a binding decision on behalf of the parties.[24]

15. *Id.*
16. *Id.*
17. *See infra* Section II.B.ii.
18. *See* Colvin, *supra* note 3.
19. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 594 (1995).
20. *Id.*
21. *Id.*
22. *Id.* at 594–95.
23. *Id.* at 595.
24. Robert J. Landry & Benjamin Hardy, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering and Covering of Employee Rights*, 19 U. FLA. J.L. & PUB. POL'Y 479, 483 (2008).

B. What are the Benefits and Drawbacks of Mandatory Arbitration Agreements in the Employment Context?

Scholars, judges, and legislators are in hot debate over the fairness of mandatory arbitration of statutory claims.[25] Critics cite the "disparity of bargaining power between employers and employees, the involuntary nature of the arbitral process, the lack of judicial guidance and oversight, and the submersion of important public law matters into a private process" to rationalize why compulsory arbitration of statutory claims should not be enforced.[26] In sum, critics fear that the process generates pro-employer outcomes at the expense of employees' rights. On the other hand, proponents of mandatory arbitration argue that efficiency and accessibility to a legal forum are critical benefits of this system.[27] Others make the point that effective arbitration allows more claims to be resolved before the employment relationship suffers irreversible harm.[28] Generally, supporters feel as if mandatory arbitration actually provides employees with a better chance at resolving their dispute.[29]

1. Benefits of Mandatory Arbitration

Advocates of mandatory arbitration see it as a protection against the "evils" of litigation.[30] The virtues of mandatory arbitration parallel that of arbitration, generally. In addition to being less expensive, arbitration offers a more informed, timely, and private resolution of the dispute than litigation.[31] Particularly in an employment context, the less formal resolution of arbitration may be useful in preserving a positive employment relationship that may otherwise be harmed by lengthy litigation.[32] Arguably,

25. Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1892 (2000).

26. Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 350 (1997).

27. Eljer Mfg. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("[Arbitration] is a private system of justice offering benefits of reduced delay and expense.").

28. Siderman, *supra* note 25, at 1893.

29. *See id.*

30. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 UNLV L. REV. 1631, 1638 (2005) (listing the "evils of litigation" as: publicity, jury awards, punitive damages, extensive discovery, and class actions) [hereinafter Sternlight, *Creeping Mandatory Arbitration*].

31. *See* Sherwyn et al., *Mandatory Arbitration*, *supra* note 12.

32. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001) (arguing that "unlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely

one of the greatest attributes of arbitration is the ability to select a decision maker with expertise in employment law matters.[33] This allows for a more informed and predictable decision on the merits and, more importantly, a decision that both parties are likely to accept as legitimate.[34]

For the court system, mandatory arbitration increases judicial efficiency by reducing the courts' docket.[35] Without arbitration, court dockets would become severely overloaded with claims that could each take several years to even reach trial.[36]

Mandatory arbitration also presents benefits for employees. For example, arbitration can be less intimidating than the court system,[37] and arbitration of employment discrimination claims generally takes less than half the time it takes to litigate them.[38] Additionally, because it is difficult for employees to retain competent legal counsel for routine or marginal cases,[39] many employees may not be able to properly enforce their in court.[40] As any law student will tell you, the rules of evidence within the courtroom are no joke—and certainly not something a lay person can quickly learn. Arbitration, by contrast, provides a sure forum to have employees' problems addressed by an informed neutral.[41]

---

practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement").

33. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 455 (1996).

34. *See* Edward Brunet, *The Core Values of Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3, 13 (Edward Brunet et al. eds., 2006) ("Trust of the expert arbitrator is essential to support the concept of finality."). *Cf.* Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843, 866 (2008) (suggesting that "[u]nlike judges, arbitrators can be selected for their sensitivity to local context, which might plausibly make them superior to courts at tailoring public norms to specific workplaces, not to mention better able to identify or create workplace-specific norms in areas not governed by external law").

35. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (citing the House report developed at the enactment of the FAA stating "[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable").

36. *Id.*

37. Donna R. Milhouse, *Agreements to Arbitrate: Facilitating Employment Dispute Resolution of Statutory Claims*, 74 MICH. BUS. L.J. 1158, 1161 (1995).

38. *See* Richard A. Bales, *A Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 343 (2006).

39. *See* Siderman, *supra* note 25, at 1894.

40. *Id.* at 1894-95.

41. *Id.*

Additionally, the lower monetary cost of arbitration, coupled with its informal nature, allows some employees to bring claims that they otherwise would not have been able to bring in court.[42]

Finally, proponents weigh the drawback of not being able to bring a claim in court against the notion of not having the ability to arbitrate at all. For employees who lack a mandatory arbitration agreement, voluntary arbitration becomes unlikely.[43] It is unlikely that employers, knowing that an employee cannot bring a claim to court, will volunteer to arbitrate the same claim.[44] If, however, employers are bound to arbitrate, any claim will be heard.[45]

2. Three Major Critiques of Mandatory Arbitration

Critics' argument that mandatory arbitration is detrimental and unfair to individuals has many subparts; however, this Note will focus on three major critiques relating to the sexual-harassment-in-the-workplace predicament. The first concern regards the arguably nonconsensual nature of mandatory arbitration. The second concern is that employers enjoy informational and bargaining advantages over employees, and in using these advantages, may impose an arbitration process that favors the employer even more. And the final critique arises in the context of mandatory arbitration of statutory right claims such as Title VII discrimination.

a. The Nonconsensual Nature of Pre-dispute Arbitration Agreements

One major critique pertaining to mandatory arbitration is that the agreements are essentially nonconsensual because employees

42. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 8 (1998); Susan A. Fitzgibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401, 1412 (2000) (concluding that "[b]ased on experience in labor arbitration, *pro se* representation may also be used more effectively and with fewer risks than in court because of the more informal nature of arbitration"); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 651-52 (asserting that "the savings in time and expense that arbitration brings may allow an employee to pursue claims that he or she would otherwise be reluctant or unable to press").

43. Siderman, *supra* note 25, at 1894.

44. *Id.*

45. *Id.* (citing RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 8 n.87 (1997)) (arguing that while compulsory arbitration prevents one percent of claimants who could get a lawyer to take their case from going to court, it opens up a forum for those claimants who would otherwise be shut out of the system because their claims are too small)); *see also* Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., Mar. 28, 1994, at C1.

do not typically read or understand arbitration clauses, and even if they do, have no option but to sign them.[46] This critique stems from the broader concern that employers often use their disproportionate bargaining powers to make employees sign arbitration agreements that grossly favor the employer.[47]

Empirical studies show that only a miniscule percentage of adults read form agreements, and of these, an even smaller number understand what they read.[48] Moreover, even if individuals read and understand mandatory arbitration clauses, employment contracts are offered on a "take it or leave it" basis.[49] As a result, individuals who are limited in employment options have little choice but to sign such agreements. In addition, people tend to be overly optimistic, and often under-predict the need they might have to bring a future claim and thus undervalue what they are losing by giving up the right to sue (i.e. the right to bring employment related claims to trial before a judge or jury).[50]

Courts view arbitration clauses as legitimate because they see the clauses as a bargained-for element of a contract.[51] Contracts are to be upheld when two parties voluntarily agree to be bound without undue influence or other unconscionable factors.[52] However, more often than not, parties to mandatory arbitration contracts are not on equal footing—for precisely the reasons described above. In short, the typical employee lacks the knowledge or ability to make an informed decision with respect to

46. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649 ("even to the extent that consumers might read and understand an arbitration clause imposed on a predispute basis, psychologists have shown that predictable irrationality biases will prevent them from properly evaluating the costs and benefits of accepting such a clause.").

47. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 2(3), (7) (2009) (asserting that "[m]ost consumers and employees have little or no meaningful option whether to submit their claims to arbitration . . . " and that "[m]any corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals . . . . ").

48. *See* Alan M. White & Cathy L. Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (analyzing literacy research which shows that a surprisingly high percentage of literate adults are unable to extract pertinent information from form contracts); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1059–60 (1998).

49. *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (finding that many employees are not able to negotiate the terms of their employment contract).

50. *See, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW & ECONOMICS 13, 39 (2000); Sternlight, *supra* note 25, at 1649.

51. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (noting that the legislative intent behind the FAA was to put arbitration agreements on the same level as other contracts).

52. *See id.* (expressing the importance of upholding contracts).

such an agreement.[53] The lack of understanding of what arbitration entails prohibits employees from properly consenting to the agreement. As a result of this nonconsensual nature of the contract, critics urge that mandatory arbitration is wrong as a matter of public policy.[54]

b. Structural and Procedural Concerns

A second major critique of mandatory arbitration agreements is that they may often be slanted in favor of the business.[55] Instead of judges, arbitration cases are decided by arbitrators, hired by companies that routinely give them business.[56] Critics argue that a "repeat provider" problem arises when companies give this repeat business to arbitrators.[57] Essentially, they fear that arbitrators may become biased toward the employer if the employer frequently uses their services.[58] Although providers vehemently deny the charge that they are biased, critics maintain that, consciously or subconsciously, arbitrators may slant the result in companies' favor in order to retain business.[59]

Even if arbitrators are not biased, employers still have the advantage of being a "repeat player."[60] The idea here is that employees who participate in arbitration are hindered because (1) they lack information about arbitrators (such as experience and previous employment), and (2) they have less experience than employers who have likely participated in arbitration proceedings before.[61]

---

53. Haagen, *supra* note 48, at 1059.

54. *See* EEOC Notice Number 915.002, section VII, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, (July 10, 1997), https://www.eeoc.gov/policy/docs/mandarb.html [hereinafter EEOC Notice].

55. *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649–50.

56. *Id.*

57. *See, e.g.*, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 35–37 (1999).

58. Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 698–99 (2010).

59. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1650.

60. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 L. & SOC'Y REV. 95, 97–104 (1974) (explicating typology of parties that divides litigants into "repeat players" and "one-shotters" and discussing each type of party's incentives and advantages in legal system).

61. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 208–13 (1997) (reporting results of her study on employment arbitrations, in which employees win less frequently and win less of what they demanded when arbitrating against repeat-player employer as compared to when arbitrating against one-shot employer); Russell Evans, Note, *Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in*

Of course, while there exists extensive empirical data supporting the "repeat player" effect, some scholars have pointed out that the data is ultimately misleading because it includes a large proportion of claims by lower-paid employees who may choose the arbitral process even for frivolous claims, because it is often free.[62] Other scholars argue that even if a repeat player effect does exist, litigation, too, provides such an effect for lawyers who represent employers and employees in court. However, because lawyers are more likely to take claims going to litigation (as opposed to arbitration) due to the potential for higher earnings,[63] the scale of fairness is more balanced in litigation.

c. Concerns Relating to Statutory Claims

The final concern arises when mandatory arbitration is applied to Title VII and other statutory rights actions. Mainly, critics of employment arbitration argue that it does not serve the policy goals of anti-discrimination laws as well as a court proceeding would.[64] Opponents believe that arbitration proceedings evade public accountability, and that compared to public adjudication, arbitration is less effective at general deterrence and development of legal precedent.[65]

The argument pertaining to accountability is that the private nature of mandatory arbitration prevents employees from holding their employers accountable to the public. Employers are less likely to learn of an arbitration outcome that punishes another employer's discrimination.[66] When a matter is addressed by the court, however, other employers are exposed to the resulting consequences and are thus deterred from engaging in discrimination themselves.[67]

Employment Contracts Survive a "Fairness" Analysis?, 50 HASTINGS L.J. 635, 644 (1999).

62. *See* Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 495, 530 (2010).

63. Bingham, *supra* note 61, at 198–99.

64. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 396 (1999) (arguing that "arbitration is not an effective forum in which to satisfy the public goals of employment discrimination statutes, even when employees are accorded a fair hearing").

65. *Id.* at 400, 437–38.

66. *EEOC Policy Statement on Mandatory Arbitration*, *reprinted in* 133 Daily Lab. Rep. (BNA) at V-A-1 (July 11, 1997) (arguing that arbitration's private nature weakens general deterrence).

67. *Id.* at IV-C (July 11, 1997) ("By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination.").

A confidential forum also denies the public access to knowledge of harmful business practices, such as sexual harassment and discrimination.[68] While arbitration often results in a private award, litigation of discrimination claims develops and refines legal precedent and educates the public about the legality of certain employment practices.[69] This developed law not only governs future disputes, but also provides employers with guidelines for appropriate conduct and reinforces cultural norms that disavow invidious discrimination.[70]

The lack of public accountability and transparency addressed here will be further explored in this Note, illuminating it as one factor that must be changed in order to make mandatory arbitration fairer for employees.[71]

C. The Evolution of Mandatory Arbitration in the United States

Voluntary binding arbitration has a long and mostly honorable history in the United States.[72] Traditionally, businesses sought to resolve disputes through binding arbitration because of the expertise, speed, efficiency, privacy, and neutral decision makers that arbitration provided.[73] Internationally, arbitration is favored because it allows businesses to feel secure against potential biases from another country's courts and to obtain results that are more enforceable in another country than a court decree.[74] Courts themselves have traditionally supported voluntary binding

68. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 197 (finding that cases outside of the public forum allow fewer people to engage in dialogue on the issue); *see also* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358–59 (1995) (stating that litigation reveals incidents of discrimination that may impact the entire industry).

69. *EEOC Policy Statement*, *supra* note 66, at IV-A (noting that "[a]bsent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, . . .or sexual harassment . . . "); Moohr, *supra* note 65, at 432.

70. Moohr, *supra* note 64, at 400, 437–38 ("In articulating the standard of acceptable conduct, an adjudication reaffirms these values and forms community standards.").

71. *See infra* Section IV.B.iii.

72. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, WASH. U. L.Q. 193, 194 (1956) (examining uses of arbitration in New York, beginning with the Dutch West India Company in the 1600s, and concluding that "arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century").

73. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1635.

74. *Id.* (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7–11 (2d ed. 2001)). Arbitration agreements are typically more enforceable in foreign countries than are court decrees because over one hundred countries have adopted the New York Convention requiring them to enforce arbitral awards issued by other signatory countries.

arbitration, enforcing both arbitral awards and post-dispute agreements to arbitrate.[75] However, pre-dispute agreements to arbitrate, i.e. mandatory arbitration clauses, have a more complex history, with courts originally refusing to enforce them.[76] This of course changed with the passing of the Federal Arbitration Act. However, until recently, these pre-dispute agreements were not used by businesses to require employees to resolve disputes.[77]

1. The Federal Arbitration Act (FAA)

In order to understand why mandatory arbitration became widely acceptable, one must understand how the Supreme Court interprets the Federal Arbitration Act (the "FAA").[78] When Congress passed the FAA in 1925 it required courts to grant motions to compel arbitration pursuant to arbitration agreements.[79] The FAA provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[80] Therefore, under the FAA, parties entering into an arbitration agreement are contractually bound to arbitrate any dispute that arises under said contract.[81]

A series of Supreme Court decisions then expanded the FAA's reach to cover almost all employment contracts, regardless of whether the parties actually had an opportunity to bargain or negotiate the terms.[82] Since then, the number of arbitration agreements has increased exponentially.

2. Supreme Court Jurisprudence Leading to the Emergence of Mandatory Arbitration

Section 2 of the FAA states that "a written provision in . . . a contract evidencing a transaction . . . arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

75. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1636.

76. *See, e.g.*, Tobey v. Bristol, 23 F. Cas. 1313, 1319–23 (C.C.D. Mass. 1845) (No. 14,065) (refusing to use equitable powers to enforce pre-dispute agreement to arbitrate).

77. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1636.

78. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1-16 (2000)).

79. *Id.*

80. 9 U.S.C. § 2 (1994) (stressing that arbitration agreements entered into voluntarily will be upheld).

81. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (emphasizing that a party making an agreement to arbitrate should be held to that decision).

82. *See infra* Section II.C.ii.

contract."[83] In Moses H. Cone Memorial Hospital v. Mercury Construction,[84] the Court interpreted Section 2 of the FAA as Congress' way of promoting a liberal federal policy favoring arbitration.[85] The Court explained that because the FAA favors arbitration, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.[86] The practical impact of this decision is that whenever courts must decide whether a claim can be resolved through arbitration, the court's decision will be slanted towards arbitration.

The significant rise of mandatory arbitration agreements in employment contracts that followed Moses H. Cone Memorial Hospital can be attributed to a line of United States Supreme Court cases that permitted the use of arbitration in situations that businesses had never previously thought acceptable.[87] In the first significant case regarding mandatory arbitration in the employment context, Alexander v. Gardner-Denver,[88] the Supreme Court found that a compulsory arbitration clause in a collective bargaining agreement did not preclude a Title VII federal claim.[89] This meant that an employee had both a contractual right to submit a race discrimination grievance to arbitration and an independent statutory right to file a lawsuit under Title VII.[90] This decision weakened the influence of mandatory arbitration clauses in reference to employment contracts, but only temporarily.[91]

83. 9 U.S.C. § 2 (1925).

84. 460 U.S. 1 (1983).

85. *Id.* at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

86. *Id.* at 24–25.

87. *See* Katherine V.W. Stone & Alexander J.S. Colvin, Report, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECONOMIC POLICY INST. (Dec. 7, 2015), http://www.epi.org/publication/the-arbitration-epidemic/.

88. 415 U.S. 36 (1974).

89. *Id.* at 48–49 (inferring that Title VII supplements, rather than supplants, existing laws relating to employment discrimination).

90. *Id.* at 49–50 (the Court reasoned that although arbitration is efficient and inexpensive the informal proceedings were not the correct forum for deciding statutory claims); Title VII of the Civil Rights Act of 1964 is a federal law that prohibits sexual harassment. 29 U.S.C. § 2000e-2. Under Title VII, harassment based on race, color, sex, national origin, or religion constitutes discrimination. *Id.*

91. Although the Court today recognizes arbitration as an appropriate forum for adjudicating an individual's statutory claim, it has not expressly overruled Gardner-Denver; in later decisions the Court has found arbitration appropriate, as it provides a neutral forum for dispute resolution, so long as individual substantive rights are protected. *See* Roma, *supra* note 6, at 525.

In 1991, the Court's attitude toward arbitration had changed, as evidenced by its holding in Gilmer v. Interstate/Johnson Lane Corp.[92] In Gilmer, the Court held that individual statutory claims brought under the Age Discrimination in Employment Act ("AEDA") may be subject to valid pre-dispute arbitration agreements.[93] In rejecting the plaintiff's argument that arbitration of age discrimination was inconsistent with the ADEA's purpose, the Court explained that an agreement to arbitrate an ADEA claim is not a waiver of substantive rights, but merely an agreement to resolve claims arising from those rights "in an arbitral, rather than a judicial, forum."[94] The Court reasoned that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[95] This idea was subsequently applied by lower courts to hold that claims arising under Title VII may also be the subject of pre-dispute arbitration agreements.[96]

Gilmer also held that the FAA manifests a "liberal federal policy favoring arbitration agreements," and preempts state statutes that conflict with this approach.[97] Thereby effectively making the FAA the law of all lands. However, because the agreement at issue in Gilmer was within a securities registration application, and not an employment contract, the Court ultimately failed to address whether Section 1 of the FAA applied to all employment contracts.[98] This question remained unsolved.[99]

92. 500 U.S. 20, 26 (1991).

93. *Id.* at 35. Gilmer argued that requiring arbitration of employment discrimination claims would be inconsistent with public policy and undermine the role of the EEOC, but the Court rejected both arguments. *Id.* at 26–29.

94. *Id.* at 26.

95. *Id.* at 28.

96. *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749–50 (9th Cir. 2003) (en banc) (ADA and Title VII); Rosenberg v. Merrill Lynch, Pierce Fenner & Smith, Inc., 170 F.3d 1, 7 (1st Cir. 1999) (Title VII); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 368 (7th Cir. 1999) (Title VII).

97. *Gilmer*, 500 U.S. at 24–25 (reasoning that the FAA's purpose was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

98. *Id.* at 26 (holding that arbitration may not be appropriate for all statutory claims and that in determining whether arbitration is suitable, courts should look to the text of the statute, its legislative history, and whether or not there is an "inherent conflict" between the statutory purpose and arbitration).

99. Although the majority in *Gilmer* did not address whether the FAA applied to employment contracts, the dissent discussed the issue and concluded that Congress did not intend for the FAA to apply to employment contracts at all. *See id.* at 3941. Justice John Paul Stevens wrote "[T]he FAA specifically

Ten years later, the Court addressed Gilmer's unsolved question in Circuit City Stores v. Adams.[100] There, the Court expressly ruled that the FAA applied to all employment contracts except for those specifically exempted.[101] This interpretation was extremely narrow because the FAA only exempts employment contracts of transportation workers.[102] Circuit City Stores reinforced case law from lower federal courts and further encouraged the use of mandatory arbitration contracts.[103]

After the Supreme Court issued these decisions, which asserted that arbitration is "favored" and permitted, businesses jumped at the opportunity to compel arbitration in contexts where they previously assumed such agreements would not be enforced.[104]

D. Mandatory Arbitration Today

Since Gilmer,[105] arbitration has become a preferred method of dispute resolution for many employers who view it as faster and more cost effective than litigation.[106] Today, more than fifty-five percent of nonunion, private-sector employees are bound by arbitration clauses.[107] Of the employers who require mandatory

was intended to exclude arbitration agreements between employees and employers." *Id.* at 40 (Stevens, J., dissenting).

100. 532 U.S. 105 (2001).

101. *Id.* at 122–23.

102. *Id.* at 119.

103. Landry, *supra* note 24, at 488 ("The *Circuit City* decision clarified the broad scope of the FAA and seemed to affirm employers' use of mandatory arbitration provisions in employment contracts").

104. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1638.

105. 500 U.S. at 26.

106. Bales, *supra* note 19; *see also* Equal Employment Opportunity Commission Alternative Dispute Resolution Policy Statement, *reprinted in* 133 Daily Lab. Rep. (BNA) at E-4 (July 17, 1995) (recognizing that if the circumstances are appropriate that ADR techniques can provide "faster, less expensive, less contentious, and more productive results in eliminating workplace discrimination"); *see* Bingham, *supra* note 62, at 189 (citing to studies that provide evidence of increase between 1991 and 1995 in number of employers using predispute employment arbitration agreements); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) (asserting that "[t]he use of employment arbitration began to accelerate dramatically after the United States Supreme Court decided Gilmer"); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) (reviewing empirical studies and concluding that "[a]lthough there are limitations to the existing studies, they do show a consistent pattern of significant expansion of employment arbitration in the decade and a half since the Gilmer decision" and hypothesizing that "employment arbitration is likely already a more widespread system for governing employment relations than collective bargaining and labor arbitration").

107. Colvin, *supra* note 3.

arbitration, about thirty percent include class action waivers—meaning that employees also lose their right to pursue collective legal action to address widespread rights violations.[108]

Over this same period of time, however, state legislatures and courts have sought to regulate and invalidate various forms of arbitration agreements that they believed to be threatening to the interests of the state, its businesses, and its employers.[109] However, most of the attempts to pass legislation or implement case law contrary to mandatory arbitration have been preempted by the FAA.

It is unclear why states nevertheless attempt to pass legislation that is preempted. Professor Sarah Rudolph Cole, at the Moritz College of Law, speculated that states may attempt to pass preempted legislation as a "purely symbolic" gesture, with the hope that such legislation might spur Congress to amend the FAA to allow states greater leeway to regulate arbitration.[110] Professor Gary Spitko, at Santa Clara University School of Law, theorized that states might simply perceive the need for arbitration regulation to be so great that it is in their best interest to proceed with arguably preempted regulations until the Supreme Court rules on the preemption of the specific effort at issue.[111]

E. Recent Legislation Regarding Mandatory Arbitration and Sexual Harassment in the Workplace

While the general climate towards mandatory arbitration among courts and legislatures is positive, many have found mandatory arbitration agreements to be problematic in the context of statutory complaints such as sexual assault, harassment, and discrimination.[112] In recognition of the harms caused by forced arbitration of these types of complaints, some officials have taken steps to address the issue.[113] The actions taken reflect a general understanding that forced arbitration can be unfair to employees;

108. *Id.*

109. *See, e.g.*, Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL., 759, 785–87 (2001) (discussing various state statutes that purport to protect certain categories of disputants from compliance with predispute arbitration agreements).

110. *Id.* at 789.

111. E. Gary Spitko, *Federal Arbitration Act Preemption of State Public Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEG. L. REV. 1, 4 (2015).

112. *See generally* EEOC Notice, *supra* note 55; *see* Landry, *supra* note 24; *see* Katherine V.W. Stone & Alexander J.S. Colvin, Report, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECONOMIC POLICY INST. (Dec. 7, 2015), http://www.epi.org/publication/the-arbitration-epidemic/.

113. *See infra* notes 116–29.

however, the measures taken nonetheless fall short of fully protecting employees.[114]

In 2009, President Obama signed into law the first federal legislation that prevents employers from forcing binding arbitration on their employees.[115] The Franken Amendment to the 2010 Defense Appropriations Bill[116] was a small victory for opponents of arbitration, as it prevented the use of any funds made available under the Defense Appropriation Act if a contractor or subcontractor providing services or equipment under the Act requires its employees to arbitrate certain claims.[117] These claims included: those arising under Title VII, or any torts relating to (or arising out of) sexual assault, harassment, intentional infliction of emotional distress, and more.[118]

However, in the same year the Franken Amendment was passed, the Rape Victims Act of 2009[119] failed. If enacted, the act would have made any agreement to arbitrate a dispute unenforceable with respect to claims arising out of rape.[120] Unlike the Franken Amendment, the Rape Victims Act would have applied to all employers, not just to federal contractors receiving funds under the particular act.[121]

The approach taken by the Franken Amendment was subsequently extended to some federal contracts through the Fair Pay and Safe Workplaces Executive Order of 2014 ("FPSW").[122] The FPSW order bars all federal contractors with contracts of greater than one million dollars from enforcing mandatory arbitration agreements in claims based on Title VII, or tort claims involving sexual assault or harassment.[123] The FPSW, although another win for opponents of mandatory arbitration, suffers from similar limitations as the Franken Amendment did as the Order only applies to a limited number of potential employment-related claims.

---

114. DAVID SELIGMAN, NAT'L CONSUMER LAW CTR., MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 3 (Nov. 2015), https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf. [hereinafter SELIGMAN, MODEL ACT].

115. *See* Dep't of Defense Appropriations Act of 2010, Pub. L. No. 111-118 § 8116, 123 Stat. 3409, 3454 (2010) (Franken Amendment).

116. Dep't of Defense Appropriations Act of 2010, Pub. L. No. 111-118 § 8116, 123 Stat. 3409, 3454 (2010) (Franken Amendment).

117. Pub. L. No. 111-118, § 8116, 123 Stat. 3409 (2009).

118. Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009).

119. Rape Victims Act of 2009, S. 2915, 111th Cong. § 3 (2009).

120. *Id.*

121. *Id.*; *see* Franken Amendment, *supra* note 118.

122. Exec. Order No. 13673, 79 Fed. Reg. 45309 (July 31, 2014).

123. *Id.*

In February 2018, state attorney generals ("AGs") in all fifty states, the District of Columbia, and U.S. territories wrote a letter to Congressional leadership seeking the elimination of arbitration clauses in employment agreements for sex harassment claims.[124] In the letter, the AGs objected to the "veil of secrecy" created by arbitration, which prevents similarly situated individuals from learning about the harassment claims, thereby precluding them from also seeking relief.[125] The letter also mentions the "Ending Forced Arbitration of Sexual Harassment Act of 2017"[126] that is pending in the U.S. Senate.[127] This legislation would prohibit the enforcement of an arbitration clause for claims based on sex under Title VII of the Civil Rights Act.[128]

Finally, and to this date, the most prominent effort to deal with mandatory arbitration at the federal level is the proposed Arbitration Fairness Act ("AFA").[129] Although various versions of the AFA exist, the most recent version would amend the FAA to specify that "no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer or franchise dispute, or a dispute arising under any statute intended to protect civil rights."[130] If enacted, the AFA would effectively eliminate all mandatory arbitration within employment and consumer realms, as well as in antitrust and civil rights cases.[131] The AFA has been repeatedly introduced in Congress, with versions proposed in 2009, 2011, 2013, and most recently 2015.[132] However, the AFA has not received a vote, and passage in the current Congress appears unlikely.[133]

124. Letter from National Association of Attorneys General, to Congressional Leadership (Feb. 12, 2018), https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Musell-NAAG%20Letter%20re%20mandatory%20arbitration.pdf [hereinafter Letter from AGs].

125. *Id.*

126. S. 2203, 115th Cong. (2017–2018).

127. *See* Letter from AGs, *supra* note 126.

128. S. 2203, 115th Cong. (2017–2018).

129. Proposed Arbitration Fairness Act of 2017, H.R. 1374, S. 537, 115th Cong. § 402(a). The AFA was originally proposed in 2009 and the findings then suggested that the bill's sponsors were primarily concerned with the inequality of bargaining power between employers and employees, the lack of meaningful choice, the potential for unfair arbitration procedures attendant to such inequality, and dissatisfaction with the lack of transparency in arbitration. H.R. 1020, S. 931, 111th Cong. § 2 (2009).

130. H.R. 1020, S. 931, 111th Cong. § 2 (2009).

131. Stone & Colvin, *supra* note 114.

132. *Id.*

133. *Id.*

F. The "Knowing and Voluntary" Requirement

Some have suggested that Congress impose a requirement that employees agree to arbitrate Title VII claims "knowingly and voluntarily."[134] Generally, "knowing" means that an employee is aware of the arbitration agreement she is entering into, and "voluntary" means that she is willingly entering into it.[135] At one point, the Ninth Circuit implemented a knowing standard, which required that an employee knowingly enter into a mandatory arbitration agreement for Title VII claims.[136] In Prudential Insurance Co. of America v. Lai,[137] the Ninth Circuit held that employers are required to inform employees who sign pre-dispute agreements that any employment discrimination claims will be subject to mandatory, binding arbitration.[138] The Ninth Circuit's standard has been questioned for its failure to define the parameters of a "knowing" requirement.[139] Without establishing these parameters, employers are left to guess whether their employee "knowingly" agreed to arbitrate an employment discrimination claim.

In Nelson v. Cyprus Bagdad Copper Corp.,[140] the Ninth Circuit clarified the knowing requirement when it rejected an argument that an agreement to arbitrate an ADA claim could be inferred from the employer giving an employee an Employee Handbook containing arbitration provisions.[141] The court held that "[a]ny bargain to waive the right to a judicial forum for civil rights claims . . . in exchange for employment or continued employment must at the least be express; the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question."[142] Unfortunately, this standard is quite simple to meet,[143] and it is unforeseeable that this standard would make a significant impact on peoples' decisions of whether to take a job.

134. *See* Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 28, 36 (1996).
135. Siderman, *supra* note 25, at 1907.
136. *See* Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).
137. *Id.*
138. *Id.* at 1305.
139. Siderman, *supra* note 25, at 1908.
140. 119 F.3d 756 (9th Cir. 1997).
141. *Id.* at 762.
142. *Id.* (emphasis added).
143 Keeping in mind that many people either do not understand what mandatory arbitration entails or have limited job prospects. *See* White, *supra* note 136, at 37.

Moreover, as critics of this standard point out, the knowing requirement will have little effect if the agreement is not also voluntary.[144] Unlike the knowing requirement, no court currently requires that a waiver of Title VII claims be voluntary.[145] To require courts to subjectively determine whether an arbitration clause was voluntarily entered into poses its own issues. This Note will discuss why the knowing and voluntary standard does not effectively address the issues posed by mandatory arbitration in section IV.[146]

III. ISSUE

Employees are often required to sign arbitration agreements as conditions of employment.[147] In these agreements, employees sign away their right to litigate employment-related disputes in front of a court, and instead agree to resolve all future claims—including statutory civil rights protections found in Title VII—through binding arbitration.[148] While arbitration may be a faster and cheaper alternative to litigation, using the arbitral forum raises unique problems in the context of civil rights claims. The problems surrounding the arbitration of Title VII claims include the nonconsensual nature of mandatory arbitration clauses, the alleged propensity for arbitral proceedings to be slanted in favor of the business, and restricted public accountability particularly in regard to statutory rights such as those under Title VII.[149]

As a result of the lack of safeguards in place for employee's rights, mandatory arbitration may be propagating sexual harassment cultures in the workplace. Unfortunately, the combination of the FAA and a strong federal policy favoring mandatory arbitration compels courts to decide all disputes in favor of mandatory arbitration.[150] Thus, in order to effectively reform the mandatory arbitration system, Congress, and Congress alone, must take action to create stricter regulations to safeguard the rights of employees and make arbitration a fair forum for statutory claims.

144. *See* Grodin, *supra* note 136, at 37.
145. Siderman, *supra* note 25, at 1909.
146. *See infra* Section IV.D.
147. Eric Kolowitz, *"I Didn't Agree to Arbitrate That!"—How Courts Determine if Employees' Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses*, 13 CARDOZO J. CONFLICT RESOL. 565, 570 (2012).
148. EEOC Notice, *supra* note 55, at section I.
149. *See id.* at Section C.ii..
150. *See id.* at Section II.C.

IV. ANALYSIS

In 2017, the floodgates sprung open when the media published sexual harassment allegations made against media mogul Harvey Weinstein.[151] The Weinstein scandal sparked a national conversation about sexual misconduct in the workplace as women from all over felt encouraged to come forward with allegations of their own against prominent male figures, ranging from sexual misconduct and harassment to rape.[152] Despite a number of the allegations leading to the men in question being dismissed or otherwise disciplined,[153] the dismissal of these men remains the exception, not the rule. While these particular dismissals culminated from the heavy publicity surrounding the allegations, not all harassment claims are visible to the public eye. Even some of the individuals hit publicly with harassment charges are sometimes able to carry on unharmed in their careers. The most prominent example being President Donald Trump, who was accused of sexual harassment by several women while in the running for President, and still succeeded in the 2016 Presidential election.[154]

In the past seven years, United States companies have paid out more than $295 million in public penalties over sexual harassment claims.[155] Too often, sexual harassment in the workplace remains hidden and businesses fail to take disciplinary action until they feel threatened by bad publicity.[156] The fact that existing anti-discrimination and harassment laws, such as Title VII, fail to prevent such culpable actions tends to suggest that some form of legal reform is needed. The next section of this analysis seeks to understand the weaknesses in the current legislation based on a case analysis of Gretchen Carlson and the harassment scandal at Fox News.

---

151. Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME: ENTERTAINMENT (Jan. 26, 2018), http://time.com/5015204/harvey-weinstein-scandal/.

152. *Id.*

153. Corynne Cirilli, *High Profile Men Accused Of Sexual Harassment and Sexual Abuse*, COVETEUR: NEWS (Nov. 29, 2017), http://coveteur.com/2017/11/29/harvey-weinstein-sexual-harassment-repercussions/.

154. Danielle Kurtzleben, *Here's The List of Women Who Accused Donald Trump of Sexual Misconduct*, NPR: POLITICS, Oct. 20, 2016, https://www.npr.org/2016/10/13/497799354/a-list-of-donald-trumps-accusers-of-inappropriate-sexual-conduct.

155. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGES ALLEGING SEXUAL HARASSMENT FY 2010-FY 2018, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (Jan. 14, 2018).

156. *See infra* Section IV.A.

A. How Title VII Failed to Prevent Harassment at Fox News

In the last few years, dozens of women at Fox News came forward with sexual harassment allegations against men at the Fox network.[157] After significant negative press coverage, Fox News was hard pressed to fire many of the accused, costing the network over eighty million dollars in pay-outs to the departing executives and settlements to the alleged victims.[158] Despite these charges, the legal prohibitions against sexual harassment in the workplace failed to deter Fox News from ignoring the rampant harassment for years. For example, in January of 2016, after settling multiple cases regarding Bill O'Reilly's misconduct with female employees, Fox News nevertheless renewed O'Reilly's employment contract.[159] Fox News was, at the time, fully aware of the harassment allegations made against O'Reilly.[160] It is likely that the reason Fox News was able to retain O'Reilly for so long, despite the recurring allegations, was because the network circumvented anti-harassment laws through the use of mandatory arbitration clauses.

Title VII of the Civil Rights Act of 1964[161] is a federal law that prohibits sexual harassment. Under Title VII, harassment based on race, color, sex, national origin, or religion constitutes discrimination.[162] However, Title VII is often critiqued for its failure to deter sexual harassment in the workplace.[163]

One established critique of Title VII, regarded as the "standards and defenses critique," may partially explain why Title VII fails to have the deterrent effect desired.[164] According to this critique, Title VII encourages only superficial compliance without actually preventing or punishing harassment, makes it too difficult for employees to prove their claims, and fails to adequately protect

157. Kate W. Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, PENN. STATE. L. REV. 463, 465 (Aug. 1, 2017).

158. Emily Steel & Michael Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017.

159. Doug Stanglin, *Report: Fox kept Bill O'Reilly despite $32M sexual harassment settlement*, USA TODAY, Oct. 21, 2017, https://www.usatoday.com/story/news/2017/10/21/report-bill-oreilly-struck-sexual-harassment-deal-january-former-fox-analyst/787360001/.

160. John Bacon, *Bill O'Reilly dismisses NYT report as 'lies and smears'*, USA TODAY, Oct. 22, 2017, https://www.usatoday.com/story/news/nation/2017/10/22/bill-oreilly-dismissed-nyt-report-lies-and-smears/788461001/.

161. 42 U.S.C.A. § 2000e-2 (West).

162. *E.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–65 (1986).

163. *See supra* note 157.

164. *See* Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700–06 (2000).

employees who choose to report harassment.[165] However, the "standards and defenses critique" fails to fully explain the events that occurred at Fox News because Title VII was not the only law in play. Fox News is located in New York City, which is governed by a stricter law prohibiting harassment in the workplace—the New York City Human Rights Law ("NYCHRL").[166] The NYCHRL has a lower standard for proving harassment and provides greater protections against retaliation.[167] Nevertheless, even the existence of this stricter anti-discrimination law failed to deter the widespread harassment at Fox News. These facts suggest that an effective reform of discrimination law will take more than merely strengthening a plaintiff's individual claims through additional legislation.

1. The Fox News Scandal

Gretchen Carlson joined Fox News in 2005.[168] From 2006 to 2013, Carlson was the co-host of the "Fox & Friends" morning show.[169] Carlson alleges that during her time on the Fox program she experienced sexist and condescending behavior by her co-host, Steve Doocy.[170] Carlson first complained to her supervisor about Doocy's behavior in September 2009.[171] Shortly after Carlson filed this complaint, her work environment began to change. Carlson alleges that in response to her complaint, Roger Ailes called her a "man hater" and "killer" who "needed to learn to 'get along with the boys.'"[172] Carlson further alleges that Ailes retaliated against her by assigning her fewer interviews, ending her regular appearances on "The O'Reilly Factor," failing to showcase her to the public, and more.[173] According to Carlson, this retaliatory conduct eventually led to her removal from the "Fox & Friends" program altogether, her reassignment to a less desirable afternoon slot, and a reduction in pay.[174]

Carlson's complaint also listed a variety of harassment claims against Ailes.[175] Some of the alleged actions include: (a) claiming

165. *Id.*
166. N.Y.C. Admin. Code §§ 8-107(1)(a).
167. *Id.*; *see* Nuñez, *supra* note 160, at 49–96.
168. Complaint and Jury Demand ¶ 8, Carlson v. Ailes, No. BEL-L-005016-16 (N.J. Super. Ct. Law Div. July 6, 2016) [hereinafter Carlson Complaint].
169. *Id.* at ¶ 10; GRETCHEN CARLSON, https://www.gretchencarlson.com/about.
170. Carlson Complaint, *supra* note 171, at ¶ 11.
171. *Id.*
172. *Id.* at ¶ 13.
173. *Id.* at ¶ 14.
174. *Id.* at ¶¶ 16–17.
175. *See generally id.* ¶¶20–22.

that Carlson saw everything as if it "only rains on women" and admonishing her to stop worrying about being treated equally and getting "offended so God damn easy about everything;" (b) ogling Carlson in his office and asking her to turn around so he could view her posterior; (c) commenting that certain outfits enhanced Carlson's figure and urging her to wear them every day; (d) commenting repeatedly about Carlson's legs; (e) lamenting that marriage was "boring," "hard," and "not much fun;" (f) wondering aloud how anyone could be married to Carlson, while making sexual advances by various means, including by stating that if he could choose one person to be stranded with on a desert island, she would be that person; (g) asking Carlson how she felt about him, followed by: "Do you understand what I'm saying to you?;" (h) boasting to other attendees at an event where Carlson walked over to greet him that he always stays seated when a woman walks over to him so she has to "bend over" to say hello; and (i) telling Carlson that she was "sexy," but "too much hard work."[176]

On June 23, 2016, Fox News refused to renew Carlson's contract.[177] The next month Carlson filed a lawsuit against Ailes individually, asserting claims of harassment and retaliation under the NYCHRL.[178] Instead of suing Fox News under Title VII, Carlson strategically chose to sue Ailes individually under the NYCHRL because her employment contract with Fox News required mandatory confidential arbitration of any claims against the network.[179] Ailes attempted to compel arbitration, but the case reached settlement before the court was able to decide on the issue.[180] While Fox News paid Carlson twenty million dollars to

176. *Id.* ¶ 20.
177. *Id.* ¶ 25.
178. *Id.* ¶ 4.
179. The employment agreement between Carlson and Fox News states in relevant part: "Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association then in effect . . . . Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence." Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration, Exhibit A, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016).
180. *See* Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016); Order of Voluntarily Dismissal, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. Sept. 6, 2016); Petition to Compel Arbitration, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. July 15, 2016); Notice of Voluntary Dismissal, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. Sept. 9, 2016).

settle the case,[181] they negotiated a price twice as high—forty million dollars—as a payout to Ailes for his departure.[182]

Shortly after Carlson filed her suit, another former Fox News host, Andrea Tantaros, filed a complaint bringing similar sexual harassment and retaliation allegations against Ailes.[183] In her complaint, Tantaros alleged that Ailes frequently made sexual remarks directed at her and other Fox News employees about their relationships and sexuality.[184] The alleged retaliation against Tantaros for complaining about the harassment included actions by Fox News media relations personnel such as: failing to provide media support, denying interview requests of Tantaros, crafting and placing false and negative stories about Tantaros, and posting negative social media comments about her using fake accounts.[185] When Tantaros complained of the harassment and retaliation to senior Fox News executive, William Shine, he allegedly warned her that Ailes was a "very powerful man" and Tantaros "need[ed] to let this one go."[186]

Turning down a settlement offer in excess of one million dollars to keep her claims quiet,[187] Tantaros instead filed her complaint in New York State court alleging claims against Fox News and a number of executives including Ailes.[188] This time the defendants were successful in compelling confidential arbitration,[189] and as a result the outcome of this proceeding remains private. Since the Carlson and Tantaros suits, many others have come forward and Fox News has reportedly reached settlements with at least six women who accused Ailes of sexual harassment.[190]

One query that arises when reviewing these complaints is whether, without the high-profiles of the victims and defendants involved, there would have been enough press and media coverage

181. Bill Chappel, *Fox Will Pay Gretchen Carlson $20 Million to Settle Sexual Harassment Suit*, NPR: AMERICA (Sept. 6, 2016), https://www.npr.org/sections/thetwo-way/2016/09/06/492797695/fox-news-will-pay-gretchen-carlson-20-million-to-settle-sexual-harassment-suit.

182. Nuñez*, supra* note 160, at 470.

183. Complaint, Tantaros v. Fox News Network, et al., No. 157054/2016 (N.Y. Sup. Ct. Aug. 22, 2016) [hereinafter Tantaros Complaint].

184. *Id.* at ¶ 5(a)-(e).

185. *Id.* at ¶ 6).

186. *Id.* at ¶ 7.

187. Nuñez*, supra* note 160, at 471.

188. Tantaros Complaint, *supra* note 186, ¶ ¶ 75-98).

189. Nuñez*, supra* note 160, at 472. (citing Order on Motion to Compel Arbitration, Tantaros v. Fox News Network LLC, No. 157054/2016 (N.Y. Sup. Ct. Feb. 2, 2017).

190. Emily Steel & Michael Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017, at A1.

to pressure Fox News into taking action against the alleged offender? Here, non-legal forces ultimately led Fox News to fire the perpetrators, but both federal and state law failed to do so despite years of allegations. This unfortunate reality begs the question of why it took this long-winded series of events for Fox to rectify and take action against conduct that is already prohibited by the law.

2. How Mandatory Arbitration Undermines Laws such as Title VII

While there are laws in existence which protect employees from sexual harassment, such as Title VII, these laws do a poor job of deterring such behavior, as evidenced by the happenings at Fox News[191] and the exponentially growing number of sexual harassment claims filed.[192] One explanation for why these laws are so easily circumvented is that mandatory arbitration clauses undermine the law by allowing employers to secretly pay out victims and brush harassment claims under the rug. For example, Fox News paid millions of dollars over the years to settle harassment claims against Bill O'Reilly.[193] Since most of these claims never reached the courtroom, the full extent of O'Reilly's abuse was hidden from the public eye.[194] Only when Carlson took extraordinary steps to avoid arbitration did the harassment at Fox News become a big enough news story to pressure Fox News into dismissing O'Reilly.[195]

As a term of employment, Fox News requires many of its employees to agree to confidential binding arbitration.[196] Gretchen Carlson, for example, was a party to such an agreement.[197] Because of the arbitration clause in her employment contract, Carlson's only option for filing a public suit and bringing to light the harassment was suing Ailes individually.[198] However, even

191. *See supra* Section IV.A.i.

192. 12,860 claims were filed at the EEOC in 2016 alone. EEOC, *supra* note 157. This does not include charges filed at state or local Fair Employment Practice Agencies. *Id.*

193. Steel & Schmidt, *supra* note 193.

194. *See id.*

195. *See* Carlson Complaint, *supra* note 171.

196. *See* Arbitration Agreement Between Gretchen Carlson and Fox News, Exhibit A, Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 8, 2016) (containing an Exhibit A of "Standard Terms and Conditions" which includes the mandatory arbitration clause).

197. *Id.*

198. *See* Carlson Complaint, *supra* note 171; Plaintiff's Brief in Opposition to Defendant's Motion to Compel Arbitration and Stay Judicial Proceedings, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. July 15, 2016).

her ability to individually sue Ailes was zealously disputed and remained unresolved before settlement.[199] In fact, her individual cause of action against Ailes would have been unavailable in most jurisdictions; the NYCHRL allowed Carlson to sue Ailes individually, an action not permitted under federal law.[200] In addition, while the particular language in Carlson's contract left some wiggle room for excluding individual claims against executives from arbitration, most contracts do not permit this.[201] Overall, it was the culmination of these uncommon circumstances that brought Carlson's case into the public eye.

Considering the foregoing, Title VII alone cannot be blamed for its failure to deter the sexual harassment culture at Fox News. The private, confidential nature of mandatory arbitration not only keeps sexual harassment allegations out of court, but also out of the public domain. If confidential arbitration contributes to the lack of deterrent effect imposed by existing discrimination laws, then one solution may be to pursue legislation and encourage activism to make arbitration decisions more public and subject to greater judicial review. This idea will be further addressed below.[202]

B. Inadequacies of the Current Arbitration System in Addressing Title VII Claims

1. Mandatory Arbitration Clauses are Nonconsensual and Inherently Unfair

Under even the most reasonable definitions, many would argue that mandatory arbitration clauses are nonconsensual given that most employees fail to read, let alone understand, the

199. Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Carlson v. Ailes, No. 2:16- cv-04138 (D.N.J. July 8, 2016); Order of Voluntarily Dismissal, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. Sept. 6, 2016); Petition to Compel Arbitration, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. July 15, 2016); Notice of Voluntary Dismissal, Ailes v. Carlson, No. 1:16-cv-5671 (S.D.N.Y. Sept. 9, 2016).

200. N.Y.C. Admin. Code §§ 8-107(1)(a) ("It shall be an unlawful discriminatory practice: (a) For an *employer or an employee or agent thereof*") (emphasis added); 42 U.S.C. § 2000e-2(a) (2015) ("It shall be an unlawful employment practice for an *employer* . . . ") (emphasis added).

201. *See* Eric Wemple, *Roger Ailes Opts for Secrecy, Cowardice, in Face of Gretchen Carlson Suit*, WASHINGTON POST, July 9, 2016 ("Ailes is not named in [the arbitration agreement]. Their argument is that FOX means Ailes. They should have written more broadly, most arbitration clauses name others who work for or with, are associated with, etc. I consider him a non-party under this language. Poor drafting." (quoting Paul Bland, executive director of Public Justice)).

202. *See infra* Sections IV.B.iii & V.

clauses.[203] Even if employees understand arbitration provisions, the majority lack any meaningful choice when entering into these agreements because employers have exclusive control over the terms of the employment relationship.[204] Employees often have no power to bargain for better terms. This power imbalance results in contracts that are not bargained-for exchanges.[205] Economic climate further exacerbates the divide in bargaining power as applicants who are limited in employment options have little choice but to sign the agreement.[206] Despite this lack of bargained-for exchange, courts continue to uphold arbitration agreements as a matter of contract.[207]

When posed with this concern, proponents of mandatory arbitration will respond by questioning why employment contracts should be treated or enforced any differently than other contracts. To be enforceable, a contract requires mutual assent and consideration.[208] People sign contracts every day that they fail to read or understand. These contracts are nevertheless enforced. If courts began to treat employment contracts differently based on the notion that employees fail to understand the terms or have unequal bargaining power, and therefore agree involuntarily, where would the line be drawn?[209]

However, critics also argue that mandatory arbitration is wrong as a matter of public policy because it eliminates individuals' rights to have a trial before a judge or jury.[210] Even in Gilmer, the case that originally confirmed the use of mandatory arbitration, the Court recognized that subjecting Title VII claims to mandatory arbitration was inconsistent with Congress' goal

203. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649; *see also infra* Section II.B.i.

204. Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114, 128 (2012).

205. *Id.* at 125.

206. *See* Walter J. Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 HOFSTRA LAB. & EMP. L.J. 245 (1996). Even in 1996, many individuals who found the job market difficult signed pre-employment agreements because it allowed them to obtain work: they believed "no alternative [was] available." *Id.* at 263.

207. *Id.* at 246.

208. 17 Am. Jur. 2d Contracts § 29 (1964).

209. The justification for the "strict judicial respect" for arbitration agreements is based on a belief that if parties agree to resolve their dispute through arbitration, a court should not interfere with the parties' original intent. Evans, *supra* note 62, at 652–53.

210. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649.

because Congress had empowered the federal courts to litigate Title VII claims.[211]

Title VII was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment.[212] "Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government."[213] It did so in three ways. First, Congress created the Commission, initially giving it authority to investigate claims of discrimination and to interpret the law,[214] and subsequently giving it litigation authority to bring cases to court that it could not resolve administratively.[215] Second, Congress granted certain enforcement authority to the Department of Justice.[216] Third, Congress established a private right of action to enable aggrieved individuals to bring their claims directly in federal court, after initially bringing their claims to the Commission for administrative purposes.[217] Mandatory arbitration effectively does away with this third avenue of enforcement.

This private right of access to courts is an essential part of the statutory enforcement scheme,[218] but mandatory arbitration essentially "privatizes" the enforcement of federal discrimination laws.[219] The imposition of mandatory arbitration substitutes a private dispute resolution system for the public justice system intended by Congress.[220] This private arbitral system is different in many ways from the judicial forum. When issues do arise, such as sexual harassment claims like those brought by Andrea Tantaros, employees have no avenue to resolve the dispute except through arbitration.[221] In arbitration, employees may then be pressured into settling their complaints in private, out of sight from public speculation, and without the chance to hold the offender publicly accountable.[222]

211. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 56 (1991) (expressing that the goals of arbitration are distinct from the goals of the courts).
212. *See* EEOC Notice, *supra* note 55, at Section V.
213. *Id.* at Section III.
214. *See* §§ 706(b), 713 of Title VII, 42 U.S.C. §§ 2000e-5(b), 2000e-12.
215. *See* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).
216. *See* §§ 706(f)(1), 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6.
217. *See* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).
218. *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA).
219. EEOC Notice, *supra* note 55, at section V.
220. *Id.*
221. *Supra* Section IV.A.i.
222. EEOC Notice, *supra* note 55, at section V(A)(1).

2. Mandatory Arbitration Can Be Biased Towards Employees

Critics contend that arbitration proceedings have a tendency to be biased against the employee.[223] Employers imposing mandatory arbitration through clauses in employment contracts have the ability to manipulate the arbitral mechanism to their benefit.[224]

Mandatory arbitration clauses are drafted by employers and imposed on employees particularly because employers believe them to be in their own best interest.[225] It should thus come as no surprise that the system may often fall short of being fair. The ability of businesses to draft agreements in their own favor is made possible by their superior bargaining power,[226] and these agreements consequentially reinforce this bargaining power. Proponents of arbitration, however, suggest that this argument applies to litigation just the same, and that employers always have superior bargaining power and that is the way of business.[227]

Another argument relevant to biases found in arbitration is that the employer is at an advantage as the "repeat player."[228] While it is likely the employer has participated in many arbitration proceedings, the employee has not.[229] As a result, the employee is generally less adept in making an informed selection of arbitrators than the employer who knows more about arbitrators' records.[230] However, this same point could arguably be made about litigation. It is unlikely that an employee, who is unable to afford representation, will bode well in court against an experienced attorney representing the employer.

Finally, opponents argue that arbitrators could be influenced by the fact that the employer, not the employee, provides them with future business.[231] A recent study of employment law cases

223. *See* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 30, at 1649-50.

224. *See supra* notes 51–54.

225. EEOC Notice, *supra* note 55, at section V(A)(3)(B).

226. Referring to the idea that many employees who apply for a job may take an offered position without reading the contract, understanding the contract, or simply because they need the job. *See supra* Section IV.B.i.

227. Gary E. Spitko, interview (Oct. 3, 2018).

228. EEOC Notice, *supra* note 55, at section V(A)(3)(B).

229. *Id.*

230. *Id.*

231. *See, e.g.*, Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process").

revealed this bias, finding that the more frequently an employer uses arbitration, the better the employer fared in arbitration.[232]

3. Confidential Nature of Mandatory Arbitration Leads to a Lack of Public Accountability

The limited judicial review of arbitration awards results in a general failure to control and discipline errant arbitrators, to expose employers to public scrutiny, and to develop new law through precedent.[233]

For one, arbitrators are hired by private parties and do not have to answer to public scrutiny.[234] "While the courts are charged with giving force to the public values reflected in the anti-discrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute."[235] Title VII, for example, was created to enforce the public interest in combating employment discrimination.[236] Plaintiffs' awards in Title VII lawsuits, especially the larger and more well-known ones, often serve as a notice to the public of the extreme costs of permitting discrimination in the workplace.[237]

While published decisions by courts expose the identities of the accused, private arbitration awards keep these identities hidden.[238] "The risks of negative publicity and blemished business reputation can be powerful influences on behavior."[239] Without a public trial, there may be less negative publicity, which translates into less incentive for employers to act fairly toward employees.[240] As a result, arbitration permits the immediate resolution of disputes, but fails to uphold the public values behind the law.[241]

Furthermore, arbitration affords very little opportunity for the development of new legal precedent due to the limited judicial

232. *See* CLIFF PALEFSKY, MANDATORY BINDING ARBITRATION: IS IT FAIR AND VOLUNTARY?, H.R. REP, at 6 (2009).
233. Siderman, *supra* note 25, at 1911–12.
234. *Id.*
235. EEOC Notice, *supra* note 55, at section V(A)(1).
236. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 777 (1990) ("[T]here is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest ensuring that the law is correctly and consistently applied . . . ").
237. Siderman, *supra* note 25, at 1912 ("Publicity can clarify contested issues, and deter future behavior by publicizing the high damages awarded for egregious conduct.").
238. Siderman, *supra* note 25, at 1915.
239. EEOC Notice, *supra* note 55, at IV(C).
240. Siderman, *supra* note 25, at 1915.
241. "A common critique of arbitration is that without a jury there is no opportunity for an exercise of local judgement in evaluating whether the conduct at issue is acceptable to the community." *Id.*

review of arbitrators' decisions.[242] This too deters public accountability because the absence of new legal standards permits offenders to get away with such acts. Not only is development of the law stifled, but individual decisions by arbitrators are virtually free from scrutiny.[243] Higher courts and Congress are therefore unable to correct the potential errors of statutory interpretation made by arbitrators.[244]

Finally, the unavailability of judicial review or private arbitration undermines existing antidiscrimination laws.[245] Because arbiters may apply Title VII law in conflicting manners, employers and employees may become confused, or may lack a uniform understanding or definition of discrimination.[246] This issue is also explored in Section IV(A)(ii) above and a proposal identifying one way to address it is introduced in Section V below.

C. Working Around the FAA's Preemption of State Legislation

More recently, federal agencies, legislators, and commentators alike have expressed their concerns pertaining to mandatory arbitration of statutory civil rights claims.[247] Some actors have taken steps to try to mitigate the negative effects of such agreements.[248] Currently, the most prominent effort to deal with mandatory arbitration at a federal level is the proposed Arbitration Fairness Act ("AFA").[249] Various versions of this statute have

242. Review is limited because the standard for judicial review is difficult to meet. *See* Wilko v. Swan, 346 U.S. 427, 436 (1953) (holding a court will only vacate an arbitration decision for substantive reasons if the opposing party can show a "manifest disregard" of the law), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); *see also* Bell Aerospace Co. v. International Union 516, 356 F. Supp. 354, 356 (W.D.N.Y. 1973) (explaining that the FAA set the standard that "manifest disregard" of the law entails that the arbitrator "understood and correctly stated the law but proceeded to ignore it.").

243. EEOC Notice, *supra* note 55, at V(A)(2).

244. *Id.*

245. *See* Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stag*es, 12 OHIO ST. J. ON DISP. RESOL. 387, 428 (1997).

246. *Id.* ("The danger is great that individual private employment arbitrators will apply a law such as Title VII in a conflicting manner; such danger largely goes unchecked because of the unavailability of judicial review.").

247. *See* Section II.E.

248. David Seligman, *Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 59 (2016) (describing several federal efforts to limit the use of forced arbitration).

249. *See* Arbitration Fairness Act of 2017, H.R. 1374, S. 537, 115th Cong.

been proposed,[250] but the most recent version seeks to amend the FAA to specify that "no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[251] Although the AFA has drawn the support of many scholars,[252] it is unlikely to pass in the current political climate.[253] However, without some other form of federal action, it is likely that the FAA will continue to preempt most state laws that attempt to limit forced arbitration.[254]

Despite these attempts to address the issues that stem from mandatory arbitration, the system today remains inadequate in protecting employees' rights. In light of this reality, the National Consumer Law Center ("NCLC") proposed a Model State Consumer and Employee Justice Enforcement Act (the "Model Act")[255] to provide model language for alternative state solutions.[256] The Model Act was designed to mitigate the harms of arbitration while still operating within the confines of state action available under the FAA.[257] While there are many arguments that such regulations would nevertheless be preempted by the FAA,

250. Stone & Colvin, *supra* note 114 (different version of the AFA were proposed in 2009, 2011, and 2013).

251. *Id.*

252. *See, e.g.*, Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 468 (2011); Sternlight, *Panacea or Corporate Tool?*, *supra* note 8, at 726; Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKLEY J. EMP. & LAB. L. 31, 55-56 (2014).

253. For example, the AFA has no Republican co-sponsors in either the House or Senate. *See* H.R. 1374, S. 537. Critics argue that the AFA is too broad and that a "blanket prohibition on the enforcement of arbitration clauses" is unwarranted. Erin O'Hara O'Connor, Kenneth J. Martin, & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 182 (2012).

254. AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011); Seligman, *supra* note 251, at 62.

255. *See* Seligman, *supra* note 251.

256. *See generally id*.

257. Seligman, *supra* note 251, at 62. Although, the FAA preempts any state law that limits forced arbitration, the proponents of the Model Act see room for state action in: (a) using state's public enforcement and procurement powers to protects its own financial and enforcement interests; (b) regulating the formation of arbitration agreements rather than their enforcement; (c) unconscionability challenges to arbitration agreements "as long as what renders such clauses unfair is not a 'fundamental' attribute of arbitration;" (d) limiting enforcement of arbitration agreements in insurance contracts, contracts regarding transportation workers, and contracts that do not involve interstate commerce or when the parties agree state law applies, areas exempted from FAA preemption; (e) regulating private companies that administer arbitrations; (f) drafting procedures for litigating questions about arbitration in state court. *Id.* at 62–63.

states can still look to the Model Act for examples of potential solutions.

Title I of the Model Act allows private attorneys generals to bring actions on behalf of the state and its interests.[258] Under many state employment statutes, private actions are supplementary to an underlying state right to bring its own enforcement proceedings.[259] However, because States generally lack the budget to play a substantial enforcement role, Title I proposes to delegate the state enforcement power to private attorneys.[260] This could encourage private attorneys to take on more of these cases.[261]

Title II of the Model Act prohibits the state from contracting with any companies that use forced arbitration in their contracts with either consumers or employees.[262] This utilizes a State's marketplace power to discourage businesses from using mandatory arbitration clauses in their employment contracts.[263] Title III of the Model Act aims to protect employees at the formation of an agreement by requiring arbitration contracts to "adequately disclose terms and condition[s]."[264] Title IV of the Model Act creates rebuttable presumptions that certain mandatory arbitration provisions are unconscionable, such as: inconvenient venues, waiver of rights to seek remedies provided by statute, waiver of right to seek punitive damages, and a requirement that the individual pay costs of arbitration that exceed the court cost of bringing a state or federal claim.[265] In addition to these provisions,

258. *Id.* at 61.

259. *Id.* at 60–61.

260. Seligman, *supra* note 251, at 65. ("A person may initiate on behalf of the State an action alleging violations of [*designated State consumer and worker protection statutes*] to recover civil penalties on behalf of the State and to seek injunctive, declaratory, or other equitable relief that the State would itself be entitled to seek.")

261. For an argument as to why this type of "Iskanian" doctrine would be preempted by the FAA, see Spitko, *supra* note 113.

262. Seligman, *supra* note 251, at 31. ("The State shall not do business with any person or any of its parent entities or subsidiaries if that person includes forced arbitration clauses in any of its contracts with consumers or employees . . .").

263. *See id.* at 33.

264. *Id.* at 39 ("This title applies to contracts [the categories of which are to be determined by each state] formed after this Title's effective date that meet any one of the following three criteria: (a) An employment or consumer contract not written in plain language that an average consumer or employee would understand; (b) An employment or consumer contract not written in the language in which the transaction was conducted, unless it can be proven that fewer than ten percent (10%) of the entity's transactions are conducted in that language; or (c) if a consumer contract, all of the material terms are not found in a single document."). For an argument as to why this would be preempted by the FAA, see Spitko, *supra* note 113.

265. *Id.* at 43.

the Model Act offers four other sections aimed at the areas of arbitration law not preempted by federal law.[266]

The Model Act was drafted as an idea for states to pass non-preempted laws directed at mandatory arbitration. However, due to a concern that their efforts will be preempted by federal law, many states do not even attempt to draft such legislation.[267] Similar regulations, adopted by Congress, would allow employees and employers alike to reap the benefits of mandatory arbitration while avoiding the negative aspects employees often face. Whereas state-level legislative action always runs the risk of being challenged under the FAA, legislation passed by Congress would encounter no such issue.

D. Why the "Knowing and Voluntary" Standard Would Fail to Address the Inadequacies of Mandatory Arbitration

In Part II(F)[268] this Note discussed the idea of implementing a "knowing and voluntary" standard for arbitration agreements. This type of standard aims to address the concern that employees sign away their rights to litigate future complaints involuntarily due to a lack of understanding of the agreement.[269] In making the dispute resolution process fairer, some believe that a higher standard of consent would ensure that employees are fully aware of their decision when they accept an arbitration agreement.[270] The "knowing and voluntary" standard has been suggested as a mechanism for doing so.[271] Generally, "knowing" means that an employee is aware of the arbitration agreement she is entering into, and "voluntary" means that she is willingly entering into it.[272]

Some circuits, such as the Ninth Circuit, have attempted to implement a variation of this standard. In Prudential, the Ninth Circuit required that an employee knowingly enter into mandatory arbitration for any Title VII claims.[273] However, this standard only

266. *Id.* at 48–55.
267. Seligman, *supra* note 251 at 63.
268. *See infra* Section F.
269. *See* Siderman, *supra* note 25, at 1889–90.
270. *Id.*
271. The knowing and voluntary language originated in a footnote in *Gardner-Denver* and was used in floor debates preceding the passage of the CRA. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974) ("In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent. . .was voluntary and knowing."). During floor debates over the CRA, Senator Robert Dole stated that section 118 encouraged arbitration only when "parties knowingly and voluntarily elect to use these methods." 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).
272. Siderman, *supra* note 25, at 1907.
273. *See* Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

mandated that an arbitration agreement be express, which can be objectively measured by examining the language of the agreement.[274] Requiring an express statement acknowledging mandatory arbitration in an employment contract may be helpful to employees who read and understand the clause, but does little to ensure that the agreement is also "voluntary."

No court has attempted to implement a requirement that waivers of Title VII claims be voluntary.[275] Simply having a "knowing" requirement without the "voluntary" counterpart will have little effect in balancing the scales for employees. Unfortunately, requiring a "voluntary" requirement may unintentionally cause more issues than it prevents because a true voluntary waiver of statutory rights can only apply after a dispute has arisen.[276] Proponents of the voluntary requirement argue that an employee's consent to a nonnegotiable term of employment cannot be voluntary, and thus neither can mandatory arbitration agreements.[277] Based on this interpretation, imposing a voluntary requirement on arbitration would effectively eliminate mandatory arbitration agreements altogether.[278] This may be the reason courts have yet to insist on such a standard.

Another reason courts may dislike the voluntary standard is because of its potential to increase timely and costly litigation. Whether or not an arbitration clause is voluntarily entered into requires a subjective determination.[279] This necessitates a close evaluation of an employee's state of mind.[280] Such a heightened standard would open every mandatory arbitration agreement to debate, as employees and employers would argue over whether the agreement was actually entered into knowingly and voluntarily.[281] Instead of fixing the arbitration system, a "knowing and voluntary" standard might derail it.[282] If litigation was an expected side

274. Renteria v. Prudential Insurance Co. of America, 113 F.3d 1104, 1108 (9th Cir. 1997).

275. Siderman, *supra* note 25, at 1909 ("The EEOC and most commentators agree that a voluntary waiver of statutory rights can only apply after a dispute has arisen.").

276. *Id.*

277. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 107 (1996).

278. *See id.*

279. Siderman, *supra* note 25, at 1909.

280. *Id.*

281. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1358 (1997) (explaining that the determination of whether a contract was voluntarily entered into "will be subject to the vagaries of after-the-fact litigation" and will "inject an additional element of uncertainty" into determining whether the agreements are binding).

282. Which is why this type of regulation would also be likely pre-empted by the FAA.

effect, it would no longer be worthwhile to use the arbitration system, which was designed to be efficient and cost effective.[283] Regardless, any such voluntary standard is likely preempted by the FAA.[284] While some courts and legislatures nevertheless permit and enforce such standards, they are likely to be overturned by the Supreme Court.[285]

Finally, if pre-dispute arbitration clauses were completely voluntary, they would be optional. If mandatory arbitration became optional, most employers would not voluntarily choose to arbitrate their claims.[286] Employees would not have the resources to pursue lesser claims and would have a hard time finding lawyers to represent them.[287] Thus, employers, knowing that most employees lack the resources to bring smaller claims to court, would have no incentive to voluntarily arbitrate the same claim.[288] "If, however, employers are bound to arbitrate by a compulsory arbitration agreement, minor as well as more formidable claims will be heard."[289]

Oftentimes when critics of mandatory arbitration suggest that it should be rid of altogether, they overlook its potential benefits. Mandatory arbitration is not an inherently negative facet of the legal world. Instead of implementing a "knowing and voluntary" standard, or trying to forbid mandatory arbitration altogether, the arbitration system needs to be improved. By providing a controlled system of arbitration, reformed to accommodate the needs of employees, the goals of the "knowing and voluntary" standard can be met without deterring from the usefulness and effectiveness of arbitration.

V. PROPOSAL

Although mandatory arbitration is not a characteristically malicious alternative to dispute resolution, there are many aspects of mandatory arbitration that must be safeguarded in order to prevent large businesses from taking advantage of employees' lack

283. *See* Estreicher, *supra* note 284, at 1358-59.

284. A state law may not "stand [] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. Volt Info. Scis., Inc. v. Leland Stanford Univ., 489 U.S. 468, 477–78 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

285. *See* Spitko, *supra* note 113 at 8.

286. "There was credible testimony by management representatives before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate." U.S. DEPT'S OF COMM. & LABOR, FACT FINDING REPORT: COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS 118 (May 1994).

287. St. Antoine, *supra* note 42, at 8.

288. *See* Siderman, *supra* note 25, at 1894.

289. *Id.*

of bargaining power. Specifically, Congress must account for the shortcomings of arbitration to ensure that employees receive the rights Congress intended when drafting Title VII. After identifying the problems in the current arbitration system, Congress must take the lead in implementing change, because most state actions regarding mandatory arbitration will be subjected to scrutiny or preempted without some sort of amendment to the FAA.

The most direct way to address the issues mandatory arbitration poses to statutory rights, such as Title VII, is for Congress to amend the FAA to exempt all arbitration of such claims. However, the current political climate towards eradicating mandatory arbitration altogether is not friendly,[290] and completely eliminating mandatory arbitration is not the best solution.[291] Another alternative is exempting from the FAA arbitration of discrimination claims under Title VII.[292] An apparent issue with this is that if Congress exempted only discrimination claims, employees bringing several claims against employers would be forced to split their claims between arbitration and litigation. This would be extremely costly for both sides and would defeat the efficiency rationale behind mandatory arbitration.

While many critics of arbitration propose drastic changes and amendments to the FAA, the reality is that Congress is unlikely to alter the FAA in such an extreme manner.[293] Instead, this author proposes that we take the middle ground and push for Congress to amend the FAA in a manner that gives States more regulation power over employment arbitration as to protect the interests of workers related to state and federal statutory schemes such as Title VII. This approach would allow each state to tailor their

290. *Supra* note 256.

291. *See supra* Section IV.D (arguing that as contrasted with litigation, employment arbitration offers a more knowledgeable, cost-effective, and expeditious adjudication of a dispute. A complete ban on mandatory arbitration would not serve these interests well).

292. On December 6, 2017, after this note was drafted, Representative Cheri Bustos and Senator Kirsten Gillibrand introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017. S. 2203, 115th Cong. (2017-2018). Senate Bill 2203 states that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute," defined as "a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under Title VII." *Id.* The bill is pending before the Senate Health, Education, Labor, and Pensions Committee. *Id.*

293. In recent years, a number of bills have been introduced in Congress proposing to invalidate mandatory arbitration agreements to various extents - the most extreme blankly invalidating all mandatory arbitration clauses. Spitko, *supra* note 113, at 50, n.223. None of these bills has been politically viable. *Id.* at 50.

arbitration laws to address the concerns and needs specific to its employees.

Accordingly, this author proposes that Congress amend the FAA to limit its preemptive scope by granting States the authority to establish various procedural regulations on arbitral proceedings. Specifically, the procedures States should regulate are: (1) greater judicial review of arbitration decisions,[294] (2) written, non-confidential opinions with reasons,[295] (3) increased discovery, (4) access to information in choosing an arbitrator,[296] (5) jointly and neutrally selected arbitrators who are trained and qualified,[297] (6) cost of arbitration,[298] and (7) non-waivable remedies.[299] These procedural protections will address many of the concerns discussed in this comment while serving the best interests of all parties. While organizations such as the AAA and JAMS already require many of these rules, not every employment contract is governed by these organizations and these rules are not binding law.

294. Currently, the grounds for judicial review of an arbitration award under the FAA are extremely limited. *See* 9 U.S.C. § 10 (1994) (permitting judicial review of any award procured by "corruption, fraud, or undue means," arbitrator misconduct, or exceeded authority). Because arbitral proceedings are often slanted in favor of employers, judicial review is necessary to even out the imbalance for employees. *See supra* Section III.B.iii. In order for judicial review to exist, there must also be written records. *See id.* Increasing judicial review will also permit development of the law. *See id.*

295. This would allow arbitration participants, the EEOC, and Congress to study past decisions when choosing arbitrator, deciding to settle a case, and determining whether the law was correctly applied. *See* Sherwyn et al., *Mandatory Arbitration*, *supra* note 12, at 120.

296. The ability to choose an arbitrator is already part of most systems, but giving employees more information about arbitrators, particularly costs, histories, and past decisions (which would also require access to written decisions) would give employees the opportunity to choose an arbitral that is fairer. A roster of qualified arbitrators should be provided for employees to select from.

297. I suggest that arbitrators need knowledge of the statutory issues in the dispute. Some sort of formal training program should be implemented to ensure that arbitrators are qualified for their important role.

298. Placing the arbitral fee on the employer would make arbitral proceedings fairer as employees would not be required to pay for a judge in court. Lessening the financial burden for employees may increase the likelihood that an employee who has suffered from discrimination will bring a claim. An alternative to this would be cost-splitting, which would actually deal with the "repeat player" issue more effectively.

299. In *Martens v. Smith Barney,* the court held that arbitration agreements waiving the remedies of Title VII to be unenforceable, including attorney's fees, monetary relief, and equitable remedies. 181 F.R.D. 243 (S.D.N.Y. 1998). While employers may not be as eager to enter arbitration if these remedies are available, the expediency of arbitration over litigation will nevertheless reduce employers' overall costs and maintain arbitration as a desirable forum for employers. *Id.*

Of course, the concern with such an amendment would be the power it gives States to regulate arbitration in favor of employees while ignoring the interests of employers.[300] However, considering employers generally have the upper hand in employment disputes, this concern seems to pale in comparison to the current need for mandatory arbitration reform.

With the ongoing #MeToo movement[301] and media attention surrounding mandatory arbitration, now is the perfect time to lobby for change. There is no quick fix. This requires a cultural shift—it will take work in every industry, on all rungs of employment, everywhere. Individuals should continue to contact their state and federal representatives, initiate petitions, contact people running for elected positions, and voice their grievances. The current movement has not gone unnoticed by political power figures.[302]

While some states may be encouraged to change their arbitration proceedings, there will not be widespread reform of the arbitration system until a broad regulatory scheme is enacted for arbitration of Title VII (or other statutory) claims. Congress or the Supreme Court must clarify the scope of the FAA, and then Congress must amend the FAA to set specific guidelines on how mandatory arbitration clauses may be written and how arbitration proceedings must be regulated. A formal arbitral system controlled by law will increase the viability of arbitral forums for Title VII disputes and thereby reduce the risk of unfair arbitral proceedings.

VI. CONCLUSION

Employers across the country utilize the arbitration system to resolve civil rights disputes. Supreme Court jurisprudence in favor of mandatory arbitration enables large employers to force their employees into arbitration to resolve practically all types of claims. Arbitration provides employees with a sure forum and an experienced decision maker. Arbitration is also quicker and less

300. For a thorough discussion of this concern and another approach that deals with such concern, see Spitko, *supra* note 113, at 52.

301. The #MeToo movement has gained nationwide notoriety, building a community of survivors and bringing vital conversations about sexual violence into mainstream society. The movement seeks to de-stigmatize survivors by highlighting the breadth and impact sexual violence has on thousands of women. ME TOO, https://metoomvmt.org/ (last visited Dec. 20, 2017).

302. After Senate Bill 2203 was introduced all fifty state attorneys general threw their support behind the bill by writing a letter to both Senate and House Representatives asking, "for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace." Letter from Nat'l Ass'n of Attorneys General, to Congressional Leadership (Feb. 12, 2018), https://www.manatt.com/Manatt/media/Documents/Articles/AGs-letter.pdf.

expensive than litigation. These benefits, however, are currently outweighed by the need to provide substantive relief of statutory claims. Mandatory arbitration clauses allow corporations to both write the rules that govern their contracts with workers and design the procedures used to interpret and apply these rules when disputes arise. Without stricter regulation, mandatory arbitration leads to a greater imbalance in power between employers and employees, and its confidential nature deters from the preventative efforts of anti-harassment laws such as Title VII.

The current mandatory arbitration system is ill-equipped to fairly settle civil rights claims and requires reform. This is demonstrated by the failure of existing anti-discrimination laws to prevent rampant harassment in the workplace, such as in the Fox News example discussed above. If employees are required to arbitrate Title VII claims, the procedures should include specific protections of their interests, preventing employers from taking advantage of the system. To ensure protection of employees' substantive rights the system requires additional safeguards such as written public opinions, training programs for arbitrators, non-waivable remedies, and increased judicial review to ensure that the law is correctly interpreted and applied. Congress must amend the FAA to give States more discretion to make these reforms in order to establish arbitration as a fair option for both employees and employers.

Even if Congress were to implement these changes, arbitration would still serve its intended function of providing faster and less expensive relief. If such protections existed and were enforced, perhaps harassment in the workplace would not run rampant and well-known men such as Harvey Weinstein would not get away with over thirty years of misconduct. Adopting clear procedural protections and measures will lead to a fair arbitration system for the arbitration of Title VII disputes.

Introduction

Author Proposes Baseball Arbitration to Efficiently End Divorces

Surveying the sheer number of divorces working through the system and the direct and indirect costs associated with them, the author thin-slices the continuum of dispute resolution options to propose baseball arbitration protocols to bring efficient finality to many of them.

Baseball arbitration is an arbitration hybrid successfully used in Major League Baseball to resolve salary disputes. It incentivizes parties to reduce posturing and tighten their demands since the arbitrator can only choose one of the parties' demands ("day" protocol) rather than come up with her own award. Naturally, each side seeks to get closest to what the arbitrator might award so their demand is closer – and successful.

After contrasting benefits and weaknesses of mediation and arbitration in the context of lower asset divorces, the author proposes this hybrid to reduce impasse inducing posturing in mediation and the loss of control that unbounded arbitration could produce. Having thin-sliced the continuum of ADR options, the author also suggests that this form of arbitration could tag onto an otherwise impassed mediation. Of course, that brings a separate set of issues.

Under this model, both sides would propose a complete set of terms, including line items for parenting, assets, child support, spousal support, tax and other issues. While one option would be for the arbitrator to pick one complete demand or the other, the author proposes a menu option. The arbitrator would select between the parties' demands on an issue-by-issue basis reducing the risk that one side throws in an aggressive point hoping that the overall package frames it to be the winning proposal with an outlier.

This hybrid proposal would according to the author reduce time and expense by optimally mixing ADR options to fit the fuss.

Donald R. Philbin, Jr.
Editorial Board
Fellow, American College of Civil Trial Mediators

UTILIZING FINAL-OFFER ARBITRATION TO SETTLE DIVORCES: A PROPOSAL AND ANALYSIS

Rachel Schwartzman*

I. INTRODUCTION

A divorce occurs every thirteen seconds in America.[1] That amounts to 6,646 divorces per day, 46,523 divorces per week, and 2,419,196 divorces per year.[2] Divorce settlements, like many other forms of negotiation, often begin with the parties making offers and demands at two opposite ends of the spectrum, in anticipation of being forced to compromise as the negotiation draws out. However, the more extreme the initial demands are, the longer the divorce takes. In order to avoid lengthy and expensive divorces, many couples seek alternative dispute resolution methods to settle their disputes.[3] While methods such as mediation and arbitration currently exist and are advantageous for reducing costs and time spent negotiating divorce settlements, parties still find themselves spending more time and money than they would like on settling their divorce.

An answer may be provided by binding final-offer arbitration (FOA)—also known as "last, best offer" or "baseball arbitration."[4] FOA is a dispute resolution method in which both parties submit a "final offer," and an arbitrator or panel of arbitrators chooses one of the offers, instead of finding a compromise between the two.[5] This method encourages parties to

---

* Rachel Schwartzman is a Juris Doctor Candidate of Yeshiva University's Benjamin N. Cardozo School of Law, expected to graduate in May, 2020.

[1] Yulia Vangorodska, *Marriage and Divorce by the Numbers*, VANGORODSKA L. FIRM (2015), https://nydivorcefirm.com/divorce-by-the-numbers/.

[2] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, WILKINSON & FINKBEINER FAM. L. ATTORNEYS, https://www.wf-lawyers.com/divorce-statistics-and-facts/.

[3] *Divorce and Out-of-Court Proceedings: Alternative Dispute Resolution*, FINDLAW.COM, https://family.findlaw.com/divorce/divorce-and-out-of-court-proceedings-alternative-dispute.html.

[4] Michael R. Carrell & Louis J. Manchise, *At Impasse? Consider Final Offer Arbitration*, NEGOTIATOR MAG., Dec. 2013–Jan. 2014.

[5] INT'L CTR. FOR DISP. RESOL, *Final Offer Arbitration Supplementary Rules* (2015), https://www.adr.org/sites/default/files/Final%20Offer%20Supplementary%20Arbitration%20Procedures.pdf.

be reasonable from the beginning of the process, as otherwise the arbitrator will likely choose their opponent's offer instead of theirs.[6] The idea is that "since no compromise is possible, FOA should incite the disputants to stake out more reasonable bargaining positions: each party should prefer to make concessions rather than face the possibility that the arbitrator chooses the other's side proposal."[7] Another purpose of FOA is to prevent arbitrators from simply basing their decisions on a compromise that falls in the middle between the two parties' requests, in order to settle each issue.[8] The theory is that FOA will encourage good faith bargaining between parties, and that each side's fear of losing to a more reasonable offer will facilitate settlements, or at the very least, induce reasonableness.[9]

FOA is most commonly known for its use in Major League Baseball salary disputes, where notably only one issue—salary—is presented to the arbitration panel.[10] In addition, FOA is known for being used as a means to settle public sector labor disputes, especially in jurisdictions and public safety professions where strikes are not feasible for various reasons.[11] As FOA is often utilized to expedite the settlement of both labor and sports salary disputes, it seems it could be a useful method to apply to any dispute that typically takes extensive amounts of time and resources to settle.[12] The question is whether this method could be successfully applied to divorce settlements, an arena that could certainly benefit from a swifter and more practical system than those already in use.

Part I of this Note will analyze the alternative dispute resolution method of final-offer arbitration—how it operates, why it is a beneficial mechanism for settling disputes, and how and why

---

[6] *Id*.

[7] Claude Fluet & Yannick Gabuthy, *Conventional versus Final-Offer Arbitration* (2010), https://www.gate.cnrs.fr/IMG/pdf/y10_m10_SER_FluetGabuthy.pdf.

[8] *Id.*

[9] Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L ARB. n.3 (1999) http://aria.law.columbia.edu/final-offer-arbitration-a-model-for-dispute-resolution-in-domestic-and-international-disputes/.

[10] *Id.*

[11] *Id.*; *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.

[12] *Newark Firemen's Mut. Benevolent Ass'n, Loc. No. 4 v. City of Newark*, 90 N.J. 44, 60–61, 447 A.2d 130, 13–139 (1982).

it should be applied to the settlements of divorces. Part II will discuss the staggering divorce statistics in the United States, as well as explore the current available methods of alternative dispute resolution for settling divorces and ways in which they are lacking. Part III will examine some of FOA's history, the structure of the process, and why it is preferable to other methods that currently exist. Part IV will discuss how FOA works in Major League Baseball salary disputes and public sector labor disputes. Finally, in Section V, this Note will propose utilizing binding FOA as an effective means to settle divorces, followed by criticisms of the method.

II. BACKGROUND

A. The Divorce Problem in the United States

A staggering forty-one percent of first marriages end in divorce; that number increases to sixty percent for second marriages and seventy-three percent of third marriages.[13] It has also been noted that forty to fifty percent of married couples in the United States divorce, with the divorce rate climbing for those who remarry, according to the American Psychological Association.[14] Getting divorced has become so mainstream in the United States, that it comes as little surprise that actress Zsa Zsa Gabor has been married and divorced nine times.[15] The United States suffers one of the highest divorce rates among nations—there are an estimated nine divorces in the time it takes for the average couple to recite their wedding vows (two minutes), and 1,385 divorces happen during a typical wedding reception (five hours).[16] Half of all children in the United States will witness the dissolution of a parent's marriage, and of this half, nearly fifty percent will also

[13] Vangorodska, *supra* note 1.

[14] John Harrington & Cheyenne Buckingham, *Broken hearts: A rundown of the divorce capital of every state*, USA TODAY (Feb. 2, 2018, 7:00 AM), https://www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001/.

[15] *32 Shocking Divorce Statistics*, MCKINLEYIRVIN.COM (Oct. 30, 2012, 11:06 AM, updated 2018), https://www.mckinleyirvin.com/family-law-blog/2012/october/32-shocking-divorce-statistics/.

[16] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, *supra* note 2.

witness a parent's second marriage end.[17] Studies done at the University of California and Brown University show that simply having a close friend or co-worker that is in the process of a divorce increases a married individual's likelihood of going through a divorce with their own spouse by 147%, and 75%, respectively.[18] Similarly, those who have siblings, parents, or other relatives that have divorced, are more likely to divorce as well.[19] After digesting these stunning divorce facts, it seems as though divorce in the United States has become "contagious," so to speak.

1. Cost of a Divorce

The average cost of a divorce can range from hundreds to thousands of dollars.[20] According to Forbes.com, the average cost of a contested divorce ranges from $15,000 to $30,000, with these numbers varying depending on multiple aspects of the divorce and how "contentious" the parties are.[21] Some have compared the costs of divorce to the costs of a wedding.[22] When determining the cost of a divorce, one must factor in attorneys' fees, court costs and fees, appraisals, experts, and when real estate is involved, refinancing and record deed fees.[23] While having a prenuptial agreement will save time and money during divorce proceedings, not every married couple has one.[24] Divorces not only cost the couple getting the divorce; one researcher found that a single divorce costs state and federal governments about $30,000, considering things such as an increase in food stamps usage, public housing, bankruptcies and the juvenile delinquency that stems from divorce.[25] In 2002, when 1.4 million divorces occurred in the

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *32 Shocking Divorce Statistics*, *supra* note 15.
[21] *Id.*
[22] Laura Seldon, *How Much Does the Average Divorce Really Cost?*, HUFFINGTON POST (July 30, 2013, 03:50 PM), https://www.huffpost.com/entry/how-much-does-the-average_b_3360433.
[23] *Id.*
[24] *Id.,* (saying that, "While having a prenuptial agreement will save time and money during divorce proceedings, not every married couple has one.")
[25] *Divorce Statistics: Over 115 Studies, Facts and Rates for 2018*, *supra* note 2.

United States, it is estimated to have cost the taxpayers in excess of $30 billion.[26]

B. Why the Current Methods of Divorce Mediation and Arbitration are Deficient

It is important to acknowledge that "somehow, the process of divorce has been passively accepted as this slightly sublimated form of ritualized violence in which the goal becomes inflicting pain on the other spouse. . . rather than obtaining what each needs for the future."[27] Parties become so obsessed with making the other party suffer, that they lose track of what is really important, which in turn ends up costing them time, money and an immeasurable amount of emotional trauma. Another problem with divorce negotiations today, is that parties tend to engage in what is known as the "chilling effect"—starting the negotiations with extreme demands in the expectation of having to ultimately compromise somewhere in the middle of the two parties' positions.[28] It is a common misconception that most divorces are settled by a trial.[29] Rather, the reality is that ninety-seven percent of cases settle.[30] Two existing forms of alternative dispute resolution methods used to settle divorces instead of litigation are divorce mediation and divorce arbitration.[31] These methods are becoming so popular that it is even joked that "the growing movement towards Alternative Dispute Resolution has now reached the point that it's starting to be referred to instead as 'Appropriate Dispute Resolution.'"[32] However, as popular as these processes may be, both mediation and arbitration still lack efficiency in settling divorces.

---

[26] *Id.*

[27] ROBERT KIRKMAN COLLINS, DIVORCE MEDIATION: COMMON SENSE AND THE CRISIS OF DIVORCE, 19 (2018).

[28] Carrell & Manchise, *supra* note 4.

[29] ROBERT KIRKMAN COLLINS, *supra* note 27, at 20.

[30] *Id.*

[31] Anthony C. Adamopoulos, *Understanding Divorce Arbitration and Mediation*, MASS. DISP. RES. SERVS., https://www.mdrs.com/neutrals/interviews-with-the-experts/understanding-divorce-arbitration-and-mediation/ (speaking generally about divorce arbitration and mediation options).

[32] ROBERT KIRKMAN COLLINS, *supra* note 27, at 2.

1. Divorce Mediation

Mediation is a relatively inexpensive method some parties opt to utilize in order to settle their divorce in a more private, comparatively quick and less expensive manner.[33] Mediation works best for parties who feel they can amicably settle their divorce, as the parties are forced to "interact directly in order to resolve the issues."[34] For this reason, mediation will not be effective if the parties cannot engage in a constructive, open dialogue with one another.[35] Due to the animosity and emotional events surrounding a marital break-up, more often than not this is the case when parties are divorcing. Another problem with mediation is that sometimes the parties reach an impasse, and because only the parties have the authority to make the decisions, failure of both parties to compromise can result in a standstill.[36] "Because the mediator lacks the power to compel a resolution, mediation often results in simply prolonging the impasse."[37] Similarly, if one party is not assertive enough, his or her interests may get lost, leading to an unfair outcome.[38] Put simply, it is easier for submissive and non-assertive parties to get taken advantage of in mediation;[39] these "less-assertive" parties will likely not have the confidence, or even the self-awareness, to assert that mediation might not be in their best interest in the first place, and then will suffer the consequences of being soft-spoken, yet again, throughout the mediation process. For these reasons, divorce mediation is only a viable option for a limited group of couples.

2. Divorce Arbitration

---

[33] *Pros and Cons of Divorce Mediation over Court*, JBMARTINLAW.COM, https://jbmartinlaw.com/pros-and-cons-of-divorce-mediation-over-court/; *Mediation: The Pros and Cons*, LAUFERFAMILYLAW.COM, https://www.lauferfamilylaw.com/mediation-pros-cons/.

[34] *Pros and Cons of Divorce Mediation over Court*, *supra* note 33.

[35] *Id.*

[36] Carrell & Manchise, *supra* note 4

[37] Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, OHIO ST. J. ON DISP. RESOL. 1, 1–27 (2012).

[38] *Pros and Cons of Divorce Mediation over Court*, *supra* note 33; *Mediation: The Pros and Cons*, *supra* note 33.

[39] *The Pros and Cons*, LAUFERFAMILYLAW.COM, https://www.lauferfamilylaw.com/mediation-pros-cons/.

Some people may choose arbitration as a method to settle their divorce in a cheaper, expedited, and more private manner.[40] However, this process has some downfalls:

> First, if the parties view negotiations as a prelude to a mini-trial in front of an interest arbitrator, the parties may be less willing to make their strongest arguments at the bargaining table, and instead may sandbag until the arbitration; this may have a "chilling effect" on negotiations and discourage the "give and take" necessary for good-faith collective bargaining. Second, knowing that the arbitrators will "begin" the deliberations with where the parties "ended" their negotiations, the parties may be more likely to stake out polar positions and less likely to compromise at the bargaining table.[41]

Additionally, because arbitrators may be "tempted to 'split the difference' between the parties," the parties are also more likely to take extreme stances when beginning arbitration.[42] Because a third party (the arbitrator) makes the final decisions in arbitration, there is a chance that the arbitrator will impose a resolution that neither party is happy with, and there is virtually no appeals process.[43] Similar to how less-assertive parties suffer consequences in mediation, if one party is unable to present a "clear, solid case" to the arbitrator, the chances of them receiving a favorable outcome decreases.[44] Perhaps divorce arbitration can be viewed as even less desirable than divorce mediation, as divorce arbitration typically does "not provide the same cost and time savings [as divorce mediation], nor does it allow the disputing parties to benefit from the problem-solving, relation-building process of mediation."[45] Lastly, similar to in mediation, there is always the possibility that one or both parties will begin with outrageous positions at opposite ends of the spectrum, in in anticipation of being

---

[40] *The Post-Divorce-Parenting Glossary*, CUSTODYZEN.COM, http://www.custodyzen.com/divorce-terms/divorce-arbitration.html#5.

[41] Carrell & Bales, *supra* note 37, at 11.

[42] *Id.*

[43] *Id.*

[44] *Arbitration*, LADYDIVORCE.COM, https://ladydivorce.com/arbitration/.

[45] *Family Law Arbitration*, BUCKSFAMILYLAWYERS.COM, https://www.bucksfamilylawyers.com/practiceareas/arbitration.

bargained down to somewhere in the center, elongating the dispute resolution process.

C. Background Conclusion

Divorce mediation and arbitration have both proven to be rather successful in achieving divorce settlements; however, each process suffers from its own shortcomings. Final-Offer Arbitration could provide advantages that are not currently offered in the alternative dispute resolution processes available for divorce today; this Note seeks to highlight those benefits, while exploring why this method of alternative dispute resolution could be favorable and effective if applied to divorce settlements.

III. DISCUSSION: AN OVERVIEW OF FINAL-OFFER ARBITRATION

A. The Basics and Early History

Final-Offer Arbitration (FOA) is a subcategory of interest arbitration.[46] The other type of interest arbitration is commonly referred to as "conventional arbitration."[47] FOA laws were first developed as an alternative to strikes in the public sector, because it was thought that conventional arbitration had a chilling effect on the negotiation process, because parties typically took extreme stances to avoid suffering concessions, since they knew that the arbitrator was likely to use a compromise as their determining tool.[48]

B. Structure of Final-Offer Arbitration

Similar to other interest arbitrations, the arbitrator in FOA makes the final decision for dispute settlements, and it is binding.[49] "However, unlike interest arbitration, where the arbitrator has the authority to fashion whatever resolution s/he sees fit, in final-offer arbitration, the arbitrator is limited to choosing between the

[46] *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.
[47] *Id.*
[48] *Id.*
[49] Carrell & Bales, *supra* note 37, at 12.

parties' last best offers . . ."[50] In FOA, each party submits a "final offer" to an arbitrator (or panel of arbitrators) who then selects either an entire "package," or chooses an offer on an "issue-by-issue" basis.[51] The idea is that in FOA, it is in the parties' "best interest to seriously and meaningfully negotiate in good faith and to narrow their differences to a point that reflects their best and final offers before the arbitrator selects one offer over the other."[52] The arbitrator chooses a party's offer based on which is the most reasonable, which is not necessarily the most compromising.[53] This process gives each party an equal opportunity to win the "award,"— what the chosen offer is referred to in FOA and other types of arbitration, as well—in addition to lessening the fear of an unwanted outcome.[54] The advantage of FOA is that the parties submit their proposed final offers and do not leave the arbitrator great discretion in the outcome.[55] Because of this, the parties have incentive to come to, or come close to, an agreement—assuming both parties are being somewhat reasonable—before the arbitrator chooses an offer, because the arbitrator has no authority to alter the final offer to add an element of compromise between the two parties; the winning offer is to be taken and binding in the exact manner it was presented, with no additional compromise to be made by the arbitrator.[56] FOA is less likely to have the same "chilling effect" as conventional arbitration, because it operates in a manner similar to how a strike would, by "posing potentially severe costs of disagreement in a manner that conventional arbitration does not."[57] Finally, if the parties have insight as to what the arbitrator will find reasonable, they will likely adjust their final offer accordingly.[58]

In some iterations, a "grace period" in FOA allows the parties to review the other's final offer before it is submitted to the

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *W. Des Moines Ed. Ass'n v. Pub Emp't Relations Bd.*, 266 N.W.2d 118, 119 (Iowa 1978).
[54] *Nat'l Union of Hosp. Emp. v. Bd. of Regents*, 2010-NMCA-102, 149 N.M. 107, 111, 245 P.3d 51, 55.
[55] *W. Des Moines Ed. Ass'n v. Pub Emp't Relations Bd.*, 266 N.W.2d 118, 119 (Iowa 1978).
[56] *Id.*
[57] *Id.*
[58] *Id.*

arbitrator, giving the parties an opportunity to come to a settlement themselves before the FOA decision process begins.[59] This is a last-chance effort for the parties to determine the outcome of their settlement on their own, before it is placed into the hands of a third party. If they cannot come to an agreement by themselves, then the offers are given to the arbitrator to make the decision for them. The "grace period" likely occurs right before the final offers are submitted to the arbitrator; however, they could remain open up until the arbitrator renders his or her decision to the parties. Therefore, if the parties come to an agreement before the award is announced but after the final offers have been submitted, they could decide to alert the arbitrator that they have come to an agreement on their own and either: (1) no longer need the arbitrator to make a decision; or, (2) need the arbitrator to make a decision only on any remaining issues in dispute.

There are two common formats of FOA, typically referred to as the "day" and "night" formats.[60] Under the "day" FOA format, each party submits their final offers and then the arbitrator chooses from one of the two offers made.[61] In the "night" format, the arbitrator makes a decision independently of the offers each party will submit, and then chooses whichever offer is most similar to his or her independent decision.[62] The "night" format is typically used when there is only one issue in dispute, and when that one issue is of quantifiable nature—such as a salary—therefore making the arbitrator's decision more objective.[63] This is often the case in civil matters, where the only settlement issue in dispute is money. The "night" version is less likely to work when there are multiple issues being negotiated, because it will be more difficult to determine which offer is closer to the arbitrator's award when there are varying components.[64]

Depending on the rules set forth before the FOA begins, an arbitrator does not necessarily have to choose one party's entire proposal when there are numerous issues in dispute.[65] While it may be most simple to just choose one party's proposal in its

[59] Carrell & Manchise, *supra* note 4.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Carrell & Bales, *supra* note 37.
[65] Carrell & Manchise, *supra* note 4.

entirety, there are often situations in which there are multiple issues in dispute—especially non-economic ones—that may be difficult to view and decide on collectively. When more than one issue is at hand and a party's offer is selected in its entirety, it is called the "total package" approach.[66] Alternatively, for disputes on multiple issues, the parties can submit a final offer on each of the issues individually, and the arbitrator decides on an "issue-by-issue" basis.[67] Using this approach, the arbitrator can choose the most reasonable offer on each issue, giving the parties the opportunity for at least some of their offers to be chosen, if not all. It is thought that the "issue-by-issue" approach is more appropriate when non-economic issues are at hand, to avoid "combining apples (economic) and oranges (non-economic [provisions]) in the same package and making comparisons difficult."[68] The "total package" approach works better when all of the issues under dispute are of the same nature, but it is more unlikely that a package will contain reasonable positions on all of the issues if the issues are varying, making the "issue-by-issue" approach more appropriate.[69] Additionally, critics of "total-package" FOA raise concern that parties may be inclined to throw in one, or a few, outlandish provisions in a package that is otherwise reasonable, making "issue-by-issue" more preferable, because it forces parties to propose reasonable offers on all of the issues.[70] However, one criticism of the "issue-by-issue" approach is that an arbitrator might feel inclined to use a "compromise" method in awarding an equal amount of issues to each party—which is what FOA seeks to avoid.[71]

Also worth mentioning, is the timetable for when proposals should be offered, the "grace period," and the final decision. According to two of the leading scholars in this topic:

[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Carrell & Bales, *supra* note 37.
[71] Carrell & Manchise, *supra* note 4.

> The exact timing of submissions of final offers is critical. Submitting final offers as early as possible before the arbitration hearing, and then allowing a "grace period" during which they may be adjusted before the hearing begins—but not right up to the start of the hearing—provides the parties incentive to achieve last minute settlement on issues.[72]

C. Why Final-Offer Arbitration is Preferable

While both mediation and conventional forms of interest arbitration provide quicker, less-expensive and more confidential processes for reaching settlement than do litigation and negotiations between attorneys, each method has its disadvantages. Some parties choose to pursue mediation because the process does not force them to accept anything they are uncomfortable with; however, this brings the possibility of the sometimes unavoidable lack of settlement. More simply put, mediation is not guaranteed to yield a mutually-agreed-upon settlement if either party feels the other is being unreasonable. When discussions reach a standstill in mediation, mediators often find themselves "compelled to facilitate the clients in an atmosphere primarily governed by traditional competitive distributive (zero-sum) negotiations."[73] Once the parties have established what their limits are in their minds, they may refuse to budge on certain principal issues, leaving the mediation at a standstill and the mediator unable to assist them in reaching a settlement.[74]

Where mediation can fail to achieve a resolution when the parties reach an impasse, traditional interest arbitration avoids this outcome by having the parties agree in advance to accept the decision of the arbitrator as final and binding.[75] That said, the parties in traditional interest arbitration are unable to develop the terms of the settlement themselves, as they would be in mediation.[76] The fear of being bound by an unfavorable settlement decision by an arbitrator often leads parties to seek alternative

[72] Carrell & Bales, *supra* note 37, at 25.
[73] Carrell & Manchise, *supra* note 4.
[74] *Id.*
[75] *Id.*
[76] *Id.*

methods to settle their disputes.[77] Additionally, "conventional arbitration awards tend to be based on the compromise principle . . . Consequently, it can be argued that it will 'be to the advantage of each party to enter the arbitration proceeding without having given away too much in advance.' To the extent that this reasoning is valid, conventional arbitration has a 'chilling' effect on good-faith bargaining as each side holds back in anticipation of handing the dispute to an arbitrator."[78]

FOA offers a means of resolving an impasse with the benefits of both traditional mediation and arbitration, but with fewer drawbacks.[79] Like mediation and arbitration, FOA offers a faster, less expensive and more confidential process than litigation.[80] Binding FOA is more likely to yield a settlement than mediation (where an impasse is often reached) and gives the parties the opportunity for the award to come directly from their offers (as opposed to the arbitrator awarding what he or she thinks is right).[81] By incentivizing the parties to be reasonable from the beginning of the process, an enormous amount of time is saved, because the slow process of coming closer to a middle ground from opposite extremes is avoided. In addition, sometimes the final-offer arbitration award process is avoided completely if the parties are able to negotiate amongst themselves if they see that the other party's final offer is reasonable during the grace period; needless to say, this also decreases the time to settle a divorce. Lastly, FOA can minimize "the chilling effect"—when parties feel the need to begin at opposite extremes due to the anticipation that the arbitrator will compromise on each offer—that is common in other forms of dispute resolution.[82]

IV. FINAL-OFFER ARBITRATION IN MAJOR LEAGUE BASEBALL AND PUBLIC SECTOR LABOR DISPUTES

A. Structure of Major League Baseball's Final-Offer Arbitration

[77] *Id.*
[78] Gary Long & Peter Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 ILR REV. 186, 186-203 (1974).
[79] Carrell & Manchise, *supra* note 4.
[80] *Id.*
[81] *Id.*
[82] Carrell & Manchise, *supra* note 4.

FOA is often referred to as "baseball arbitration" because of its widespread use in determining salary disputes in Major League Baseball.[83] Baseball has been recognized as a professional sport since 1871 and has been plagued by salary disputes between players and team owners ever since.[84] In the early years, a monopoly by the team owners over their players took the form of the "reserve system."[85] In this structure, players were only signed for year-long contracts, allowing players to present themselves on the open market after each season.[86] On September 30, 1879, team owners among the National League of Baseball Clubs entered into a gentleman's agreement in which the owner of every team could choose five of his players to be "reserved" for his team until they were released.[87] This system suppressed the players' salaries, increased the organization's profits, and established standards for the sport to operate under.[88] Ultimately, the reserve system was expanded to include entire teams.[89] By the 1880's, team owners put a reserve clause in the players' individual contracts, prohibiting the player from signing with any other team until he was released from the contract with the original owner.[90]

By 1973, the players union had mustered enough bargaining power to demand a salary arbitration provision from team owners.[91] On February 25th of that year, the owners and players' union signed a momentous Collective Bargaining Agreement ("CBA") that put an end to the clause that tied players to the team they first signed with, and instead gave them the opportunity to become free agents after six years.[92] FOA was used to determine the players' salaries in those first six years whenever there was a dispute between the players and the team owners.[93] The CBA provided that FOA should be utilized to determine a

[83] *Id.*
[84] Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, http://law.bepress.com/cgi/viewcontent.cgi?article=6219&context=expresso.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Gordon, *supra* note 84.
[91] *Id.*
[92] *Id.*
[93] *Id.*; Carrell & Manchise, *supra* note 4.

player's salary for the next season; however, the CBA also held that FOA was not to be used to negotiate benefits or any other issues.[94] While the FOA process was new to baseball in 1974 and certainly criticized, "it has largely continued unchanged in the 38 years since, and has been used in hundreds of cases."[95]

Salary arbitration in Major League Baseball can be viewed as somewhat of a "hybrid" between "package" and "issue-by-issue" FOA, as salary is the only issue in dispute, yet "it entails the high degree risk commonly associated with the package system."[96] That being said, FOA in the context of Major League Baseball is typically not categorized as either "package" or "issue-by-issue" FOA.[97] Because there is only one issue at dispute—the player's salary—in Major League Baseball contract negotiations, it does not make sense to categorize this type of FOA as either the "issue-by-issue" or "package" format.

Once the player and the team have presented all of their relevant evidence, the arbitrator has a time-period of twenty-four hours to render a decision.[98] There are no explanations, opinions, findings, or reasons given regarding the decision.[99] The confidential nature of the system protects the integrity of the relationship between the players and the team owners, in addition to exponentially cutting down the duration of the process by not allowing explanations of the decisions.[100] Lastly, because the parties know that the Collective Bargaining Agreement does not allow for appeals of the decision, the process ends there.[101]

B. Outcome of Final-Offer Arbitration in Major League Baseball

FOA has proven to be successful in Major League Baseball salary disputes, as the process has not only been used, but has also remained virtually unaltered for nearly 40 years.[102] One reason for its success could be attributed to the findings of both Major League Baseball and non-Major League Baseball studies, which indicate

[94] Carrell & Manchise, *supra* note 4.
[95] *Id.*
[96] Gordon, *supra* note 84.
[97] *Id.*
[98] Carrell & Bales, *supra* note 37, at 16.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*; Carrell & Manchise, *supra* note 4.

that "pre-arbitration settlement is twice as likely in jurisdictions using final-offer arbitration as it is in jurisdictions using traditional arbitration."[103] FOA provides a distinctive method of dispute resolution that promotes strong relationships between players and team owners, good faith negotiations, and a well-thought-out system of upholding the baseball financial market for decades.[104] FOA offers a quick, effective means of settling baseball salary disputes at an affordable cost, while avoiding acrimony and wasting resources. Its system allows baseball to operate continuously, without the need for a lengthy process each time a team acquires a new player. Given its successes to date, FOA is likely to remain the method of dispute resolution for years to come in the context of baseball salary disputes, and has already shown itself to be a useful method in other professional sports dispute to date.

C. Final-Offer Arbitration in Public Sector Labor Disputes

Another arena in which FOA is frequently utilized in the United States is for public sector labor disputes, where the vast majority of public employees—especially safety personnel, such as police officers and firefighters—do not have the ability or legal right to withhold their services and strike.[105] FOA in public sector labor disputes seeks to resolve impasses in "a manner that allows the employees some method of meaningfully manipulating management's costs of disagreements but which protects the public's interest in continuously receiving government services.[106] In the United States:

> [T]wenty-six states provide public employees collective bargaining rights, twelve states provide some public-sector employees collective bargaining rights, and twelve states do not allow collective bargaining by any public sector employees. Of the states permitting public-sector collective bargaining, most do not allow public-sector employees the right to strike, and therefore provide

[103] Carrell & Bales, *supra* note 37, at 15.
[104] Gordon, *supra* note 84.
[105] Peter Feuille & Gary Long, *The Public Administrator and Final Offer Arbitration*, 34 PUB. ADMIN. REV. 575, 575–583 (1974).
[106] *Id.* at 575.

> some third-party process to resolve bargaining impasses.[107]

In order to help facilitate effective negotiations, about fifteen states have designated some form of FOA as the method to be used to resolve labor disputes in the public sector of the United States.[108] In 2011, for example, three states passed bills for FOA for teachers.[109] Indiana has adapted a new law applying FOA as the method for resolving an impasse between teacher unions and school districts.[110] Similar bills were passed in Pennsylvania and Rhode Island.[111] In 1987, Maine switched from non-binding arbitration of all agricultural disputes, to binding FOA, in order to "limit strikes and protect the general welfare of the state."[112] Each state's FOA statute names different types of industries it applies to, but collectively, the groups consist of: (1) State Employees; (2) Agricultural Employees and Associations; (3) Firefighters and Police Officers; (4) Public Safety, including State Patrol Troopers and State Patrol Inspectors; (5) Labor disputes; (6) Protective Services; (7) Security and Peace Officers; and, (8) Teachers for kindergarten through twelfth grade students.[113]

V. PROPOSAL

A. Utilizing Final-Offer Arbitration for Divorce Settlements

Early research has shown that "FOA [leads] to higher pre-arbitration settlement rates. . . because the offer of the parties converged and, ultimately, eliminated the need for a settlement imposed by the arbitrator."[114] Therefore, FOA seems to reduce, if not completely eliminate, the number of "chilled first offers" and leads to lower impasse rates.[115] However, even if the parties do not come to a negotiated agreement prior to submitting their final offers to the arbitrator, "closer offers should arguably make the

[107] Carrell & Bales, *supra* note 37, at 17.
[108] Carrell & Manchise, *supra* note 4.
[109] Carrell & Bales, *supra* note 37, at 17.
[110] Carrell & Manchise, *supra* note 4*;* Carrell & Bales, *supra* note 40, at 17.
[111] Carrell & Bales, *supra* note 37, at 17.
[112] *Id.*
[113] *Id.* at 18, 19.
[114] Jaime Tijames, *Who Wants What? — Final Offer Arbitration in the World Trade Organization*, 26 EUR. J. INT'L L. 587 (2015).
[115] *Id.*

arbitrator's task easier, and, for instance, FOA[s] might help settle some issues during negotiations and, as a consequence, reduce the number of issues before the arbitrator."[116] Historically, studies show that FOA is typically used to settle wage disputes.[117] However, "there does not seem to be a fundamental problem with extending the main findings on this arbitration procedure to other fields. . ."[118]

If FOA is successful in settling other types of disputes, why not apply it to divorce? Evidence shows that FOA can be effective in settling disputes regarding monetary and nonmonetary issues.[119] Therefore, it could be worthwhile to utilize this dispute resolution method to settle divorces.

B. The Structure of "Divorce Final-Offer Arbitration"

Because of the complex nature and varying questions raised by divorce, the most appropriate form of FOA would be the "issue-by-issue" approach. Under this approach, each party would put forth their "final-offer" on issues such as parenting, assets, child support, spousal support, tax issues and other important issues. The arbitrator(s) would choose one proposal for each individual issue. For issues such as custody, the decision will be determined based on the best interests of the child or children, and the decision would be subject to review by the Court. Additionally, it is likely that the "day" format of FOA—where the arbitrator does not make an independent proposal and choose the party's offer which is most similar to that, rather chooses the more reasonable offer—would work best in this scenario, as it would give the parties to the divorce more autonomy when the arbitrator is choosing to whom to award a certain issue.[120]

C. How Do We Define the "Issues"?

Standard "issues" for the "issue-by-issue" analysis would be defined as the terms that are covered in standard judgments of

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *See* Carrell & Manchise, *supra* note 21 (explaining "day" versus "night" format of FOA).

divorce and separation agreements, as explained below. For any additional "issues," the parties would agree in advance of making their final offers on including such points in their offers. "Parenting Issues" will include scheduling, decision-making, sharing information, relocation, survivorship, and the introduction of significant others to the children.[121] "Scheduling" addresses the children's routine regarding school nights, weekends, school vacations, holidays, summer vacations, parents' and children's birthdays, Mothers' Day and Fathers' Day, etic.; it could also address methods of communication—telephone, email, text message, video calls, etc.—and access to the children while they are with the other parent, transportation between households, protocol for permission to travel outside the state or country with the children, etiquette surrounding visits and cancellations, and possible changes to the schedule at future times. "Decision-Making"—which can be done by method of joint agreement, consultation, or sole authority—focuses on choices regarding education, extracurricular activities, medical care, religion, etc. The issue of "Sharing Information" addresses the appropriate mechanisms for sharing important information about the children to the other parent (i.e., medical, school, etc.). "Relocation" requires a proposal for the procedure a parent must follow when considering moving with the children if there is shared custody. "Survivorship" requests—that is, what interactions should and should not be had with the deceased parent's family members if one of them dies—will be presented by each party with respect to their own family members, and no award will be given by the arbitrator/s for this issue. Lastly, each party will submit an offer on their ideal rules regarding the introduction of a new significant other to the children by the other parent. For this issue only, the parties can decide whether they want an award to be chosen, or if they will agree to accept the other party's conditions about when and how to introduce significant others to their children.

Another subcategory under the "Parenting Issues" category is "Parenting Expenses," which constitutes contributions towards basic needs ("child support"), educational costs, un reimbursed medical expenses, child care costs, and inheritance provisions for the children.[122]

[121] ROBERT KIRKMAN COLLINS, *supra* note 27, at, 54–55.
[122] *Id.* at 57.

The next group of issues that will be addressed is "Property Allocation." This will include offers for asset division, the marital residence, other real property, liquid assets, retirement funds and pensions, employee benefits, business interests, pets and other property (vehicles, home furnishings, etc.); it also will address liabilities (such as credit cards, debts, etc.).[123] "Spousal Assistance," such as spousal maintenance (formerly known as "alimony") and spousal health insurance will constitute another issue category, in addition to "Tax Ramifications".[124] The tax issues will include those arising from distribution of property (capital gains), basis issues (with appreciated assets), capital gains issues (from selling the marital home or other assets), and how to file tax returns going forward.[125]

Some remaining issues might be the life insurance to underwrite future obligations, arbitration, court filing and counsel and expert fees (should the parties chose to utilize these professionals in the FOA process), future arbitration/mediation clause, and any requirements for a religious divorce.[126]

D. How the Arbitrators are Chosen

As in traditional forms of interest arbitration, the arbitrator in Divorce FOA should be chosen by the parties.[127] In some instances, arbitrators can be selected through an arbitration institution's process, such as the American Arbitration Association (AAA).[128] Alternatively, the parties might seek someone with traditional experience in matrimonial family matters, such as a divorce mediator. Another issue to consider when choosing an arbitrator for Divorce FOA is whether the parties would like a single, neutral arbitrator, or a panel of three arbitrators. In this situation, there could be one arbitrator appointed by each party, and one neutral arbitrator, who is often selected by the parties' arbitrators.[129] While arbitration institutions typically require the

[123] *Id.* at 56.
[124] *Id.* at 58.
[125] *Id.*
[126] *Id.*
[127] Penny Reid & Tifannie Limbrick, *Selecting the Arbitrator: A Key Decision for your Next Arbitration*, SIDLEY.COM, (July 1, 2016), https://www.sidley.com/-/media/publications/texas-lawyer_selecting-the-arbitrator.pdf.
[128] *Id.*
[129] *Id.*

party-appointed arbitrators to be neutral, if the arbitration is not being administered by an institution, the party-appointed arbitrator can be an advocate for the party instead of simply being neutral.[130] One benefit of utilizing an arbitration institution, however, is that if the parties cannot come to an agreement on who to choose as a neutral arbitrator, the institution can appoint one.[131] Logically, it follows that parties should utilize a single arbitrator in Divorce FOA (as opposed to a panel) in order to decrease the time and costs of the process. Lastly, if the parties cannot agree on a neutral arbitrator and do not wish to use an institution to facilitate the FOA, a court can appoint a neutral arbitrator.[132]

E. Applying Final-Offer Arbitration to Divorce Mediation-Arbitration

Mediation-arbitration—sometimes referred to as "med-arb"—is an alternative dispute resolution method that uses both mediation and arbitration to try to reach an agreement.[133] "Thus, subject to variations, the essence of med-arb is to allow a softer mediation process to occur first thus taking every opportunity of achieving a resolution to a dispute which is not imposed . . . "[134] If an agreement cannot be reached through mediation, the parties proceed to arbitration, where an arbitrator will make the disputed decisions for them. Med-arb encourages the parties to come to an agreement in mediation, otherwise it will be submitted to an arbitrator, and the parties will lose control over the outcome.[135] "At that point, the presiding officer, now sitting as an arbitrator and no longer as a mediator, is enabled to proceed as if the hearing was one of arbitration and to impose a resolution, a final and binding award, generally relying on the information presented during the mediation hearing." This is beneficial to the parties, because they will not have to start from the beginning of the process, and they have an option to continue the process through a different method, should their first option not succeed.

---

[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *What is mediation-arbitration?*, STEPS TO JUSTICE, https://stepstojustice.ca/questions/family-law/what-mediation-arbitration
[134] *Med-Arb*, *Duhaime's Alternative Dispute Resolution (ADR) Law Dictionary*, http://www.duhaime.org/LegalDictionary/M/MedArb.aspx.
[135] *Id.*

Additionally, the mediator can choose an arbitrator, so that the parties do not feel constrained, or the need to act differently, towards the mediator during the mediation process.

While this method is effective for achieving a resolution once an impasse is reached in mediation, it takes the autonomy away from the parties in the decision process, which is likely one of the main reasons the parties decided to utilize mediation in the first place. To solve this dilemma, parties could opt to use "Med-FOA." This method would essentially follow the traditional "med-arb" structure, however, the parties would utilize FOA instead of traditional interest arbitration after mediation reaches an impasse. This way, a resolution is guaranteed, and the parties would not lose as much autonomy in the decision process, as they might in traditional med-arb. Similar to traditional med-arb, the parties would begin their negotiations in mediation; if the parties cannot come to an agreement on some, or even all, of the issues in mediation, instead of transitioning into traditional arbitration, the parties would opt to utilize FOA. The FOA could work in two different ways: first, the parties could elect, at the beginning of their divorce mediation process, that should they come to an impasse on any individual issue, those, and only those, issues would be decided by an arbitrator—similar to the "issue-by-issue" process of FOA. Each party would submit their final offer on each disputed issue, and the neutral arbitrator—who was originally the mediator—would choose the most reasonable offer and award that issue to the respective party. Second, the parties could begin the mediation process without coming to an agreement on what would happen should they reach a stand-still on certain issues, and at the time of the impasse, the mediator can offer to transition over to FOA for the purpose of settling the remaining disputed issues. "Med-FOA" would encompass all of the benefits of mediation, traditional arbitration, and FOA, while limiting the pitfalls that currently exist when utilizing these methods individually.

F. Criticisms

One common criticism of FOA is that there is virtually no appeals process. One response to this criticism is that "the losing parties should be somewhat pacified by the fact that the award

should not differ too greatly from that party's offer," as the offers should be similar if both are reasonable.[136]

Another criticism of FOA is that it is inherently unfair because the award consists of only one party's offer.[137] There are two answers to this: first, this fear will encourage voluntary settlements before the final award is given; and, second, the parties will find that the outcomes are "more acceptable given that the arbitrator would choose from less extreme final offers."[138]

As previously mentioned with "total-package" FOA , critics are concerned that parties may be inclined to throw in one, or a few, outlandish provisions in their package that is otherwise reasonable; this is avoided by using "issue-by-issue" FOA, because it forces parties to propose reasonable offers on all of the issues.[139] Also, the criticism of FOA that both parties can submit unreasonable packages and the arbitrator would be forced to choose between two unreasonable proposals, is also solved by using the "issue-by-issue" approach instead of the "package" format.[140] In the extraordinary scenario that the parties both choose to make unreasonable offers on the same issue, the arbitrator will be inclined to choose the more reasonable of the two offers, hence encouraging the parties to only make reasonable offers.

Another response to this critique is that research conducted on final-offer arbitration has shown that the more transparent the final-offer arbitration process is, the more reasonable the parties' offers would be, and therefore the dispute is more likely to settle.[141] "For example, in one study of final-offer arbitration scenarios structured in different ways, the study found that when the partied knew their final offers would be disclosed to the other side, their final offers were more reasonable and the parties were more likely to settle their dispute."[142]

---

[136] Josh Chetwynd, *Play Ball? An Anlaysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQUETTE SPORTS L. REV. 109, 115 (2009).

[137] David L. Dickinson, *The Chilling Effect of Optimism: The Case of Final-Offer Arbitration*, *in* ECON. RES. INST. STUD. PAPERS, DIGITIAL COMMONS AT UTAH ST. UNIV. (2003).

[138] *Id.*

[139] Carrell & Bales, *supra* note 37.

[140] *Id.*

[141] Carrell & Bales, *supra* note 37, at 23, 24.

[142] *Id.* at 24.

A further critique of the "both unreasonable proposals" issue that might not be answered by utilizing the "issue-by-issue" format instead of "package" format, is that both parties could still theoretically submit utterly irrational offers on one particular issue, and then the arbitrator would still be left to decide between two unreasonable proposals. One possible response to this would be that if the arbitrator still thinks both offers are wildly unreasonable with regards to one issue, the arbitrator may, perhaps, at his own discretion, give the offers back to the parties to come back with "more reasonable" offers before he awards that specific issue. However, this would create more incentive for the parties to refrain from putting their "best" or "final" offers first, therefore undercutting the benefits of FOA. In order for the arbitrator to be able to do this in FOA, he or she could only inform the parties that this would occur after they have both submitted their final offers, and both contain an outrageously unreasonable proposal on the same issue. When returning the issue to the parties to come up with more reasonable offers (for that issue only), the arbitrator would make it clear that the parties will not have another opportunity to adjust their proposals on that issue, and therefore, the arbitrator must pick whichever offer is more reasonable of the parties' second offers. Proposing this option would be at the discretion of the arbitrator, and would likely be an uncommon occurrence in FOA.

VI. Conclusion

FOA has numerous benefits when compared to other alternative methods of dispute resolution, making it a useful method that could be used to settle divorces. While the currently available alternative dispute resolution methods for settling a divorce are helpful in decreasing costs and time spent during the negotiations, there are aspects of these methods that make them undesirable to some, which could be resolved by implementing FOA to the divorce negotiation process. Notably, the other methods pose obstacles around the parties' autonomy in the decision process, the ability to move forward once an impasse has been reached, the "chilling effect," which slows down the process when compromise is involved, and the notion of compromising steering the outcome of the arbitrator's decision. FOA seeks to combat these barriers in multiple ways; first and foremost, it is

guaranteed to yield a settlement, and thus offers the principal advantage of traditional interest arbitration, while avoiding the primary disadvantage of mediation—the possibility of no settlement.[143]

Second, FOA encourages parties to be reasonable from the beginning, out of fear that the arbitrator will choose the other party's offer if it is more reasonable, which significantly cuts down the cost and time spent negotiating divorce settlements.[144]

Third, the arbitrator's decision provides a more reasonable settlement than that which comes out of traditional arbitration, because the decision is one proposed by one of the two parties rather than by the arbitrator alone, allowing the parties to maintain a greater level of autonomy in the decision.[145]

Fourth, the FOA process alone encourages a large percentage of the parties to settle the dispute themselves before the arbitrator renders the decision—"likely because they are given the final offer of the other side and the opportunity to then negotiate a settlement during a grace period—a critical and constructive step not typical of mediation or arbitration."[146]

Lastly, and arguably most significantly, FOA has the ability to eliminate "the chilling effect" that is common in traditional interest arbitration, where the parties do not put forth reasonable offers from the beginning under the assumption that the arbitrator will likely "split the difference."[147] By eliminating the "chilling effect," FOA reduces acrimonious and unreasonable behavior associated with divorce settlement procedures, which in turn diminishes the length of time and amount of emotional trauma commonly associated with divorces.

By applying FOA to divorce settlement negotiations, parties would reap tremendous benefits, making the difficult process more bearable and efficient for couples going through a divorce. For these reasons, and those addressed throughout this Note, the alternative dispute resolution processes for divorce negotiation settlements would benefit tremendously from the addition of "Divorce FOA."

---

[143] Carrell & Manchise, *supra* note 4.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

Introduction

In 1994, I was named an Outstanding Business Partnership Volunteer at my son's elementary school for mentoring a fifth-grade mediation program. Fast forward to 2019, my son, David, is a successful attorney and mediator with my mediation firm. My daughter, Michelle, likewise became a peer mediator in middle school. For the past ten years, she has been selected as a "Highly Effective" algebra teacher by the state of Florida. If you ask her, there is little doubt that the conflict resolution skills she learned in 8th grade have greatly contributed to her being so recognized.

No wonder that this article about how peer mediation can be utilized as part of a larger framework to combat bullying in our high schools stands out as one of my favorites of all the entries to this year's writing contest.

Many of you may remember the story of the siblings fighting over the last orange that each needed for a school project due the next day. A third sibling, younger of course, resolved the dispute via a win-win-win solution. The skills imparted in peer mediation programs stick with these young people for the remainder of their lives.

I highly recommend that each of you reading this journal, whether a parent or not, reach out to your local school system and volunteer to become involved in an existing peer mediation program or, better yet, help to develop one in your community's school system. This is the type of legacy that we, as mediators and conflict resolution professionals, should work to foster in future generations.

John W. Salmon
Editor in Chief
Distinguished Fellow, American College of Civil Trial Mediators

STICKS AND STONES: HOW SCHOOL-BASED PEER MEDIATION CAN REDUCE BULLYING IN PUBLIC SCHOOLS

Stacey Dettwiller

I. INTRODUCTION

When asked about their formative years, many Americans call to mind cherished memories created at school. Unfortunately for some of today's children, those memories are likely to be tainted, due to the significant prevalence of bullying in schools.[1] Studies estimate that over 5.7 million children, roughly 30% of the youth in the United States, are involved in bullying, either as the bully, victim, or both.[2] Bullying can be defined as repeated (or potentially repeated), unwanted, aggressive behavior involving a real or perceived power imbalance among two or more persons.[3] The bullying behavior can be: 1) verbal, such as name-calling or teasing, 2) social, like deliberately excluding someone from an activity or group, 3) physical, such as hitting, kicking, or spitting, or 4) cyber, which includes characteristics of verbal bullying but is done completely through electronic means.[4] In response to the rise in bullying, students, parents, teachers, administrators, and lawmakers have collaborated to combat its effects. The successful use of mediation in legal disputes has encouraged the implementation of school-based peer mediation programs as a form of bullying intervention, which this paper will address.

Part I of this paper describes the early inception of school-based mediation as a method of resolving conflicts, including the

---

[1] *See Bullying Statistics 2010*, BULLYING STATISTICS http://www.bullyingstatistics.org/content/bullying-statistics-2010.html (last visited November 24, 2018) (providing statistics demonstrating the prevalence of bullying and its detrimental effects on society).

[2] Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools* 9 NEV. L. J. 545, 547 (2009).

[3] *What is bullying?*, STOPBULLYING.GOV https://www.stopbullying.gov/what-is-bullying/index.html (last updated July 26, 2018).

[4] *Id.*

evolution of peer mediation and the process involved in establishing a program. Part II analyzes the evolution of anti-bullying legislation and its impact on school-based mediation programs. Part III suggests the use of peer mediation as part of a larger framework to combat bullying at the secondary level, including an outline of several points included within the establishment of such a program that are worthy of thoughtful consideration. This section also addresses concerns surrounding peer mediation, including the belief that mediation may not be an appropriate choice for bullying intervention and a look at the Uniform Mediation Act as a potential solution to these issues. The paper concludes briefly by summarizing and looking at what the future may hold for peer mediation programs.

II. THE RISE OF SCHOOL-BASED PEER MEDIATION PROGRAMS

Peer mediation programs have not always been present in American schools. In the past twenty years, however, the increased instances of school violence, coupled with the emphasis on bullying as a factor in these tragedies and a sharp spike in teen suicide rates, have asserted a compelling need for solutions.[5] This demand, in conjunction with changes in the national perspective on bullying and its effects, has been a major catalyst for the incorporation of mediation as an anti-bullying approach.[6]

A. *A Brief History of Peer Mediation*

The roots of school-based mediation are linked to the success of community-based mediation programs initiated in the 1970's.[7]

[5] *See* Bullying Statistics 2010, *supra* note 1 ("…revenge for bullying is one of the strongest motivations for school shootings, according to recent bullying statistics." "…there is a strong connection between bullying, being bullied, and suicide, according to a new study from the Yale School of Medicine").

[6] Mary M. Chittooran & Gaileen A. Hoenig, *Mediating a Better Solution*, COUNSELING 101, March 2005, at 11, 11.

[7] William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOTIATION L. REV. 213, 220-21 (1998).

These programs were successful in facilitating realistic solutions to community problems that might not otherwise have had any legal recourse, and created a means for preserving, rather than ending, relationships.[8] Similarly, the early school-based versions of these programs, such as the New York-based Children's Creative Response to Conflict ("CCRC"), focused on incorporating peace education as part of the school curriculum.[9] The program used Quaker teachings, which centered around nonviolent conflict resolution techniques, to promote its cause among students.[10]

In the 1980's, a group called Educators for Social Responsibility ("ESR") was also established in Massachusetts in order to encourage students to become involved within their respective communities.[11] Similar to the CCRC, the ESR also promoted community involvement and peace education as its goals. One smaller branch of the group, the Resolving Conflicts Creatively Program (the "RCCP"), became known for promoting peer mediation and conflict resolution, and helped establish similar programs across the nation.[12] Another group, School Mediation Associates ("SMA"), which was connected to yet another New York community-based mediation program, also stressed the importance of involving students in their own dispute resolutions.[13] SMA founders, however, felt more strongly about the concept of mediation itself as a solution, rather than its incorporation into any curriculum, and thus focused mainly on dispute resolution techniques rather than community involvement.[14]

Society, rather than pedagogy, prompted the most recent evolution in school-based mediation programs. Escalating school violence throughout the 1990's reached its peak with the mass shooting at Columbine High School in 1999, requiring a shift in

[8] *Id.* at 221.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Haft & Weiss, *supra* note 7, at 222.
[14] *Id.*

conflict resolution in order to address the growing problem.[15] While student empowerment remained a critical aspect, the former emphasis on community responsibility was replaced by the importance of reducing instances of student violence and safeguarding the nation's schools.[16]

B. *Project Outreach: A Case Study in the Implementation of Peer Mediation in Response to Conflict*

As part of the response to the increase in violent conflicts taking place at school, the American Bar Association launched its own peer mediation program in 1996.[17] Prior to the implementation of its program, the American Bar Association ("ABA") had already established a presence in school districts with its myriad opportunities for attorneys to mentor students through mock trial, moot court, and debate teams.[18] As the attorneys became more involved with the student groups and noted absences resulting from school violence, they turned to mediation as a potential source of aid.[19]

Volunteers from the ABA began training groups of students to utilize conflict resolution skills and facilitated the implementation of school-based peer mediation programs.[20] School districts in thirteen major cities, including Atlanta, Chicago, and Philadelphia, initially participated in the program. "Project Outreach" garnered attention and support from state legislatures and attorneys across the nation, including then-Attorney General Janet Reno and Supreme Court Justice Sandra Day O'Connor.[21] Project Outreach set forth detailed guidelines to facilitate success for those looking

---

[15] JAANA JUVONEN, SCHOOL VIOLENCE: PREVALENCE, FEARS, AND PREVENTION, 1–2 (RAND Corp. 2001) https://www.rand.org/pubs/issue_papers/IP219.html.
[16] Haft & Weiss, *supra* note 7, at 22.
[17] *See* Mark Hansen, *Mediation—Not for Adults Only*, 83 AMER. BAR ASSOC. J. 104 (April 1997) (providing a general overview of the purpose and intent of Project Outreach).
[18] Jack C. Hanna, *Lawyers March for School Peace: The Attorney's Role in Peer Mediation*, 5 DISP. RESOL. MAG. 27 (1998).
[19] *Id.*
[20] *Id.*
[21] *Id.*

to start a program in their district or school. The guidelines stressed the initial importance of gaining administrative support, then collaboratively developing a coordinating committee consisting of an attorney volunteer, school administration representatives, teachers and a school counselor in order to oversee the program.[22]

The next, most challenging step was to have the committee select and train the student mediators. The guidelines suggested that the committee maintain a ratio of one mediator for every thirty-five to forty students in a building.[23] Further, mediators needed to be representative of the student body populations—taking race, ethnicity, gender, and age in to consideration—and shouldn't be limited to those students with specific academic or extracurricular achievements.[24] Training would consist of a two-day in-service instruction session for both the coordinating committee and the student mediators, led by the attorney volunteer from the coordinating committee.[25] Participants would learn the theory, principles, and process of mediation, then apply their knowledge in practical situations through monitored role-play with debriefing and questions after each session.[26] Another critical aspect of the training was stressing the importance of confidentiality and its limits. This conversation would lend itself to creating the scope of the program and determining the types of disputes mediators would be able to handle.[27] The committee and mediators would also set a schedule and location for the mediations to take place.[28]

The final, and arguably most important, step in the process was marketing the program as a tool for resolving conflict, both throughout the school and the greater community.[29] The driving principle behind this integration was to create and unify a network responsive to conflict and supportive of the mediation process.[30]

---

[22] *Id.* at 28.
[23] *Id*.
[24] Hanna, *supra* note 18, at 28.
[25] *Id.* at 28-29.
[26] *Id.* at 29.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Hanna, *supra* note 18.

Further, the more sessions mediators were able to take on, the more practiced they would become.[31] The intended result was a community-wide effort directed at reducing violence among adolescents, with the distinct purpose of facilitating realistic solutions for those who were the biggest stakeholders.[32]

Though not all programs strictly adhered to the above described model, by 1998 the general use of peer mediation as an alternative form of dispute resolution had spread. Project Outreach and its brethren had established 8,500 programs in schools nationwide—about 10% of public schools at the time.[33] A more recent study conducted in 2009 indicated that the estimated number had grown to between 15,000—20,000 recognized programs and had expanded to encompass the issue of bullying, which had just begun to eclipse violent conflict as one of the leading concerns of schools nationwide.[34]

III. State Legislative Efforts Attempt to Address a National Problem: A Look at Anti-Bullying Measures

As of the date of this paper, there is no federal legislation specifically directed at bullying.[35] Individual states, however, have passed anti-bullying statutes meant to protect students and support the intervention efforts being introduced. In 1999, Georgia became

---

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See generally* Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 647 (2007) (proposing mediation as an equitable alternative to suspension), *quoted in* Matthew D. Decker, Comment, *Unexcused Absence: A Review of the Need, Costs, and (Lack of) State Support for Peer Mediation Programs in U.S. Schools*, 2009 J. OF DISP. RESOL. 485, 496 (2009).

[35] There is no specific federal law directed at bullying. However, it is sometimes so pervasive as to be encompassed under federal civil rights laws. For a general description of these circumstances, see U.S. Department of Health and Human Services, Laws and Policies, Federal Laws, STOPBULLYING.GOV https://www.stopbullying.gov/laws/federal/index.html (last updated Mar. 31, 2014).

the first state to pass such legislation.[36] The law included a provision mandating age-appropriate consequences for bullies, including counseling, and required the state department of education to maintain a list of entities which would provide anti-bullying materials and training programs for schools.[37] Other states soon followed suit in passing anti-bullying legislation and by 2015 all fifty states would have some form of law in place.[38] Several state legislatures included provisions mandating or suggesting peer mediation programs as part of a solution: Alaska required a peer mediation program for every school in the state; Pennsylvania passed legislation stating that peer mediation would become a mandatory part of its curriculum; in Tennessee, the Schools Against Violence in Education Act required district-wide school safety teams which were empowered to create mediation programs in order to deter violent conflict.[39]

Though well-meaning, the anti-bullying legislation's implementation has been problematic since it was initially passed, especially in relation to peer mediation programs. First, the statutes lack any so-called "teeth." Typical language included within the statutes requires schools to create a policy that defines and prohibits bullying; however, the statutes mostly do not require schools to implement to their own policies.[40] The laws also fail to set standards for schools regarding the critical aspects of anti-bullying and peer mediation programming, including training employees and students in preventing and reporting incidents.[41] As a result, the statutes "fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option

---

[36] *See* BULLY POLICE USA, http://www.bullypolice.org (last updated Dec. 2017) (listing and describing individual states' anti-bullying laws, dates of passage, and dates of amendments, if applicable).

[37] *Id.* (citing GA. CODE ANN. § 20-2-751.4 (West, 2018)).

[38] *Id.*

[39] *See* Decker, *supra* note 34, at 497-99 (first citing ALASKA STAT. § 14.33.120(a)(7) (West, 2018); then citing 24 PA. STAT. AND CONS. STAT. ANN. §§ 13-1302-A, 13-1303.1-A (West, 2018); and then citing TENN. CODE ANN. § 49-6-805 (West, 2018)).

[40] *See* Christensen, *supra* note 2, 556-57 (suggesting that reform for state-level anti-bullying legislation is necessary).

[41] *See id.* 557-58.

of creating anti-bullying policies, but not anti-bullying cultures."[42] Theoretically, this legislative vagueness might have been meant to provide flexibility for schools in adopting programs that fit their particular demographic needs, but it has also created glaring inconsistencies among schools and resulted in a piecemeal response to a serious problem.

Further, even if mediation programming is state-mandated, few legislatures have actually put parameters in place to account for proper funding of such programs. Estimates suggest that establishing a program may cost as little as a few hundred dollars, or as much as $40,000, depending on available resources.[43] California law established grants to provide schools with $5,000 or districts with $10,000 in order to help alleviate any costs.[44] Similarly, Delaware, Tennessee, and West Virginia also funded grants in unspecified amounts that would offset the costs of creating mediation programs within their schools.[45] While these states' efforts are praise-worthy, the implications of absent funding are twofold: First, the lack of funding creates discrepancies in the quality and extent of peer mediation programming offered. Theoretically, funding shouldn't be problematic because each program might differ in order to meet the needs of a particular demographic; however, without it, some programs are unable to obtain even necessary basic training for mediators and advisors, as well as other critical resources, rendering them ineffective or unable to provide services to meet demand.[46] Second, without funding for state-mandated mediation programs, school districts might be forced to appropriate money from other areas in order to meet their requirements. Instead of resolving conflict, peer

---

[42] *Id.* 555-56 (citing Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 673 (2004)).

[43] Decker, *supra* note 34, at 499 (citing RICHARD COHEN, STUDENTS RESOLVING CONFLICT: PEER MEDIATION IN SCHOOLS 82-83 (2d ed. 2005)).

[44] *See* Decker, *supra* note 34, at 497-99 (citing CAL. EDU. CODE §§ 32228-32228.5 (repealed 2016)).

[45] *See* Decker, *supra* note 34, at 497-99 (citing DEL. CODE ANN. TIT. 14, § 1605(7)(b)(8) (West, 2018); also citing TENN. CODE ANN. § 49-6-4302(c)(1) (West, 2018); and then citing W. VA. CODE ANN. § 18-2C-5 (West, 2018)).

[46] Decker, *supra* note 34, at 496.

mediation would create more of the same when funds were taken from other groups to provide for a mediation program.

Though anti-bullying legislation exists it is not necessarily curing the evils of school bullying, nor is it facilitating solutions, such as peer mediation, that will rectify the problem. It appears that districts are still left largely to their own devices in determining how to respond to bullying, resulting in a disjointed approach that barely skims the surface of a much more deeply rooted national problem.

IV. SCHOOLS SHOULD CONSIDER THE USE OF PEER MEDIATION AS PART OF A LARGER CONFLICT RESOLUTION CURRICULUM FRAMEWORK IN ORDER TO COMBAT BULLYING

Concerns for students' health and safety, coupled with questions of school liability in bullying litigation, have left districts wondering which approach to bullying issues is correct. Studies have demonstrated that peer mediation programs, when used in conjunction with a school-wide anti-bullying dialogue, are effective in reducing bullying in schools.[47] As programs differ, due to factors such as the divergent composition of student bodies and the disparate resources available to each school, supportive empirical evidence has been somewhat difficult to gather and thus allowed critics to detract from the successes of peer mediation programs.[48] Proponents of peer mediation can respond to these criticisms, however, by promulgating better understanding and accessibility to mediation as a whole and employing guiding

[47] *See* Angelique Palmer, *Room for Me? – An Analysis of Whether Mediation is a Viable Solution to School Bullying*, 16 CARDOZO J. CONFLICT RESOL. 221, 231-35 (2014) (citing John Braithwaite, *Education, Truth, Reconciliation: Comment on Scheff*, 67 REV. J. U.P.R. 609 (1998) (citing DENISE GOTTFREDSON, SCHOOL-BASED CRIME PREVENTION, IN PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (Lawrence Sherman, et al. eds., 1996); also citing Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171-90 (1993)).

[48] *See* Haft & Weiss, *supra* note 7, at 218, 261-62 (suggesting that peer mediation and legal mediation face comparable scrutiny).

principles already in place, such as the Uniform Mediation Act, to affect positive change in the way schools approach bullying situations.

A. *Properly Implemented Peer Mediation can be an Effective Anti-Bullying Tool*

In 1999, Columbine High School seniors Dylan Klebold and Eric Harris shot and killed twelve of their classmates and one of their teachers.[49] After the tragedy it was revealed that the shooters had been victims of bullying, and observers immediately theorized that the attacks were the by-product of mistreatment by classmates and the failure of administration to resolve the issues.[50] It is important to note that this bullying theory was later determined not to be the *only* catalyst for the attacks;[51] however, at the time, the media and the public latched on to the idea that preventing bullying would prevent a horrific event like this from happening again. As a result, however, school bullying was propelled to the forefront of both media and public attention.[52]

As suggested above, the concept of bullying itself is not new, but the shift in the collective societal attitude toward bullying is. In the past, students who were bullied often did not speak up, and those that did were told to "toughen up" or that bullying built their

---

[49] *See* Steven Arthur Provis, Bullying (1950-2010): The Bully and the Bullied (2012) (unpublished Ph.D. dissertation, Loyola University Chicago) https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1380&context=luc_diss (citing BROOKS BROWN & ROB MERRITT, NO EASY ANSWERS: THE TRUTH BEHIND DEATH AT COLUMBINE (Herndon: Lantern Books, 2002) (describing the incidents surrounding the school shooting at Columbine High School in Littleton, Colordao)).

[50] *Id.*

[51] *See* David Brooks, *The Columbine Killers*, NY TIMES, Apr. 24, 2004; *see also* Peter Langman, *Columbine, Bullying, and the Mind of Eric Harris*, PSYCHOLOGY TODAY, May 20, 2009 https://www.psychologytoday.com/us/blog/keeping-kids-safe/200905/columbine-bullying-and-the-mind-eric-harris.

[52] Palmer, *supra* note 47, at 221.

character.[53] In contrast, the post-Columbine approach to bullying highly encouraged students to report instances and "let the adults handle it."[54] While the emphasis on reporting is absolutely necessary, the suggestion that bullying should be handled only by adults is somewhat misguided. Some commenters posit that the rise in bullying has been exacerbated because fewer children are being taught how to effectively resolve conflict.[55] While it is imperative that an adult is informed of a potential bullying situation, research suggests that adolescents may be better equipped to solve such problems because of their ability to view conflict and resolutions more creatively.[56] Further, adolescents might be more likely speak candidly with a peer as opposed to an adult. For these reasons, a comprehensive "whole-school" approach[57] that promotes dispute resolution education, in conjunction with a peer mediation program, is a viable solution for reducing instances of bullying and serving the interests of all involved.

The whole-school model begins not with anti-bullying messages, but by harkening back to the origins of peer mediation to incorporate aspects of ethics, morals, and civility into general education. A well-planned curriculum might take a year or more to develop prior to its actual execution within the school and require the time and collaboration of an entire staff, including: Research and investigation into the cost estimate for such a program, and then securing the necessary funding; administrative efforts to

---

[53] Provis, *supra* note 49, at 2 (citing Deborah Carpenter and Christopher R. Ferguson, *History of Bullying - Dealing with Bullies*, (last visited April 16, 2011) http://www.netplaces.com/dealing-with-bullies/what-is-bullying/ history-of-bullying.htm).

[54] *See* Decker, *supra* note 34, at 489-90.

[55] *See* Jon M. Philipson, *The Kids are not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81, 88 (2012) (citing Chris L. Nix & Claudia Hale, *Conflict within the Structure of Peer Mediation: An Examination of Controlled Confrontations in an At-Risk School*, 24 CONFLICT RESOL. Q. 327, 328-29 (2007)).

[56] *Id.*

[57] Palmer, *supra* note 47, at 232 ("Research to date suggests that comprehensive bullying prevention efforts which involve the entire school community hold the most promise for changing the norms of behavior and the prevalence of bullying in schools").

create space within the school day to implement lessons; a planning committee to design a program appropriate for each age level; and, ultimately, a venue through which the learning would take place. An illustrative example of the educational aspect of the whole-school approach exists in Norway.[58] The "Olweus" program blends students, administration, teachers, parents, and non-teaching staff together, creating a committee responsible for developing a school-wide anti-bullying culture.[59] The committee administers surveys and conducts research in order to target not only the larger issues, but also more individualized concerns affecting students in their personal lives.[60] The committee also sets forth rules and the consequences for failure to conform.[61] Classroom teachers are responsible for conducting weekly "meetings" to discuss peer relations and implementing a curriculum that promotes alternative solutions to conflict.[62] If bullying is taking place, staff members meet with individual bullies to administer punishment and create plans for future improvement and monitoring.[63] Olweus's general success indicates that a comprehensive approach beginning with a visible, direct, universal message that condemns negative behavior and promotes positive conflict resolution skills is a key component in minimizing bullying situations.[64]

Educational and cultural shifts alone, however, will not alleviate the immediate problem: Schools need to be able to stop bullying that is already taking place. While the Olweus method suggests a more punitive response, it should be noted that bullies frequently behave as they do because of some other factor in their personal lives which may not be addressed through punishment. Peer mediation integrated within the proposed curriculum focuses not only on resolving current bullying situations, but also on further promoting conflict resolution skills as a tool to reduce

[58] Philipson, *supra* note 55, at 98.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 98.
[64] Philipson, *supra* note 55, at 99.

future instances. [65] At an elementary level, full-blown peer mediation might not be an appropriate choice, due to certain developmental limitations of young children.[66] However, encouraging students to apply the skills taught within the curriculum, in conjunction with a counselor or teacher overseeing the process, could introduce facilitative mediation and encourage self-determined resolutions at a younger age.

The secondary level—generally defined as ages eleven through eighteen[67]—would be the ideal place to establish a peer mediation program as a viable solution for bullying situations. A system similar to that of the Project Outreach model mentioned above[68] would be encouraged in order to establish a mediation clinic. An administrative committee comprised of stakeholders from both within and without the school would select a diverse group of mediators to participate, alongside the committee, in an intensive two- to three-day training in which basic mediation skills, goals, and guidelines are taught and practiced. The mediator selection process would be thoughtful and deliberate: To the extent possible, mediators would represent not only the gender, racial, and ethnic composition of the student population, but also include other diversifying factors, such as socioeconomic status and academic and extra-curricular achievement. The committee would also serve as advisors for the school's mediation clinic and, along with the mediators themselves, set parameters within which the program would operate. Finally, just as in the Project Outreach program, the committee and mediators would also gather a support network, incorporating stakeholders from both within and without the school

---

[65] *See* Christensen, *supra* note 2, at 563 (suggesting that peer mediation which targets only bullying is less effective than creating an environment which disapproves of a bully's behavior)

[66] *Id.* at 92.

[67] Though generally only high schools are considered secondary schools, education provided at the secondary level has been expanded to include ages eleven through eighteen. *See What is the Definition of Secondary School?* LEARN.ORG https://learn.org/articles/What_is_the_Definition_of_Secondary_School.html (last visited Oct. 29, 2018).

[68] *See supra* pp. 4–7.

itself to act as "cheerleaders" and offer support or services when necessary.[69]

1. *Developing Key Components of Peer Mediation Programs Supports Their Successful Implementation*

While each peer mediation program may differ, according to the needs of its particular demographics, several key concepts should be established in order to promote greater effectiveness. These key concepts are often referred to as "best practices" in education and do not necessarily flow from a governing body, but from research and successful use in the classroom.[70] Similarly, no formal rules exist for peer mediation programs,[71] but three components emerge as critical points of focus for a school attempting to establish a peer mediation program. First, programs should emphasize the development of a specific set of core mediator skills and techniques to be employed in practice. Next, clear parameters should be set to limit the scope of possible cases mediated and provide a basis of expectations for the peer mediators. Finally, the overarching goals of the program itself should be closely tailored to the process used in practice.

The available studies that have been conducted on school-based peer mediation programs suggest that they are centered around a facilitative style of mediation.[72] This is likely due to the fact that facilitative mediation is highly interest-based, which is consistent with the goal of addressing the problem at the root of the bullying issue and not just the negative behavior.[73] Further, the opening statements associated with a facilitative mediation style can be cathartic, which might be beneficial for both the victim and

---

[69] Haft & Weiss, *supra* note 7, at 230, 257-58.

[70] *See* Rebecca Alber, *Defining "Best Practice" in Teaching*, EDUTOPIA (May 29, 2015) https://www.edutopia.org/blog/defining-best-practice-teaching-rebecca-alber.

[71] *See supra* Part II.

[72] *See* Philipson, *supra* note 55, at 88-90 ("Peer mediation entails training students to serve as third party neutrals who facilitate conflict resolutions between disputing peers"); *see also* Christensen, *supra* note 2, at 569-74.

[73] *See* Christensen, *supra* note 2, at 571-72.

the bully.[74] Evaluative and transformative mediation styles, in contrast, are probably not realistic or appropriate styles for youthful peer mediators. The inexperience of the adolescent conducting the mediation session, coupled with the inability to enable complicated transformative mediation training in schools provide fairly persuasive arguments as to why these two mediation styles would be unsuccessful if implemented.

Another critical factor in a program's effectiveness is the ability to recognize its limitations. This means that prior to a session, a program advisor, counselor, or other administrator should skim each case to determine whether it is appropriate for peer mediation.[75] Parameters for case selection, established prior to program implementation, should generally center on the facts specific to each situation. Anecdotal reports from both scholars and participants suggest that cases involving physical bullying should not be eligible for peer mediation, due to the violent nature of such situations.[76] Further, types of cyber bullying cases, such as those involving sexting, should be removed because of possible criminal implications that are not within the scope of a peer mediator's capabilities to handle. This leaves verbal and social bullying cases as those mainly referred to peer mediation. These cases may then be further limited by additional factors, such as willingness to participate in peer mediation. Though limiting the scope of cases in this manner might seem counterintuitive to reducing bullying, it actually fosters the possibility of reaching realistic, lasting resolutions through the process of narrow tailoring and focused interventions.

Additionally, due to the sensitive nature of the cases and parties, peer mediators must also be particularly constrained by the need for privacy. The Model Standards of Conduct for Mediators

---

[74] *Id.*

[75] Cases might be referred to mediation by students, teachers, or other staff, but not all cases are suggested for mediation. *See* Philipson, *supra* note 55, at 93 ("…peer mediation is ineffective where: 1) a high level of hostility exists between the disputants, 2) a significant psychopathology in the relationship exists in the disputants' relationship, or 3) most importantly, a power imbalance exists in the disputants' relationship").

[76] *Id.*

provide an ethical framework from which programs might draw inspiration in constructing their own privacy guidelines.[77] Standard V provides that mediators "maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law" in order to protect parties' right to privacy.[78] Though it is clearly well-intentioned, a confidentiality standard this strict might actually undermine the authority of school administration and prevent important information from a mediation session from reaching the necessary audiences, such as a teacher or principal. Therefore, it would likely be better for a peer mediation program to alter the provision to require mediators to maintain the confidentiality of all information obtained in mediation, with the exception of a debriefing session between the mediator and one of the adults on the administrative committee or in the event that other exceptions—such as the possibility of physical harm or violence to another or oneself—are triggered. Such adaptations would still commit the mediator to maintaining the parties' privacy but also allow critical facts to be reported.[79]

Finally, the importance of specific goals and a clear connection between those goals and the mediation process cannot be understated. Most established peer mediation programs actually share more similarities than differences in their fundamental goals and approach to the process, which suggests that this component might be easier to study and replicate for schools looking to

---

[77] MODEL STANDARDS OF CONDUCT FOR MEDIATORS: PREAMBLE (AM. ARBITRATION ASS'N., AM. BAR ASS'N., & ASS'N. FOR CONFLICT RESOLUTION 2005).

[78] MODEL STANDARDS OF CONDUCT FOR MEDIATORS: STANDARD V. CONFIDENTIALITY (AM. ARBITRATION ASS'N., AM. BAR ASS'N., & ASS'N. FOR CONFLICT RESOLUTION 2005).

[79] The Model Standards of Conduct for Mediators can be read to allow this type of alteration: "[T]he parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations" MODEL STANDARDS OF CONDUCT FOR MEDIATORS: STANDARD V. CONFIDENTIALITY (D) (AM. ARBITRATION ASS'N., AM. BAR ASS'N., & ASS'N. FOR CONFLICT RESOLUTION 2005).

implement a new program.[80] Promoting better conflict resolution skills throughout the student body is a commonly held goal among programs, and its prominence is visible in the focus on self-determination in mediation. In one such program, a typical session opens with the mediator greeting the students and verifying their willingness to mediate.[81] As with other types of mediation, participation is voluntary, but here it is even more important to honor the students' wishes in order to encourage self-determination.[82] The mediator then establishes their role as the neutral third party, explains that the session is a vehicle for conversation, and emphasizes the students' right to privacy, which is another critical point in promoting self-determination.[83] Finally, the mediator lays down ground rules, which may include no swearing, no blaming or name calling, and no interrupting. [84] Once students agree to the rules, the mediation can begin. Students take turns presenting their views of the conflict and discussing their thoughts and feelings. Once both sides have been heard, the mediator might ask each side to make a general list of the issues they feel are most important to resolve.[85] This allows the student parties to further take control, as they are essentially setting the agenda for mediation, and also helps the peer mediator focus on similar points of interest between the parties. At this point, students may also ask to meet privately with the mediator to discuss their lists or they may remain in the session together.[86] Either way, the discussion shifts to focus on creating possible solutions to the issues presented. Once the solutions have been generated, students work together—or come back together if they chose to meet privately—going through the list, rejecting those ideas that they cannot accept and beginning to compromise on those that they

[80] *See* Decker, *supra* note 34, at 487 (citing Jerry Tyrrel, PEER MEDIATION: A PROCESS FOR PRIMARY SCHOOLS 18 (Marian Leibmann ed., Souvenir Press 2002)); *see also* Haft & Weiss, *supra* note 7, at 223 (noting that the differences among the numerous programs are largely irrelevant).
[81] *See* Decker, *supra* note 34, at 487.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 488.
[86] *Id.*

may.[87] The list is one basic approach the mediator might use to generate movement, however it is not the only tool she might employ. If the session does not produce any solutions, it is possible for students to return at another time and try mediation again.[88] If a resolution is reached, the mediator will guide the students in drafting an agreement. One study has suggested that having students write out their own agreement promotes a deeper understanding of the obligations and a connection with the terms, and thus encourages that student participants draft their own agreement.[89] Either way, the agreement memorializes the session and provides terms through which students are held accountable for their actions, and the process promotes the overarching goal because students have essentially solved the problem themselves.

Peer mediation is not a "one-size-fits-all" practice; therefore, each program will differ slightly in order to meet the needs of the student body which it serves. However, there are key elements that each program should address in order to foster its success. Encouraging and developing a facilitative mediation style, providing limitations in the form of case selection and mediator behavior, and employing a process that focuses on promoting clear goals will enable peer mediation programs to better serve the interests of their student constituents.

B. *Addressing the Concerns Surrounding the Use of School-Based Mediation Programs in Connection with Anti-Bullying Efforts*

Just as there are supporters of the use of school-based peer mediation programs in response to bullying, some critics have cautioned against its use. As indicated above, the basic mediation program model centers on facilitating conversation between parties that are at odds with one another. It has been suggested that treating bullying as simply a conflict to be resolved sends an inappropriate message to bullies and their victims that both sides are "partly right and partly wrong," instead of flatly stopping the

[87] *See* Decker, *supra* note 34, at 488.
[88] *Id.*
[89] *Id.*

behavior.[90] This issue, coupled with the concern that mediation may further traumatize victims by forcing them to communicate face-to-face with their bullies, has led some groups to discourage the use of peer mediation programs in schools.[91] Further, the inconsistent success rates among schools that have implemented peer mediation programs has led to additional concerns about their validity and efficacy in preventing and reducing instances of bullying.[92]

In addressing these issues, it is notable that they do not seem to account for the basic principles of mediation. For example, one of the core beliefs of mediation is that it is a voluntary process.[93] Parties come to the table of their own volition, not because they are being forced to communicate with one another. While court-mandated mediation is highly plausible in the legal system, peer mediation drastically differs in this respect and parties are simply encouraged, not forced, to come to the table.[94] Furthermore, one of the critical aspects of establishing a mediation program is setting parameters for the type of cases peer mediators handle.[95] In this respect, the program might further limit its scope by conducting pre-mediation interviews with potential parties in order to get a sense of whether the case is appropriate for mediation. Similar to the screening process suggested for domestic violence mediation cases,[96] pre-mediation interviews might minimize the possibility of perpetuating victimization and ensure parties' willingness to

---

[90] *Misdirections in Bullying Prevention and Intervention*, ANTI-DEFAMATION LEAGUE https://www.adl.org/education/resources/tools-and-strategies/misdirections-in-bullying-prevention-and-intervention (last visited November 8, 2018).

[91] *See id.*

[92] Palmer, *supra* note 47, at 221.

[93] *See* Christensen, *supra* note 2, at 564.

[94] *Id.*

[95] *See supra* p. 6.

[96] *See* N. Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 194-198 (2003) (excerpted in GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES 526-27 (6th ed. 2012) (suggesting use of pre-mediation screening in divorce cases may allow for the use of mediation while also reducing the possibility of subjecting victims of domestic violence to further victimization).

participate.

Additionally, the existence of inconsistencies among the approaches to peer mediation do not necessarily indicate that the concept should be abandoned altogether. A major issue in determining both the successes and shortcomings of peer mediation is the lack of funding for and difficulty of conducting long-term or diverse studies on existing programs. The research that has been done, however, suggests that programs are actually more similar than not in key aspects, such as implementation and mediator selection processes.[97] This same research also implies that the difference setting programs apart lies not in their practices, but in their overall goals.[98] Thus, one program dedicated to promoting conflict resolution skills may appear vastly different from another that has a wider goal of reducing bullying overall. This slight distinction may result in the appearance that one program is more successful than the other, but the reality is that the two have different primary concerns and should not be compared as direct equals. To fully address the concerns over these discrepancies, better evaluation of existing programs is needed. The evaluation need not be comparative in nature but should attempt to group together schools whose programs have similar goals in order to better assess their effectiveness, and ultimately to respond to the argument that dissimilarities equate to dysfunction.[99]

One additional, potential source of support in addressing the inconsistencies among peer mediation programs is the Uniform Mediation Act ("UMA").[100] Introduced in 2002, the Act sought to establish rules to which mediators would adhere in order to provide a more unified experience.[101] Provisions within the Act address

[97] Haft & Weiss, *supra* note 7, at 229-35.

[98] *Id.* at 256-57.

[99] Due to its limited scope, this paper will not address evaluative measures for peer mediation programs. See Haft and Weiss, *supra* note 7, at 261-70, for a discussion of research-based alternatives for evaluation.

[100] After a reasonable search, I was unable to locate any direct research or writing suggesting the use of the UMA in conjunction with the regulation of peer mediation programs.

[101] James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 DISP. RESOL. MAG. 6 (Winter 2017).

issues such as mediator impartiality, training, privacy, and confidentiality of the parties.[102] The UMA has been introduced to legislatures in New York and Massachusetts and formally adopted by twelve jurisdictions: District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.[103] In order to replicate the cohesiveness promulgated by the UMA, these states might also encourage peer mediation programs to follow the Act's provisions by adding an amendment written specifically to standardize certain aspects of peer mediation.[104] Such a practice would be incredibly beneficial in terms of creating an evaluation system for peer mediation programs because it would not only give researchers an equal foundation from which to base their studies, but would also allow enough flexibility for schools to diversify their programs to appropriately meet the needs of their particular student body. Further, research suggests that the uniform applicability of UMA principles may provide guidance, even where a state has not formally incorporated the Act.[105] Optimistically, this might mean that the same will also be true of peer mediation, and programs not governed by the Act might attempt to follow suit and adopt its principles anyhow.

Overall, the concerns regarding victimization and program disparity appear to emerge from lack of education about mediation rather than empirical evidence. This fundamental misunderstanding further demonstrates the need for a comprehensive approach that emphasizes dispute resolution education with a supporting peer mediation program, that includes not only students, teachers and administration, but also parents and

---

[102] UNIF. MEDIATION ACT (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAW 2003).

[103] *Id.*

[104] An amendment would be required because the UMA specifically excludes peer mediation from the application of its principles ("The Act also exempts mediations between students…because the supervisory needs of schools toward students…may not be consistent with the confidentiality provisions of the Act") UNIF. MEDIATION ACT §3(B)(4)(A) CMT. AT 5 (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAW 2003).

[105] *See* Coben, *supra* note 101, at 9 (addressing application of confidentiality principles in states that have not formally adopted the UMA).

outside stakeholders as well.

V. Conclusion

The history of peer mediation demonstrates its ability to help resolve those conflicts that fall outside the standard legal framework. Its relative success in community disputes has led to the implementation of peer mediation programs in schools, and its subsequent use as an anti-bullying mechanism. Though legislation proposing anti-bullying measures has been passed in all fifty states, it has mostly been ineffective in achieving its goals. Where the law has failed to provide a solution for bullying, however, peer mediation can provide a realistic response that may help alleviate the problem. When incorporated as part of a larger, whole-school approach that includes educating students about dispute resolution, peer mediation programs can enable cultural change that encourages both bully and victim to see beyond their conflicts to similarities upon which a mutual agreement can be formed. Opponents argue that peer mediation perpetuates victimization and that programs are too dissimilar to be truly effective. These arguments have led to a negative perception of peer mediation and tempered its expansion in schools; however, both arguments imply a need for better dispute resolution education and appropriate regulation of peer mediation through evaluative measures. This also seems to perpetuate the need for schools to incorporate a whole-school, culture-based approach as their response to bullying, suggesting that peer mediation will continue to have place in public schools for the foreseeable future.

Introduction

As a Florida Law School graduate (Class of 1969, if you must know) and a 25-year fulltime ADR practitioner, I was delighted to see a Florida Law student submitting this finalist piece in our New York State Bar Association/American College of Civil Trial Mediation Annual $10,000 ADR Law Student Writing Contest. Ms. Gina Gonzalez provides us with an intriguing and insightful work on yet another potential threat to arbitration programs resulting from a collateral series of courtroom challenges to statutory damage caps in Florida medical malpractice claims. It all starts with a 1980's movement in the Florida legislature to curb excessive non-economic medical damage awards by statutorily capping available malpractice awards. Unfortunately, those damage limitations were coupled with a pre-suit damage arbitration program which, in many instances, was effectively mandated to both claimants and defendants. As successful challenges to the constitutionality of the monetary damage caps wound their way through the Florida courts, a clear path has been laid for an additional attack on the coupled arbitration program as well. In this time of constant judicial challenges to contractual and statutorily imposed arbitration procedures in other industries, Ms. Gonzalez's piece becomes a timely and thoughtful exploration of a much broader situation.

A well written, well researched and well-reasoned submission that quickly rose to the top of those submitted nationwide in our competition and ended up only a few points short of winning the entire contest. This is an excellent reflection on the Florida Law School and its ADR Department. Along with the entire Editorial Board of the American Journal of Mediation, I am proud to recommend its publication.

Lawrence M. Watson, Jr.
Editor Emeritus
Emeritus Fellow, American College of Civil Trial Mediators

ANOTHER ONE BITES THE DUST: FLORIDA'S CURRENT TREND IN OUTLAWING STATUTORY CAPS ON NON-ECONOMIC DAMAGES RESULTING FROM MEDICAL MALPRACTICE CLAIMS. ARE THE ARBITRATION STATUTES NEXT TO GO?

Gina Gonzalez

Doctors vs. Lawyers, a tale as old as time. Both professions dedicate their lives and careers to helping others; however, they generally end up on opposite sides of a lawsuit. Medical malpractice litigation is costly, emotional, and—no matter the verdict—the parties will never be able to go back in time to act differently. The mourning family or injured party needs someone to blame, and the law provides them an avenue to seek justice.

I. Background

During the 1980's, Florida health care experienced an insurance "crisis" as excessive medical malpractice premiums forced physicians out of practice—effectively limiting patients' access to medical treatment throughout the state.[1] Insurance premiums were skyrocketing as a result of the increased cost of medical care, coupled with large jury verdicts in favor of claimants.[2] In an effort to rectify the "crisis" that caused some insurance premiums to be more than 400% greater in some areas of Florida[3], the legislature sought to create a solution to the problem.

---

[1] Watkins and Lavery, *Medical Negligence Arbitration Proceeding Before Florida's Division of Administrative Hearings*, FLA. B.J., May 2015, at 33.

[2] *Id.*

[3] Among its many findings, the Task Force found that:

> 1) a family physician who performs no surgery and practiced outside Dade and Broward Counties saw a 229% increase in medical malpractice insurance premiums for the period of 1983 to July 1, 1987; and 2) a family physician who performs no surgery

The legislature implemented a law requiring "presuit investigation" prior to any filing of a medical malpractice claim, in order to eliminate meritless claims and avoid litigation.[4] Additionally, various methods of alternative dispute resolution−including mediation and arbitration−were encouraged and required throughout various times of the lawsuit.[5] The legislature even went so far as to create statutory caps on the amount of non-economic damages available to plaintiffs who succeed in their medical malpractice lawsuits.[6] Those very statutes are the crux of this analysis.

II. Statutes Resulting from Florida's Tort Reform

In response to Florida's insurance "crisis," physicians petitioned legislatures to make changes in the policy surrounding personal injury cases.[7] The movement of tort reform focused on minimizing economic losses from malpractice litigation by limiting the amount of damages awardable to plaintiffs.[8] These

> and practices in Dade or Broward County saw a 300% increase in medical malpractice insurance premiums for the same period. Furthermore, the Task Force found that rates for specialties also increased sharply. For example, the rates for obstetricians increased by 444% in Dade and Broward Counties, as compared to 304% in the rest of the state.18 These facts support the Legislature's conclusion that increased costs in medical malpractice insurance premiums have resulted in increased health care costs and made liability insurance "functionally unavailable" for some physicians.

University of Miami v. Echarte, 618 So.2d 189, 196 (Fla.1993) *(*citing Academic Task Force for Review of the Insurance and Tort Systems, Preliminary Fact-Finding Report on Medical Malpractice (Aug. 14, 1987) Fact-Finding Report at 26-31, 36, 239-40).

[4] *See* § 766.106, Fla. Stat. (2018).

[5] *See* §§ 766.207; 766.209; 766.108, Fla. Stat. (2018).

[6] *See Id.*; § 766.118, Fla. Stat. (2018).

[7] Michelle Diaz, *The Real Emergency: Will Florida Follow Georgia in Medical Malpractice Reform?*, 40 Nova L. Rev. 185, 188 (2015).

[8] *Id.* at 189.

limitations would be placed on a claimant for a number of reasons, however this analysis will focus on three statutes specifically.

a. Section 766.207, Florida Statutes: Voluntary binding arbitration of medical negligence claims.

One requirement of the medical malpractice "presuit investigation" is for claimants to notify the defendants of their intent to initiate litigation for the alleged injury.[9] At that point, either party may elect to settle the claim through a voluntary binding arbitration proceeding.[10] As a pre-requisite to attending the presuit arbitration, the defendants must first admit liability for the injury, and the arbitration continues only to determine the issue of damages.[11] The arbitration panel is composed of three arbitrators: one selected by the claimant; one selected by the defendant; and one administrative law judge who would serve as the chief arbitrator.[12] In the arbitration hearing, the claimant would be entitled to receive economic and non-economic damages, however, the non-economic damages would be statutorily capped.[13] Specifically:

> Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more

[9] § 766.106, Fla. Stat.
[10] § 766.207(2), Fla. Stat.
[11] § 766.207(3), Fla. Stat.; D'Alesio Jr., *The Benefits and Risks of Using Presuit Voluntary Binding Arbitration as an Alternative Dispute Resolution Process in Medical Malpractice Cases*, FLA. B.J., Dec 2015, at 21.
[12] § 766.207(4), Fla. Stat.
[13] § 766.207(7)(a-b), Fla. Stat.

> than $125,000 noneconomic damages.[14]

The most common forms of non-economic damages sought after in a medical malpractice case include: the inconvenience of the injury; disability or disfigurement; pain and suffering; mental anguish; loss of consortium; and loss of the enjoyment of life. Despite the statutory cap on the non-economic damages available to the claimant, some benefits to presuit arbitration include the amount of time saved, efficient pay out, and the claimant's attorney's fees falling on the defendant.[15]

b. Section 766.209, Florida Statutes: Effects of failure to offer or accept voluntary binding arbitration.

Despite the "voluntariness" of the presuit binding arbitration proceeding, a party's decision to forego arbitration once it has been offered, does have a chilling effect on the rejecting party. Until recently[16], if a claimant offered to settle their medical malpractice claim through arbitration−and the defendant rejected the offer−the claimant would then be entitled to recover a greater amount of non-economic damages, up to the limits articulated in section 766.118, Florida Statutes (2018).[17] On the reverse notion, if the defendant offered to admit liability and settle the issue of damages through an arbitration proceeding−to which the claimant rejected−the claimant will only be able to receive up to $350,000 in non-economic damages, regardless of the actual jury award.[18] Illustrative of this point, if a jury determines a claimant is entitled to $4 million in non-economic damages for their pain and suffering, but the claimant previously rejected the defendants'

[14] § 766.207(7)(b), Fla. Stat.
[15] § 766.207(7)(f-g), Fla. Stat.
[16] Portions of section 766.118 were eventually found to be unconstitutional, and such provisions no longer limit the non-economic damages awardable to a medical malpractice claimant. *See North Broward Hospital District v.Kalitan*, 219 So. 3d 49, 59 (Fla. 2017); *see also Estate of McCall v. United States*, 134 So.3d 894, 916 (Fla. 2014).
[17] §§ 766.209(3)(a); 766.118, Fla. Stat.
[18] § 766.209(4)(a), Fla. Stat.

offer to settle the claim in presuit arbitration, that claimant will only be entitled to $350,000 of the $4 million award; merely $100,000 more than they could have received in the actual presuit arbitration.

c. Section 766.118, Florida Statutes: Determination of Noneconomic Damages.

While sections 766.207 and 766.209 were enacted by the legislature during the birth of Florida's tort reform in 1988, it was not until 2003 that Florida created a strict cap on non-economic damages overall in medical negligence claims.[19] Interestingly, the resulting statute, section 766.118, created differing limits on non-economic damages resulting from the negligence of practitioner or non-practitioner defendants. Specifically, section 766.118(2) provided that in a cause of action for personal injury arising from the negligence of practitioners, the non-economic damages award cannot exceed $500,000 per claimant; however, if the negligence resulted in a permanent vegetative state or death, or if the negligence caused a catastrophic injury, then non-economic damages could be awarded up to $1 million.[20] Section 766.118(3), however, similarly limits the non-economic damage award but to $750,000 and $1.5 million respectively, when the injury resulted from the negligence of a non-practitioner or hospital.[21] Notably, of each of the above described statutes, section 766.118 is the only statute which contains provisions that are no longer good law following recent decisions stemming from the Florida Supreme Court.[22]

III. Constitutional Implications Called into Question

a. Access to the Courts

[19] § 766.118, Fla. Stat.
[20] § 766.118(2), Fla. Stat.
[21] § 766.118(3), Fla. Stat.
[22] *See Kalitan*, 219 So. 3d at 59; *McCall*, 134 So.3d at 916.

After being implemented in 1988, sections 766.207 and 766.209, which limit the amount of non-economic damages awardable to a medical malpractice claimant in presuit arbitration, went unchallenged. The constitutional implications of these statutes were not raised to the Florida Supreme Court until 1993 in *University of Miami v. Echarte*.[23] In *Echarte*, a young girl was treated for a minor brain tumor and as a result of medical negligence, the young girl's right hand and forearm needed to be amputated to save her life.[24] The defendant requested to settle the claim through presuit arbitration which then triggered the applicability of sections 766.207 and 766.209.[25] Due to the arbitration statutes being triggered, the young girl's parents would only be able to obtain up to $250,000 in non-economic damages if they agreed to arbitration, or up to $350,000 if they rejected the offer.

The Echartes moved for declaratory judgement and the trial court agreed that sections 766.207 and 766.209 violated a number of constitutional rights including: access to the courts; right to trial by jury; equal protection; procedural and substantive due process; single subjection requirement; taking without just compensation; and improper delegation of authority.[26] The Third District Court of Appeals affirmed the trial court's holding, however they limited their written opinion specifically to the right of access to the courts challenge, and expressly declined to discuss the other constitutional rulings.[27] Upon *de novo* review, the Florida Supreme Court ultimately reversed the holding and declared the statutes were in fact constitutional.[28] However, similar to the district court, they limited their discussion specifically to the validity of the statutes under the right of access to courts, and offered little insight into why they believed the statutes did not violate the right to trial by jury, equal protection, substantive and procedural due process,

[23] *University of Miami v. Echarte*, 618 So.2d 189 (Fla.1993).
[24] *Id.* at 190.
[25] *Id.*
[26] *Id.* at 191.
[27] *Id.* at FN 10.
[28] *Id.* at 198.

the single subject requirement, the taking clause, or the non-delegation doctrine.[29]

In determining whether the right of access to courts was violated pursuant to article I, section 21, of the Florida Constitution, the Florida Supreme Court relied on the seminal case *Kluger v. White*[30] which articulated the relative standard. In *Kluger*, the court declared:

> [T]he Legislature is without power to abolish [the right of access to courts] without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[31]

The court in *Echarte* relied on the second prong of the *Kluger* test which required a legislative finding that an "overpowering public necessity" existed, and that "no alternative method of meeting such public necessity can be shown."[32] The court ultimately found that the arbitration statutes which limited the non-economic damages awardable, were necessary to meet and potentially resolve Florida's medical malpractice alleged insurance crisis.[33] The court further opined that no alternative or less onerous method of meeting the crisis was provided, so sections 766.207 and 766.209 satisfied the *Kluger* test and were, in fact, constitutional.[34]

Though the Florida Supreme Court in *Echarte* created binding statewide precedent as to the constitutionality of the

[29] *Id.* at 191.
[30] *Kluger v. White*, 281 So.2d 1 (Fla.1973).
[31] *Id.* at 4.
[32] *Echarte*, 618 So.2d at 195 (citing *Kluger*, 281 So.2d at 4).
[33] *Id.* at 197.
[34] *Id.* at 197-98.

medical malpractice arbitration statutes, sections 766.207 and 766.209 were once again brought into inquiry for a constitutional analysis in 2010. A similar issue was presented to the Second District Court of Appeals of Florida in *Parham v. Florida Health Sciences Center, Inc*.[35] In *Parham*, a mother lost her newborn baby allegedly by the negligence of a physician who never requested a surgical consult, and the medical provider failed to have a pediatric surgeon on staff.[36] After trial, the jury awarded the parents of the newborn $12 million in non-economic damages, $8 million to the mother and $4 million to the father.[37] Immediately after the verdict, the defendants filed a motion for remittitur to enforce the limitation of non-economic damages, because the claimants refused to settle the case in presuit arbitration which was previously offered by the defendants.[38] Following the precedent set in *Echarte*, the Second District Court of Appeals was required to reduce the $12 million award for the parents, to only $700,000 total−$350,000 for the mother and $350,000 for the father−since the claimants refused to settle the claim in voluntary binding arbitration once offered.[39] Though the court affirmed the reduction of the claimants' damage award, they also opined that some of the claimants' constitutional arguments warranted discussion.[40]

The claimants in *Parham* argued that the *Echarte* decision was no longer good law, and that their case should be reconsidered for a number of reasons; however, the court only acknowledged a few arguments in their published opinion. First, the court analyzed the benefits of voluntary presuit arbitration, finding the main benefit to be the speed and efficiency of finalizing an otherwise extensive and time-consuming medical negligence claim. However, the court also insinuated the potential equal protection violations stating that the efficiency of presuit arbitration, "would

[35] *Parham v. Florida Health Sciences Center, Inc.*, 35 So.3d 920 (Fla. 2d DCA 2010).
[36] *Id.* at 923.
[37] *Id.*
[38] *Id.* at 924.
[39] *Id.* at 929.
[40] *Id.* at 924.

appear to be a valuable tool for the claimant with a small claim, but it places great limitation on a claimant who has or will endure extensive pain and suffering."[41] The court further opined that the "reasonable alternative" to accessing the courts, required by the *Kluger* standard, was not met by section 766.209.[42] The court specifically noted that the "reasonable alternative" would be for claimants to accept the arbitration offer, which would effectively lower the potential damage award to only $250,000, providing an even more limited remedy than the $350,000 damage cap for rejecting arbitration.

Perhaps most notably, the claimants in *Parham* argued that even if there was an "overpowering public necessity" for limiting the non-economic damage award during Florida's insurance "crisis" when the *Echarte* decision was made, the limitation should not last in perpetuity.[43] The court acknowledged that "the legislature should have some obligation to reassess [the insurance crisis] conditions occasionally to confirm the continuing existence of an overpowering public necessity."[44] The claimants in *Parham* believed they would be able to successfully show the insurance "crisis" was no longer an issue, and therefore the "overpowering public necessity" that the court relied on in *Echarte*−when it decided the arbitration statutes were constitutional−would no longer be applicable.[45] However, because the *Echarte* decision was binding on the *Parham* court, reversing the holding in *Echarte* was never an option. The Second District Court of Appeals, therefore, certified the constitutional question of whether section 766.209, limiting the non-economic damages in medical malpractice arbitration, remained constitutional even though 1) the amount of the cap had never been adjusted for inflation since its creation in 1988, and 2) the legislature had never been required to reconfirm the continued existence of the "overpowering public necessity"

[41] *Id.* at 925.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

supporting the need for the statute.[46] While this certified question was raised to the Florida Supreme Court, it was never answered as the defendants very intentionally settled the case prior to it reaching the supreme court docket. Since the *Parham* decision in 2010, the constitutionality of the medical malpractice arbitration statutes have never been reviewed by an appellate court.

b. Equal Protection Analysis

Section 766.118, the younger medical malpractice statute limiting any non-economic damage award to claimants after trial, however, was challenged more recently in 2014. In *Estate of McCall v. U.S.*, the Florida Supreme Court narrowly addressed whether section 766.118 was unconstitutional as it pertained to wrongful death cases.[47] In its analysis, the court expressly discussed the alleged insurance crisis in Florida, and finally determined there was no longer any rational basis for limiting claimants' non-economic damages as it violated the Equal Protection Clause of the Florida Constitution.[48] Specifically, the court stated:

> The statutory cap on wrongful death noneconomic damages fails because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the statutory cap on wrongful death noneconomic damages does not bear a rational

[46] *Id.* at 929.
[47] *Id.* at 900.
[48] *Estate of McCall v. U.S.*, 134 So. 3d 894, 905, 914-15 (Fla. 2014).

> relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.[49]

In demonstrating how section 766.118 violated the Equal Protection clause, the court described three injuries of three hypothetical parties, each injury of differing magnitude. Plaintiff A was injured moderately, suffering pain and disability for a month; plaintiff B was severely injured, suffering pain and disability for a year; and plaintiff C was drastically injured, suffering permanent pain, disability, or death.[50] The court found a capped non-economic damage award pursuant to section 766.118 may be reasonable and appropriate for plaintiff A's injury, as A suffered for only a month. However, requiring a similar capped award for plaintiff C would treat C's injury differently because the statute would "automatically reduc[e] the jury's award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair."[51] It was due to this unequal treatment that the court determined reducing non-economic damages pursuant to section 766.118(2) and (3) was "not only arbitrary, but irrational" and that it "offends the fundamental notion of equal justice under the law."[52]

In *McCall*, the court further opined that the cap on non-economic damages failed the rational basis test by failing to bear a rational relationship to a legitimate state objective.[53] The court reviewed the legislature's original reasoning for enacting section 766.118, and found that some of the research concluding the insurance "crisis" stemmed from high jury awards in favor of the plaintiff was "most questionable."[54] Additionally, the court noted

---

[49] *Id.* at 901.
[50] *Id.* at 902.
[51] *Id.* (citing *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1075 (1997)).
[52] *Id.* at 903.
[53] *Id.* at 905.
[54] *Id.* at 906.

that even if Florida was in a medical insurance crisis in the 1980's, such a condition is not permanent; "[c]onditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation."[55] Ultimately, the Florida Supreme Court found that section 766.118(2) and (3) irrationally impacted plaintiffs experiencing different levels of injuries, and that there was no longer a medical crisis to support to a legitimate governmental purpose for the statute. Though it applied strictly to wrongful death claims resulting from medical negligence, the court's holding outlawed non-economic damage limitations pursuant to section 766.118(2) and (3) as it violated the Equal Protection Clause of the Florida Constitution.[56]

Those familiar with the laws surrounding Florida health care and medical malpractice claims knew that the *McCall* decision would open the door to future litigation, specifically when it questions the constitutionality of non-economic damage caps.[57] Due to the narrow holding in *McCall*, applying strictly to wrongful death claims, it came as no surprise to researchers when the constitutional implications of section 766.118 was called into question regarding *all* medical negligence claims−including those in which the plaintiff survived.[58] Most recently in 2017, the Florida Supreme Court in *North Broward Hospital District v. Kalitan* was once again required to determine whether section 766.118 was constitutional, but this time, as it pertained to a living plaintiff.[59]

In *Kalitan*, the court reiterated its previous analysis in *McCall* describing how "the cap on noneconomic damages arbitrarily discriminates between slightly and severely injured

[55] *Id.* at 913.
[56] *Id.* at 916. Notably, the Florida Supreme Court is *McCall* referred to its previous analysis in *Echarte*. The court expressly stated its decision to find section 766.118 unconstitutional was not inconsistent with its previous decision in *Echarte* because it solely addressed an equal protection challenge−while *Echarte* was interpreting an access to courts challenge. *McCall*, 134 So. 3d at 904.
[57] Diaz, *supra* note 7, at 208.
[58] *Id.*
[59] *North Broward Hospital District v. Kalitan*, 219 So.3d 49 (Fla. 2017).

plaintiffs while benefitting the tortfeasor."[60] The court disagreed with the argument that section 766.118 should be constitutionally implemented in a personal injury claim, while rejected in a wrongful death claim.[61] Relying on the same Equal Protection analysis used in *McCall*, the court ultimately expanded the previous ruling and declared section 766.118(2) and (3) unconstitutional in *all* medical negligence actions, regardless of the nature of the claim.[62] In support of its Equal Protection analysis, the court used a similar hypothetical to depict the non-economic damage cap distinctions articulated in section 766.118(2) and (3):

> Plaintiff A suffers a moderate injury; therefore recovery is capped at $500,000 if caused by a practitioner and $750,000 if caused by a nonpractitioner. Plaintiff B suffers a statutorily defined "catastrophic injury," such as the loss of a hand; therefore recovery may be capped at $1 million if caused by a practitioner and $1.5 million if caused by a nonpractitioner. Plaintiff C suffers a drastic injury, such as a permanent vegetative state; therefore recovery is capped at $1 million if caused by a practitioner and $1.5 million if caused by a nonpractitioner. Under these circumstances, plaintiff A has the best chance of being fully compensated, plaintiff B may have a chance of being fully compensated, and plaintiff C has utterly no chance of being fully compensated. Clearly, under sections 766.118(2) and (3),

[60] *Id.* at 54.
[61] *Id.* at 56.
[62] *Id.*

> plaintiff C's damages award is arbitrarily diminished, even though plaintiff C has suffered the most grievous injury.[63]

The court in *Kalitan* also reiterated that the very purpose for section 766.118 failed the rational basis test, observing the lack of evidence demonstrating how the statutory cap alleviated the alleged insurance crisis.[64] "Because addressing the medical malpractice crisis was the Legislature's stated objective when passing section 766.118, if the objective no longer exists, then there is no longer a 'legitimate state objective' to which the caps could 'rationally and reasonably relate.'"[65] As the law stands today, section 766.118(2) and (3) have been declared unconstitutional in violating the Equal Protection Clause of the Florida Constitution. As a result, claimants are generally no longer limited in their non-economic damage award for successful medical negligence claims.[66] With this recent trend and new analysis, it may be time to revisit the *Echarte* decision which found that capped non-economic damage awards in presuit arbitration are constitutional−the only broad statutory cap on medical malpractice damages that still remains.

IV. An Inevitable Decision

In reviewing the court's analysis in *Echarte*, it is important to note that while the claimant challenged sections 766.207 and 766.209 for a number of constitutional violations, the court limited its discussion only to the right of access to courts.[67] As established in *Kluger v. White*, access to the courts is a fundamental right that can only be removed in two circumstances: 1) when there is a

[63] *Id.* at 58.
[64] *Id.*
[65] *Id.* at 59.
[66] Section 766.118(4)-(6) provide other non-economic damage limitations in narrow circumstances.
[67] *University of Miami v. Echarte*, 618 So.2d 189, 191 (Fla.1993).

reasonable alternative to protect the right to redress for injuries; or 2) when there is an "overpowering public necessity for the abolishment of [the] right, and [that] no alternative method of meeting [the] public necessity can be shown."[68] In their analysis, the Florida Supreme Court in *Echarte* relied heavily on the second prong of the *Kluger* test when finding the arbitration statutes constitutional. The court opined the statutes "are necessary to meet the medical malpractice crisis" even when they limit an individual's access to the courts.[69] However, with the *McCall* decision proving that even *if* a medical malpractice insurance crisis did previously exist, the condition is no longer in effect−making the "overpowering public necessity" analysis in *Echarte* void.[70] With these new findings, the holding in *Echarte* is no longer constitutional as the arbitration statutes no longer pass the *Kluger* test; the violation of the public's access to the courts is no longer justified by an overpowering government interest in lowering malpractice insurance premiums for Florida physicians. If a new case reaches the Florida Supreme Court questioning the constitutionality of sections 766.207 and 766.209 as it pertains to access of the courts, the *Echarte* holding will likely be quashed with additional findings proving a medical insurance crisis no longer exists.

Additionally, with the recent trend of the Florida Supreme Court outlawing statutory caps of medical malpractice damages on the basis of Equal Protection, it is likely the arbitration statutes are next to go.[71] With the incredibly detailed analysis provided by the court in both *McCall* and *Kalitan*, any new case that reaches the state's high court questioning the constitutionality of sections 766.207 and 766.209 as violating the Equal Protection Clause, will almost certainly be successful. The precedent created by the former two cases leaves no room for dispute, a compelling reason for unequal treatment towards plaintiffs with differing

[68] Diaz, *supra* note 7, at 202.
[69] *Echarte*, 618 So.2d at 197.
[70] *McCall*, 134 So. 3d at 913; see also Diaz, *supra* note 7, at 207.
[71] Bingo. (See Title page)

injuries−whether wrongful death or personal injury−no longer exists. Once a physician or medical provider offers to settle a medical malpractice claim in voluntary presuit arbitration, the injured party will only be able to earn up to $250,000 if they accept the offer, or $350,000 if they reject. These capped values do not account for the severity of the injury and are not adjusted upon discovery of more egregious medical negligence. Those who are most severely injured have almost no opportunity to be made whole, while those only mildly injured will have the opportunity to be compensated appropriately. It is this unequal treatment between medical malpractice claimants, the same unequal treatment described in *McCall* and *Kalitan*, that make sections 766.207 and 766.209 unconstitutional.

Those in favor of statutory caps for noneconomic damages resulting from medical malpractice claims may argue that the "voluntary" nature of the arbitration statutes makes them unique, and therefore the court cannot apply the same analysis as it did when it outlawed section 766.118(2) and(3). However, anything more than a shallow understanding of sections 766.207 and 766.209 would indicate that the application of the statutes is hardly voluntary at all. Any potential non-economic damages for the claimant are capped the very moment the defendant offers to admit liability and settle the claim in arbitration. Regardless of whether the claimant decides to accept the offer to attend arbitration, he or she can no longer receive a single penny over $350,000 in non-economic damages the moment the defendant's offer was made. Assuming the claimant decided to reject the offer, and a jury determined the claimant should be awarded $12 million for the physical pain and disfigurement, the mental pain and suffering, the permanent disability and loss of enjoyment of life, the claimant could only ever see $350,000 of the award. However, if it was the claimant who first instigated the offer to settle the claim in arbitration, and the defendant chose to proceed to trial, the claimant's non-economic damage award would *still* be limited

pursuant to section 766.118.[72] Justice Shaw described it best in his dissenting opinion of *Echarte*, articulating that the arbitration statutes "presen[t] the classic case of 'heads I win, tails you lose.'"[73] Though the arbitration statutes still remain good law today, the current lack of a medical insurance crisis denies any rational basis for imposing the non-economic damage limitations outlined in sections 766.207 and 766.209. It is only a matter of time until the arbitration statutes are declared unconstitutional for violating the Equal Protection Clause and an individual's right of access to the courts under the Florida Constitution.

V. Alternative Remedy

Though potentially outlawing sections 766.207 and 766.209 would appear to favor plaintiffs in the state of Florida, other non-economic damage award limitations would still remain in lawful existence.[74] For example, a claimant's non-economic damages are limited when seeking an award for the negligence of a physician or medical provider bestowing emergency services and care.[75] Additionally, a limitation can be implemented when a physician is providing services to a Medicaid recipient.[76] Simply outlawing the medical malpractice presuit arbitration statutes would not tip the scales in favor of the plaintiff, as a majority of defendants do not choose to even utilize the voluntary presuit arbitration process.

As a pre-requisite to the arbitration, defendants must admit liability leaving only the calculation of damages at issue.[77] Once a defendant has admitted liability, though the non-economic

[72] This analysis only applied prior to the *McCall* and *Kalitan* decisions which found section 766.118(2) and (3) violated the Equal Protection Clause of the Florida Constitution. Now, if a defendant rejects a claimant's offer to settle the malpractice claim in arbitration, the non-economic damage award will not be limited.
[73] *Echarte*, 618 So.2d at 200.
[74] § 766.118(4)-(6), Fla. Stat.
[75] § 766.118(4)-(5), Fla. Stat.
[76] § 766.118(6), Fla. Stat.
[77] § 766.207(3), Fla. Stat.

damages would be capped, the defendant would still be responsible for all *economic* damages resulting from the claim; such damages have never been capped in value, even during the alleged insurance crisis. For this reason, the presuit arbitration process may only appeal to defendants who are not confident in their actions, and believe liability is a strong possibility if the case went to trial. These defendants would want to avoid trial and attempt to resolve the claim as efficiently as possible, leaving binding arbitration as the quickest and most cost-effective method.

Alternatively, those defendants who are confident in their actions and truly believe they would not be found liable at trial, have no incentive to admit liability just to resolve the lawsuit in presuit arbitration. Some practitioners may feel their integrity would be at stake if they admitted liability for the sole purpose of continuing with the arbitration process, despite self-confidence in their own medical decision making. On the other side, claimants who are seriously injured, or even those who are mildly injured but believe they are entitled to more than $250,000 in non-economic damages, would also not be enticed to settle the claim in presuit arbitration. It is for this reason a majority of medical negligence claims are settled in mediation at a later time throughout the lawsuit, rather than during presuit arbitration.

Mediation provides the same−if not more−benefits as arbitration, therefore potentially making it the perfect compromise for claimants and defendants who wish to efficiently settle a medical negligence claim without litigation. The Florida Supreme Court in *Echarte* listed a number benefits which can result from arbitration including: 1) the opportunity to recover without the risk of a civil trial; 2) the quickness of determining whether the defendant has any defenses with merit; 3) the saved cost of attorney and expert witness fees needed to otherwise prove liability; 4) the relaxed evidentiary standard for arbitration proceedings; and 5) the prompt payment of damages.[78] Mediation, on the other hand, offers those same exact benefits as arbitration

[78] *See Echarte*, 618 So.2d at 194.

with additional perks for both parties. In mediation, the claimant would be able to experience a truly voluntary process as there would be no statutory caps on their non-economic damage award if they choose to attend, or forego, the mediation. Additionally, the defendant would not need to admit liability prior to agreeing to attend mediation. The confidential process would be beneficial to both parties as it would allow defendants to settle similar claims for a diverse amount, helping defendants keep their costs low, while still providing an opportunity for justice to an injured party without a statutory limitation on their non-economic award.

If the parties of a medical malpractice claim forego the opportunity to settle the case in presuit arbitration, an in-person mandatory mediation is required 120 days after the complaint is filed.[79] While the claimant's non-economic damages would *not* be limited in the later mandated mediation, a defendant would have the power to trigger the arbitration statutes by offering to settle the claim in presuit; the claimant's non-economic damages would be limited at the point of the arbitration settlement offer. Assuming the constitutionality of the arbitration statutes are in jeopardy, it may be in the legislature's best interest to replace voluntary presuit arbitration with mandatory presuit mediation. There may be numerous benefits−and likely some complications−with proactively replacing the voluntary presuit arbitration statutes with an earlier mandated mediation statute, however, I leave that thesis to the next student.

[79] § 766.108(1), Fla. Stat.

Introduction

The development, incorporation, and modification of legal frameworks often follow societal change. In his detailed and optimistic article, "*Collectively Bargained For & Statutorily Arbitrated: Resolution of Sexual Orientation Discrimination and Other Statutory Claims in the Unionized Workforce*", **Brandon Thompson** of William S. Boyd School of Law at the University of Nevada, Las Vegas examines the current and potential role of arbitration under collective bargaining agreements in resolving employee statutory claims generally and claims of discrimination based on sexual orientation in particular.

The context of this article includes the debates in favor of and opposed to arbitration generally, a unionized workforce often exposed to mandatory arbitration clauses, and the need for employees to be protected against discrimination based upon their sexual orientation. The author importantly urges us all to move beyond the knee-jerk arguments often heard for or against arbitration and to look more deeply at how concerns can be minimized and processes improved. He notes that the prohibition of discrimination "because of…sex" does not expressly prohibit discrimination on the basis of sexual orientation. Following a dive into the origins and landmarks of American labor and employment law, the rise of collective bargaining, the utilization of arbitration, Title VII of the Civil Rights Act of 1964, and legal precedent to date, he argues for an improved arbitral framework and for the Supreme Court to affirmatively hold that the "because of…sex" provision protects against discrimination based on sexual orientation.

Citing that approximately 6.5 million employees in the U.S. identify as lesbian, gay, bi-sexual, or transgender, the author notes that the lack of an explicit prohibition against discrimination based on sexual orientation in Title VII leaves employees vulnerable to too many variations and too little protection at the state and local levels. Through his discussion of the past and present, and steps to be undertaken, the author gives us a glimpse of what the future dispute resolution landscape can look like for such claims.

Mr. Thompson offers views on how to improve arbitration requirements and processes included in collective bargaining agreements. And while the focus is on discrimination based on sexual orientation, he suggests that the recommendations he makes can find application to other types of statutory claims under collective bargaining agreements. Thus, he provides a process to improve the utilization of arbitration in an important context and in furtherance of important societal interests.

Richard B. Lord
Editorial Board
Fellow, American College of Civil Trial Mediators

COLLECTIVELY BARGAINED FOR & STATUTORILY ARBITRATED: RESOLUTION OF SEXUAL ORIENTATION DISCRIMINATION AND OTHER STATUTORY CLAIMS IN THE UNIONIZED WORKFORCE

Brandon Thompson

INTRODUCTION

The legal debate over the rising enforcement of mandatory arbitration clauses within collective bargaining agreements is in full swing. Decades worth of precedent and predictability has been toppled with a single ruling. Both sides are absolute in the conviction that his or her perspective is the only valid, reasonable, and, therefore, worthy assessment of the situation. This has left the landscape of employment and labor law divided and uncertain. A workable solution to resolve this legal war of attrition could reduce a great deal of money, time, and energy; resources that could be redirected to other matters of importance.

Critics of mandatory arbitration's increasing hold on society have been especially vocal. In the opening sentence of his confrontation on what he calls "Compelled Arbitration," Scholar David S. Schwartz bluntly and unapologetically asserted that the "[t]he Supreme Court has created a monster." [1] Similarly, the National Employment Lawyers Association (NELA), as a self-proclaimed "leader in opposing forced arbitration of employment claims" has held mandatory arbitration to be "anathema to our public justice system." [2] However, not all of the criticism of mandatory arbitration was as openly scathing and derogatory. In a 2004 study conducted by the Arizona Bar Association, broad and varied responses were received on topics such as the arbitration

[1] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 WIS. L. REV. 33.
[2] Staff, *Advocacy: Forced Arbitration*, NELA.ORG, https://www.nela.org/index.cfm?pg=mandarbitration (last accessed Oct. 8, 2018).

process itself, arbitrator competence, and the structure of mandatory arbitration programs. [3] It is the latter category of criticism that breathes life into the possibility that mandatory arbitration is not wholly irredeemable.

This article's focus will be on the issues of arbitration as they pertain to resolving statutory claims arising under a collective bargaining agreement (hereinafter "CBA"). More precisely, this article centers on claims of discrimination based on sexual orientation, and how collectively bargained for arbitration clauses effect an individual employee's articulation and resolution of those claims. [4] In an attempt to break from the current 'all-or-nothing' mindset, and address what this author agrees to be a flawed but beneficial entity of the legal process [5], this article seeks to present, *inter alia*, minimum standards to the collective bargaining and arbitration processes that prove palatable to both factions of the adjudication divide.

In Part I, this document will begin with a review of the pertinent historical aspects of the National Labor Relations Act (NLRA) and unionization. This will include a discussion of the development and evolution of collective bargaining, as well as, arbitration clauses within a CBA. Additionally, this section will

[3] Bob Dauber & Roselle Wissler, *Lawyer Views of Mandatory Arbitration*, ARIZ. BAR. ASSOC., https://www.myazbar.org/azattorney/pdf_articles/0705mandit-2.pdf (July 1, 2005). The survey was issued to all 9,338 members, but only 31 percent, or 2,934 lawyers, responded. The study found highly favorable reviews of the arbitration process: 93% felt they could fully present their case, 82% felt the hearings were fair and the parties acted in good faith, and 79% felt the arbitrator was unbiased. Conversely, with the exception of one county, there were strong majorities that rated the arbitrators, themselves, very poorly with regard to preparation, understanding of the issues, and knowledge of procedure.

[4] While this article will focus on, and reference only, claims of discrimination based upon sexual orientation, the provided recommendations will have application to all statutory claims under a collective bargaining agreement.

[5] *See generally* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 118 (2003) ("Employment arbitration needs to be preserved and improved not abandoned"); Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 416 (2012) ("To the extent a collectively bargaining arbitration process provides reasonable options to effectively vindicate statutory claims, employees whose unions fairly represent all of their interests should be able to use this arbitration process").

briefly discuss the origins of Title VII, and then move to modern issues of employment discrimination based on sexual orientation.

Part II will open with a lead-in to, and current arguments for, a Supreme Court ruling that provides Title VII protections against discrimination based on sexual orientation under the "because of … sex" clause. The section will conclude with an examination of the collective bargaining and arbitration processes—as they apply to sexual orientation discrimination claims in employment CBAs—through a brief discussion of the disadvantages the process has on the vindication of individual employee rights.

Finally, Part III will make brief reference to the arguments in the opening of Part II and assert that the first step in resolving the arbitration issue involves a Supreme Court ruling that affirmatively holds that the provisions of Title VII's "because of … sex" clause protect against discrimination based upon sexual orientation. Then the section will close by addressing the findings in the second half of Part II by making recommendations for (1) revised collective bargaining imposed on unions and employers, and (2) improvements to the arbitration process that enhance procedural and substantive standards while still maintaining the bargained for advantages of speed, cost, and informality.

I. LABOR RELATIONS & DISCRIMINATION: A HISTORICAL OVERVIEW OF AMERICAN EMPLOYMENT

A. *Origins of the National Labor Relations Act*

i. Early Collective Bargaining and Arbitration

In its simplest form, collective bargaining is "the process in which working people … negotiate contracts with their employers to determine their terms of employment." [6] The concept of collective bargaining, although not legislatively acknowledged or provided for, has been a part of American history since the colonial

[6] *See Collective Bargaining*, *at* https://aflcio.org/what-unions-do/empower-workers/collective-bargaining (last accessed Oct. 23, 2018).

era. [7] Early views on collective bargaining, however, ranged from outright distrust and hostility to qualified tolerance. [8] Further, without the intervention and protection of federal legislation, individual state courts were the "ultimate arbiters of workers' collective action." [9] This resulted in many states openly allowing employers to promulgate employment contract clauses that prohibited union association, as well as terminate the employment of anyone shown to be affiliated with a union or wishing to bargain collectively.[10]

Alternative dispute resolution, namely arbitration, has a similar extensive history, spanning Colonial America. [11] Arbitration is defined as 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." [12] The first known state laws codifying arbitration as an official means of dispute resolution were enacted in the early 17th century. [13] Further, arbitration was used both as a final effort at evading the American Revolution [14], and a testamentary choice of law for the probate of George Washington's last will and testament [15].

Federal absence in matters concerning labor organizing, collective bargaining, and associative dispute resolution persisted throughout the majority of the 19th century. When the federal

---

[7] Lance A. Compa, *An Overview of Collective Bargaining in the United States, in* CORNELL UNIVERSITY ILR SCHOOL DIGITALCOMMONS@ILR 91 (2014), *available in* Collective Bargaining Commons, http://digitalcommons.ilr.cornell.edu/articles/912.

[8] *Id.* at 91-92 (contrasting *Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806), where the court held collective action to be "unnatural" and "a criminal conspiracy to inflict harm on the public," with the court in *Commonwealth v. Hunt*, 45 Mass. 111 (1842), which was okay with collective action so long as it "remained peaceful").

[9] *Id.* at 92.

[10] *Id.*

[11] Steven A. Certilman, *A Brief History of Arbitration in the United States*, 3 N.Y. ST. B. ASS'N: N.Y. DISP. RESOL. LAW. 10 (2010).

[12] Black's Law Dictionary 112 (8th ed. 2004).

[13] *See* Certilman, *supra* note 11, at 10. In 1632, Massachusetts became the first colony to adopt arbitration laws, followed by Pennsylvania in 1705.

[14] *Id.*

[15] *Id.* at 11.

legislature did finally intervene, it started with dispute resolution and the enactment of the Arbitration Act of 1888. [16] Federal arbitration provisions took on its final form with the 1925 enactment of the Federal Arbitration Act (FAA) [17], supported a year later by The American Arbitration Association. [18]

Correspondingly, the government divided the other two issues into three major labor categories: the railroad and airline industries, covered by the Railway Labor Act of 1926 [19]; the remaining portion of private sector employees, govern by the National Labor Relations Act (NLRA) of 1935 [20]; and the public sector, which remained under the jurisdiction of the individual states [21] [22]. While the focus of this article will be on private sector employees governed by the NLRA, the issues and solutions presented herein are equally applicable to the public sector.

ii. Collective Bargaining and Dispute Resolution under the NLRA

As a federally enacted statute, the NLRA occupies and has preemptive power over the field of labor relations. [23] Under the enforcement of its administrating agency, the National Labor Relations Board (NLRB), the NLRA obligates employers and unions to bargain, in good faith, over "wages, hours, and other

[16] *Id.* The Arbitration Act originally granted investigative power, but was quickly replaced by the Erdman Act of 1898, which substituted investigation for a form of mediation.
[17] 9 U.S.C. §§ 1 *et seq.*
[18] *See*, Certilman, *supra* note 11, at 12.
[19] *See* Compa, *supra* note 7, at 92.
[20] *Id.* at 93.
[21] *Id.* at 97.
[22] It is important to note that while federal employees are classified as part of the public sector, they are governed by President Kennedy's 1962 executive order 10988 (codified by President Carter as Title VII of the Civil Service Reform Act of 1978), not the states. *See id.*; U.S. FED. LABOR RELATIONS AUTHORITY, 50TH ANNIVERSARY: EXECUTIVE ORDER 10988 (2012), https://www.flra.gov/50th_Anniversary_EO10988.
[23] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (holding that any state action which is found to involve §7 or §8 activity is preempted by the NLRA).

terms and conditions of employment." [24] The NLRA further mandates that these subjects must be bargained over in good faith to impasse, that is, until the "good-faith negotiations have exhausted the prospects of concluding an agreement." [25] There is an additional requirement, on the union itself, to fairly represent all the employees of a collective bargaining unit. [26] This statutory duty demands that a union "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." [27] The end goal of the bargaining process is the creation of the collective bargaining agreement (again "CBA"), which serves as the governing document for all employment terms and conditions, binding on both the employer and employees.

The Supreme Court described the CBA as a delineation of "the rights and duties of the parties," and "more than a contract … [but rather] a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." [28] The Court went even further and called the CBA "an effort to erect a system of industrial self-government;" a system whose foundation rests in its "grievance machinery." [29] Conclusively, it held arbitration to be that "machinery." [30] Moreover, arbitration over litigation has been established as the preferred method of dispute resolution in a CBA [31], and is executed as the final decision-making vehicle once all other methods have been exhausted. [32]

---

[24] National Labor Relations Act, 29 U.S.C. § 158(d); *see also* Compa, *supra* note 7, at 93; Yeongsik Kim, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 WIS. J.L. GENDER & SOC'Y 73, 82-83 (2015).
[25] *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967).
[26] *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967).
[27] *Id.*
[28] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).
[29] *Id.* at 580-81.
[30] *Id.* at 581.
[31] *Id.* at 581-82 (discussing the broad functions of arbitration over the courts).
[32] *See* Eugene K. Connors and Brooke Bashore-Smith, *Employment Dispute Resolution in the United States: An Overview*, 17 CAN.-U.S. L.J. 319, 321 (1991), available at http://scholarlycommons.law.case.edu/cuslj/vol17/iss2/15

In a prior passage, arbitration was defined as involving "one or more neutral parties," or arbitrators to facilitate a decision. Unlike in a traditional courtroom, where the jury decides the facts and a judge decides the law, arbitrators function as judge and jury. [33] Arbitrators are, generally, selected for their expertise in a particular labor field. [34] However, they may also be lawyers or retired judges. [35] In addition to the expertise of neutral arbitrators, arbitration has been favored by the labor industry for its "speed, efficiency, [and] privacy," as well as its cost-effectiveness. [36] This early form of arbitration was voluntary, bargained for, and molded to fit the industry's needs. [37] It's a stark contrast to the arbitration to be discussed later on in this article.

B. *Discrimination in the United States*

i. Title VII

Title VII of the Civil Rights Act of 1964 (the Act) [38], Title VII or simply the Title, was drafted to eliminate all forms of discrimination, within the workplace and otherwise. [39] The employment end-goal was "productive efficiency and equity" [40] demonstrated through "fair and racially neutral employment and personnel decisions." [41] At the Title's enactment, the American Civil War and, subsequent, Reconstruction efforts were almost a century passed, however the employment situation for Black

(discussing the progressive "steps" of dispute resolution required in a typical CBA before reaching arbitration).

[33] *See* Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 86 (2002).

[34] *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974) ("the specialized competence of arbitrators pertains primarily to the law of the shop")

[35] *See generally* Ebe, *supra* note 33, at 87.

[36] *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005) (arbitration is "sought [for its] expertise, speed, efficiency, privacy, and neutral decisionmakers"); Maltby, *supra* note 5, at 107 ("Arbitration is far less expensive than litigation").

[37] *See* Sternlight, *supra* note 36, at 1635.

[38] 42 U.S.C. §§ 2000e *et seq.*

[39] Major Velma Cheri Gay, *50 Years Later … Still Interpreting the Meaning of 'Because of Sex' within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61, 67 (2015).

[40] *Id.*

[41] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

Americans (as well as other minorities and women) was still extremely unwelcoming. [42] Through the emerging and escalating civil rights protests, a spotlight was focused on the country's "pervasive and egregious racial discrimination and segregation." [43] The nation was unapologetically forced to confront its own failings and charged with corrective action. [44] The creation of the Act, and Title VII, were the result.

Title VII, in pertinent part, "forbids an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,' or to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's … sex.'" [45] Congress also founded the Equal Employment Opportunity Commission (EEOC) as the gatekeeper and primary facilitator of the Act, however it left the agency amputated, without any true enforcement authority. [46] Lack of enforcement power notwithstanding, the EEOC's inaugural year saw an excess of 9,000 discrimination charges filed;

[42] *See* Gay, *supra* note 39, at 66.
[43] U.S. EQUAL EMP'T OPPORTUNITY COMM'N: EEOC 35TH ANNIVERSARY, PRE-1965: EVENTS LEADING TO THE CREATION OF EEOC, https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (hereinafter "EEOC PRE-1965").
[44] *Id.*
[45] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1989) (quoting 42 U.S.C. §§ 2000e-2(a)(1), (2)) (emphasis in original). The full text of the statute proscribes discrimination "because of such individual's race, color, religion, sex, and national origin." However, for purposes of this article, the focus will be solely on "sex" discrimination.
[46] *See* EEOC PRE-1965, *supra* note 43 (Passage of Title VII was hard-fought, hard-won, and involved many compromises. One of which was the removal of any enforcement power within the EEOC. The commission was relegated to only the "power to receive, investigate, and conciliate complaints" of discrimination. Nevertheless, over the decades, the EEOC has grown and strengthened as an "enforcement" agency despite its inaugural hindrances).

over quadruple the anticipated amount. [47] In the decade following, the number grew to almost 95,000 charges. [48] It was clear that discrimination's hold on the country had not waned, but now there was a means to combat its effects.

ii. Empirical Research on Discrimination Based on Sexual Orientation

Approximately 6.5 million employees in the United States identify as Lesbian, Gay, Bi-Sexual, or Transgender (LGBT) [49], however Title VII provides no explicit prohibition against discrimination based on sexual orientation and, thus, these individuals are forced to rely on the mercies of state and local laws for employment protection. [50] Jurisdictions slow in, or resistant to, adopting anti-discrimination statutes that cover sexual orientation leave their citizens vulnerable to attack. [51]

In 2011, the National Center for Transgender Equality conducted a study of some 6,450 surveys geared at gender identity and sexual orientation discrimination in employment and other things. [52] The results were both staggering and disturbing. Ninety

[47] J. Clay Smith, Jr., *Overlapping Jurisdiction of the Equal Employment Opportunity Commission and the National Labor Relations Board* 1 (SELECTED SPEECHES, Paper No. 2, 1980), http://dh.howard.edu/jcs_speeches/2.
[48] *Id.*
[49] Lori Ecker, *Discrimination in Employment Issues for LGBT Individuals* (AM. BAR. ASS'N, Oct. 13, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/discrimination-in-employment-issues-for-lgbt-individuals/.
[50] Zascha Abbott et al., *Recent Developments in Employment Law and Litigation*, 53 TORT & INS. L.J. 335 (2018).
[51] HUMAN RIGHTS CAMPAIGN, STATE MAPS OF LAWS & POLICIES: EMPLOYMENT (2018), https://www.hrc.org/state-maps/employment. As of June 11, 2018, 21 states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation or gender identity; one state (Wisconsin) protects based on sexual orientation only; six states have provisions against discrimination based on sexual orientation or gender identity for public employees; and five states protect based on sexual orientation only for public employees. Idaho, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, West Virginia, Tennessee, Alabama, South Carolina, Georgia, and Florida have no form of state level employment provisions against discrimination based on sexual orientation and/or gender identity.
[52] *See* Kim, *supra* note 24, at 76.

percent of the participants, 5,805 individuals, stated direct harassment or mistreatment in their place of employment. [53] Additionally, forty-seven percent of the participants suffered adverse employment actions, with approximately twenty-one percent citing a direct correlation between their gender identity or sexual orientation and termination of employment. [54] Forty-four percent reported that they were not hired, and twenty-three percent were not promoted, on account of their gender identity or sexual orientation. [55] Finally, the study also showed that participants who were of a racial minority asserted much higher rates of discrimination; upwards of double or triple that of non-racial minority participants.[56]

In 2008, the General Social Survey (GSS) conducted a study, using probability samples representative of the United States population, that found a substantial portion of the LGBT community experienced some form of workplace discrimination because of their sexual orientation or gender identity. [57] Workplace harassment was the prevailing form of discrimination, with thirty-five percent, followed by about sixteen percent who reported having lost their job due to their sexual orientation and/or gender identity. [58] The study also measured differences between those who were open about their sexual orientation or gender identity versus those who were not. [59] It is clear from the data that invidious discrimination based on sexual orientation and/or gender identity is a problem in American employment. Further, the few state provisions that are in place are insufficient to adequately

[53] *Id.* The study's sample was diverse in composition. It pulled from a varied range of racial, socio-economic and geographic environments.
[54] *Id.*
[55] *Id.* at 76-77.
[56] *Id.* at 77.
[57] BRAD SEARS & CHRISTY MALLORY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE 40-2, 40-3 (Christine Michelle Duffy & Denise M. Visconti eds., 2014).
[58] *Id.* at 40-4.
[59] *Id.* Of those who were open, fifty-six percent reported harassment and discrimination. Whereas, ten percent of those who were not open reported experiences of harassment and discrimination.

mitigate the issue. Federal intervention is not only crucial, it is inevitable.

II. RESOLUTION OF SEXUAL ORIENTATION DISCRIMINATION CLAIMS IN MODERN COLLECTIVE BARGAINING AGREEMENTS

A. "[B]ecause of ... Sex" Protections for Discrimination Based on Sexual Orientation

At its inception, Title VII's focus was on eliminating employment discrimination against Black Americans, the inclusion of "sex" discrimination was an addition. [60] Further, Congress failed to provide any guidance on its intent or meaning regarding the "because of … sex" prohibition. [61] Thus, it has been up to the courts to establish doctrines and interpretations to determine the application of this provision. [62]

Early interpretations of the "because of … sex" provision took a traditional approach to the legislature's ambiguity, narrowly and literally defining "sex" as the biological man or woman. [63] This is in line with the "fundamental cannon of statutory construction," which decrees that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." [64] Hence, under this approach, the Title's provision would simply and only mean that employers are prohibited from "discriminat[ing] against women because they are women and against men because they are men." [65]

i. When Society Moves, the Law Must Move with It

[60] *See* Gay, *supra* note 39, at 67.
[61] *Id.* at 68-69.
[62] *Id.* at 69.
[63] *Id.* at 73 (referencing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning"); *see also Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (noting that "the term 'sex' in [Title VII], when enacted in 1964, undoubtedly meant 'man or woman'").
[64] *Id.* at 362 (Sykes, J., dissenting) (quoting *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)).
[65] *Id.* at 363.

Society has evolved and continues to do so. Further, with that evolution comes changes in perception and understanding. [66] The Supreme Court set the standard for an evolving interpretation of "because of … sex" in *Price Waterhouse*. [67] There, the Court gave substance to the "sex stereotype theory," which makes actionable any discrimination on the basis of non-conformity to stereotypical gender roles and behavior. [68] The Supreme Court then followed that up with its ruling in *Oncale v. Sundowner Offshore Services.,* [69] where it held that "nothing in Title VII necessarily bars a claim of discrimination 'because of … sex' merely because the plaintiff and the defendant" are both of the same sex. [70]

The Circuit courts soon began to follow in the Supreme Court's footsteps. [71] In *EEOC v. Boh Brothers Construction Co.*, [72] an *en banc* Fifth Circuit Court ruled that harassment on the basis of gender-stereotypes may be actionable under Title VII's "because of … sex" provisions. [73] In *Boh Brothers*, an employee suffered continuous "verbal and physical harassment" simply for not conforming to his supervisor's perspective of how men should act. [74] The employee was severely mock for his use of sanitary wipes rather than standard toilet paper, was called pejorative and derogatory names, and threatened with sexual assault. [75] Despite

[66] *See* Kim, *supra* note 24, at 79 n.41 (illustration of both courts' progressive interpretation of "sex" as it relates to Title VII).
[67] 490 U.S. 228 (1989).
[68] *Id.* at 250-51.
[69] 523 U.S. 75 (1998).
[70] *Id.* at 79; *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2d Cir. 2018) (paraphrasing the Supreme Court's holding in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), by stating that discrimination according to life expectancy was "simply a proxy for sex" and, thus, the action equated to discrimination "because of … sex").
[71] *See* Gay, *supra* note 39, at 81.
[72] 731 F.3d 444 (5th Cir. 2013).
[73] *See* Gay, *supra* note 39, at 81; *see also Boh Bros.*, 731 F.3d at 453 ("[A] plaintiff may rely on gender-stereotyping evidence to show that discrimination occurred "because of … sex" in accordance with Title VII") (referencing *Price Waterhouse*, 490 U.S. 228).
[74] *Boh Bros.*, 731 F.3d at 445-46.
[75] *Id.*

lacking the three prongs of evidence highlighted in *Oncale*—(1) that the harassing party was either homosexual or motived by sexual desire; (2) that harassing party was motivated by hostility to a certain gender; or (3) the harassing party treated the sexes differently—the court found the EEOC's claims cognizable. [76] The Fifth Circuit declined to follow *Oncale's* precise evidentiary standards and, like its sister circuits, concluded that those standards were "illustrative" rather than "exhaustive." [77] It held that the EEOC needed only to show evidence that the discrimination was based upon perception of a lack of gender conformity. [78] Following the trajectory of both the Supreme and Circuit courts, the path leads directly to a line of reasoning and interpretation that is currently splitting the judiciary: discrimination based upon sexual orientation should be protected under Title VII's "because of … sex" clause.

ii. Why Title VII's "[B]ecause of … [S]ex" Provisions Cover Discrimination Based on Sexual Orientation

As discussed in the preceding sections, Title VII does not explicitly prohibit discrimination on the basis of sexual orientation. [79] Nevertheless, several state and federal laws have established protections prohibiting such discrimination. [80] Even, Congress and certain federal agencies have taken notice of, and acted on, a need for provisions against discrimination based upon sexual orientation. [81] Further, the circuits have become split on the

[76] *Id.* at 458, 461.
[77] *Id.* at 456; *see also* Gay, *supra* note 39, at 82 n.166 (comparing the 10th, 8th, and 7th circuit's conclusions that the *Boh Bros.* evidentiary route was not "exhaustive").
[78] *Boh Bros.*, 731 F.3d at 456; *see,* e.g., *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (holding that the "sex stereotyping theory" under Title VII was applicable to transsexuals); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
[79] 42 U.S.C. §§ 2000e-2(a)(1), (2) (employers are only proscribed from discriminating "because of such individual's race, color, religion, ***sex***, and national origin").
[80] *See* HUMAN RIGHTS CAMPAIGN, *supra* note 51; Section II(A)(i), *supra*.
[81] *See Hively*, 853 F.3d at 344 ("Congress has frequently considered amending *Title VII* to add the words "sexual orientation" to the list of prohibited

issue of incorporating Title VII protections under the "because of … sex" clause. [82] With the obvious movement toward expanding the provisions of Title VII, the split in the circuits, and the interest but lack of action by Congress, it is only reasonable to expect that the Supreme Court will have to intervene and make a ruling on the subject. This section seeks to discuss the two prevailing arguments, purported by the Second and Seventh Circuit courts, for why Title VII's "because of … sex" provision protects against discrimination based on sexual orientation and why, in this author's opinion, the Supreme Court should affirmatively hold so.

a. It is all because of "sex"

The first argument championed is that discrimination on the basis of sexual orientation is prohibited under Title VII's "because of … sex" provisions, because the term "sex" in intrinsic to sexual orientation. As highlighted in the opening of Part II, the term "sex" has undergone several interpretations with regards to its application to Title VII. The circuits charge that the Supreme Court, through its rulings, has established that "Title VII prohibits not just discrimination based upon sex itself, but also discrimination based upon traits that are a function of sex, such as life expectancy, and non-conformity with gender norms." [83] Equally, they contend that the interpretation of statutes and their

characteristics"); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015) (holding affirmatively that "allegations of discrimination on the basis of [] sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII"); *see also* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL OR TRANSGENDER WORKERS, https://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm (hereinafter "EEOC PREVENTING DISCRIMINATION").

[82] *See Hively*, 853 F.3d at 351-52 (holding that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes); *Zarda*, 883 F.3d at 132 (holding that a petitioner "is entitled to bring a Title VII claim for discrimination based on sexual orientation); *but see Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (holding that the court is bound by prior precedent, and unless overruled by Supreme Court or this court sitting *en banc*, there is no cause of action for discrimination based on sexual orientation under Title VII).

[83] *Zarda*, 883 F.3d at 112.

terms must be done on a "basis of present need and understanding rather than original meaning." [84] Furthermore, they reference that even the late Justice Antonin Scalia, a firm "originalist," understood this concept [85] and stated the following:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. … [Ours is a] government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which binds us." [86]

Given their above rationale, one is led to conclude that statutory interpretation not only accepts the changes in society, it is a product of those changes. A question remains, then, of how these changes relate to "sex" and "sexual orientation"?

Sexual orientation deals with a "person's predisposition or inclination toward sexual activity or behavior with other males or females" and follows under three primary categories: "heterosexuality, homosexuality, or bisexuality." [87] The courts advance their argument with the assertion that fundamental to the above definition is a determination of attraction to individuals of the same or

[84] *Hively*, 853 F.3d at 353 (Posner, J., concurring).
[85] *Id.* at 353-54 (referencing Scalia's pivotal fifth vote in the "flag burning" cases). Flag burning was held to be protected speech under the First Amendment, yet such an *action* would not have been considered as "speech" by the framers or ratifiers of the amendment.
[86] *Id.* at 362 (Sykes, J., dissenting) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997)); *see also Id.* at 344 (quoting *Oncale*, 523 U.S. at 79-80) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").
[87] Black's Law Dictionary (10th ed. 2014).

differing "sex." [88] Hence, they contend that it would not be unreasonable to conclude that, if the definition of sexual orientation is dependent upon a classification of the "sex" of both the individual and his or her partner, "sexual orientation [must invariably be] a function of sex." [89] Moreover, application of the corollary would then lead to a conclusion that discrimination based upon sexual orientation "does not exist without taking the victim's biological sex … into account," and that any adverse reaction by the offender is "purely and simply based on sex." [90] Taken further, as specifically noted by the court in *Hively*, "if we were to change the sex of one partner in a [homosexual] relationship, the outcome would be different … reveal[ing] that the discrimination rests on distinctions drawn according to sex." [91] The end product of such reasoning appears obvious, even to this author; sexual orientation is a product of sex, thus any discrimination on the basis thereof would be the equivalent of discrimination "because of … sex."

b. Sex stereotyping

The Supreme Court in *Manhart*, held that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males and females." [92] The Court again discussed the concept of stereotyping in *Price Waterhouse*, when it found impermissible sex discrimination in an employer's adverse employment action based upon a belief that "a female accountant should walk, talk, and dress femininely." [93] There, the Court succinctly removed any question that sex stereotyping had any

[88] *See Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless").
[89] *Zarda*, 883 F.3d at 113.
[90] *Hively*, 853 F.3d at 346-47.
[91] *Id.* at 349.
[92] *Manhart*, 435 U.S. at 707.
[93] *Zarda*, 883 F.3d at 120.

place in employment. [94] However, if the Court has deemed sex stereotyping so reprehensible as to fall under Title VII's "because of … sex" proscriptions, it begs the question of what is sex-based stereotyping? [95] More importantly, how does sex stereotyping relate to discrimination based on sexual orientation being prohibited under Title VII?

The Second Circuit court in *Zarda* concluded that discrimination based on sex stereotyping could be found where the "behavior or trait" causing issue or an adverse employment action "would have been viewed more or less favorably if the employee were of a different sex. [96] Applying the above test to sexual orientation, molded by *Price Waterhouse* reasoning, the court held that "when … 'an employer … acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'" [97] The court's conclusive proclamation is that "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women" [98] and "is predicated on assumptions about how persons of a certain sex can or should be." [99]

The Seventh Circuit court in *Hively* echoed this sentiment when it referred to homosexuality as "the ultimate case of failure to conform to … stereotype" in a society that "views heterosexuality as the norm." [100] Even the Eleventh Circuit—despite hiding behind precedent and holding that "there is no sexual orientation action under Title VII [101] [102]—found that

---

[94] *Price Waterhouse*, 490 U.S. at 251. ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").
[95] *See Zarda*, 883 F.3d at 120.
[96] *Id.*
[97] *Id.* at 120-21; *see Price Waterhouse*, 490 U.S. at 250.
[98] *Zarda*, 883 F.3d at 119.
[99] *Id.* at 112.
[100] *Hively*, 853 F.3d at 346.
[101] *Evans*, 850 F.3d at 1255 (referencing the binding 5th Circuit holding in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).
[102] *See generally* UNITED STATES COURTS, *The Eleventh Circuit Historical Society*, http://www.ca11.uscourts.gov/eleventh-circuit-historical-society;

"holding males and females to different standards of behavior" constitutes "discriminat[ion] on the basis of … sex." [103] The *Hively* court, like the court in *Zarda*, came to the ultimate conclusion that a "[distinction] between a gender nonconformity claim and one based on sexual orientation … does not exist at all. [104] When there is "[a]ny discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner," that "reaction [is] purely and simply based on sex." [105]

Given all of the arguments, interpretations, and illustrations provided above, it is reasonable to assume that both the Second and Seventh Circuit courts support the contention that it is past time for the Supreme Court to revisit and affirm Title VII "because of … sex" provisions against discrimination based on sexual orientation. The Court's precedents have already set the framework. [106] Even the *Hively* court noted the cognitive incongruence in the Supreme Court's use of an associative racial illustration in *Loving v. Virginia* [107], juxtaposed against its steadfast resistance to using the same illustration with regards to sexual orientation. [108] The proverbial 'writing is on the wall.' Now the Supreme Court needs only to read and apply it.

WIKIPEDIA, *United States Court of Appeals for the Eleventh Circuit*, https://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Eleventh_Circuit (as of Oct. 13, 2018, 01:56 (UTC)) (The 11th Circuit was established on October 1, 1981, from a portion of the 5th Circuit that had split off. Thus, 5th Circuit opinions prior to that date are considered binding on the 11th Circuit).

[103] *Evans*, 850 F.3d at 1260 (Pryor, J., concurring); *see also Nichols v. Azteca Rest. Enters, Inc.*, 253 F.3d 864, 869 (9th Cir. 2001) (holding that Title VII was violated where a homosexual employee was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype).

[104] *Hively*, 853 F.3d at 346.

[105] *Id.* at 347.

[106] *See generally* Part II(A)(i), *supra*.

[107] 388 U.S. 1 (1967).

[108] *See Hively*, 853 F.3d at 342 (Why is a rule that recognizes "discrimination on the basis of the ***race*** with whom a person associates [as] a form of ***racial*** discrimination" okay, but one that would recognize discrimination on the basis of the ***sex*** with whom a person associates as a form of ***sexual*** discrimination, not?).

At the onset, this article proposed a discussion and resolution of the issues presented in claims of discrimination based on sexual orientation under a CBA arbitration clause. Thus far the topics covered have included an overview of both early and post-NLRA collective bargaining and dispute resolution (arbitration), as well as a history of Title VII, sexual discrimination, and the judiciary's integration of the two. Next, will be a consideration of how all of these various components function, and fail to function, together within the employment arena.

B. Bargaining and Arguing Against Discrimination

i. Anti-Discrimination Provisions within a CBA

Justice Thurgood Marshall stated that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." [109] Additionally, he charged that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining [of which] an employer may have no objection to incorporating into a collective agreement." [110] Further, the Supreme Court has held that good faith "collectively bargained … employment-related discrimination claims … easily qualif[y] as a 'conditio[n] of employment' that is subject to mandatory bargaining." [111] [112] It is under this framework that collective bargaining for provisions against discrimination based on sexual orientation will be addressed.

Since there lacks, as of yet, a national federally mandated prohibition against discrimination based on sexual orientation, employers and unions have taken to including protective provisions within the CBA. This practice has proven both beneficial and detrimental. In jurisdictions where anti-discrimination provisions are already statutorily established to

[109] *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 66 (1975).
[110] *Id.* at 69.
[111] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256 (2009).
[112] *See also Star Tribune*, 295 N.L.R.B. 543, 547 (1989) (mandatory bargaining subjects are "matters that materially or significantly affect unit employees' terms and conditions of employment"); 29 U.S.C. §158 (failure to engage in good faith collective bargaining is an unfair labor practice).

provide for sexual orientation, [113] the presence, or lack thereof, of protections within the CBA become of lesser concern. Conversely, in other locations, failure of the employer/union bargaining process to yield anti-discriminatory accommodations have greatly imperiled employee working conditions and/or employment, without any available remedy. [114] Unfortunately, bargaining for such protections and delineating them within a CBA does not guarantee protection because, as discussed above, the "grievance machinery" for claims under a CBA is, generally, arbitration. [115]

Under the new Supreme Court regime, should the employer/union bargaining process create a CBA that "clearly and unmistakably" requires statutory claims to be handle by arbitration, employees could lose the right to be heard in a court of law. [116] This now puts vindication of an individual employee's statutory rights in the hands of the union. The employee, after exhausting all other available grievance mechanisms, is now dependent on the union viewing his claim as meritorious and electing to submit it to arbitration. Should the union decline to bring the employee's claim to arbitration, the employee's recourse is to file a claim that the union violated its duty of fair representation (DFR).[117] The DFR claim, however, will only be successful if an employee can sufficiently satisfy a two-pronged test: (1) that the employer breached the employment contract, and (2) that the union's actions were "arbitrary, discriminatory, or in bad faith." [118] The employee

[113] *See generally* HUMAN RIGHTS CAMPAIGN, *supra* note 51.
[114] *See generally Evans*, 850 F.3d 1248; *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation'"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("sexual orientation is not a prohibited basis for discriminatory acts until Title VII").
[115] *See* Part I(A)(ii), *supra*.
[116] *See 14 Penn Plaza*, 556 U.S. at 274.
[117] *Id.* at 271-72.
[118] *Id.* at 271; *see* Mitchell H. Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J. L. REFORM 517, 525 (2009); *see*, e.g., *Gardner-Denver*, 415 U.S. at 58 n.19 ("a breach of the union's duty of fair representation may prove difficult to establish"); *Vaca*, 386 U.S. at 192 ("a union does not breach its duty of fair

has a secondary option, but it is of limited benefit. In a pivotal 2002 decision, the Supreme Court held that the EEOC is not precluded from filing a lawsuit on the employee's behalf regardless of the presence of a binding arbitration agreement. [119] However, as mentioned, this alternative's value is conditional. If the EEOC decides not to file a claim in federal court on the employee's behalf, the employee remains under the prohibition of his employment CBA. He cannot pursue a claim himself, even if issued a right to sue letter.

This rationale instantly pleads a series of new questions, which will be addressed in Part III. If there is a clear waiver of the judicial forum, is the union now obligated to arbitrate ***all*** statutory claims? If not, should it be? And what are the employee's options if a union refuses to arbitrate a claim, but is not found to have violated its DFR? Would not a union's refusal to arbitrate, in this instance, constitute a "substantive waiver" of an employee's statutory rights? [120] Also of concern is how the arbitration process measures up, in and of itself?

ii. Arbitrary Arbitration

The arbitration process, while advantageous in many ways, also has several glaring faults. Early criticisms of arbitration

---

representation … merely because it settled the grievance short of arbitration"); Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of 14 Penn Plaza LLC v. Pyett*, 25 A.B.A. J. LAB. & EMP. L. 159, 171 (2010) ("the duty of fair representation has historically not been a high standard to meet"); Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 THE LABOR LAW. 183 (1996) (simple negligence in "processing a grievance or representing a member" does not constitute a union's breach of its duty of fair representation).

[119] *See EEOC v. Waffle House*, 534 U.S. 279, 292 (2002); *see generally* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 204 (2015) (providing a brief synopsis and analysis of *EEOC v. Waffle House*).

[120] *See 14 Penn Plaza*, 556 U.S. at 249, 273 (the Court stating that "a substantive waiver of federally protected civil rights will not be upheld," then deftly avoiding the subject because it "was not fully briefed"; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) (noting that any clause that functioned as "a prospective waiver of a party's right to pursue statutory remedies" would be "condemn[ed] … as against public policy").

revolved around power disparities and unfairness to employees, limited damages and various procedural flaws. [121] [122] Those concerns still exist in modern arbitration and have expanded to include: the lack of written opinions, lack of voluntariness, arbitrator bias, limited discovery, lack of arbitrator competence in the law, and limited judicial review. [123] [124] Further, there are strong concerns that when dealing with statutory claims, where an arbitration clause is contained within a CBA, the union will supplant the interests of the collective unit over those of the individual employee. [125] The concern pertinent to this article, however, is how do these issues relate to, and effect, arbitration as an appropriate forum for the resolution of employee statutory claims?

A unanimous Supreme Court in *Alexander v. Gardner-Denver* concluded that, against litigation, "arbitration [is] a comparatively inappropriate forum for the final resolution of [statutory] rights." [126] Articulated through Justice Powell, the Court held that "the resolution of statutory or constitutional issues

---

[121] *See* Zev. J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J. L. & PUB. POL'Y 217 (2016).

[122] Many of the criticisms mentioned in this section directly refer to individual arbitration, however they also apply in a collective bargaining/union setting.

[123] *See*, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991); *Gardner-Denver*, 415 U.S. at 56-57; Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227, 229 (2010); 9 U.S.C. §10(a).

[124] This list is by no means exhaustive of the expressed criticisms of arbitration over the years, but rather an illustrative display of the range of concerns.

[125] *See Gardner-Denver*, 415 U.S. at 58 n.19; *see also* Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 77 (2009) ("a collective bargaining unit grievant subject to an arbitration requirement is not free to decide whether to pursue his claim to arbitration or how to handle the case if the union processes it that far"); Green, *supra* note 5, at 381 ("Labor arbitration reflects a 'majoritarian' process pertaining to collective contractual rights, as opposed to the statutory employment discrimination rights of individual members").

[126] *Gardner-Denver*, 415 U.S. at 35.

is a primary responsibility of [the] courts," whereas "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." [127] Unless stipulated to within the clauses of a CBA, arbitrators are not required to follow the laws pertinent to the claims being heard. [128] The Court has since retreated from its early assertions, arguing that "there is no reason to assume at the outset that arbitrators will not follow the law." [129] Even if this is true, is it fair, or even reasonable, to force employees to take such a gamble with regard to their statutory rights? Many critics and scholars echo the sentiments of Justice Powell, and argue that the *Gardner-Denver* Court was completely correct in its original assessment. [130]

Critics have frequently attacked arbitration of statutory claims on procedural grounds. Limits on both discovery and an employee's control over processing his claims are among the top issues with labor arbitration. [131] Unions are not required to secure counsel when processing employee grievance claims. [132] And even if an attorney is retained, he or she is controlled and directed by the union, not the employee. [133] Additionally, depending on what is

---

[127] *Id. at 57.*
[128] *See* Berger, *supra* note 125, at 64 ("labor arbitrators are obligated to follow the dictates of the contract, not statutory mandates").
[129] *See 14 Penn Plaza*, 556 U.S. at 268.
[130] *See* Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267, 282 (1998) (referencing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) and Title VII disparate treatment procedures, "[arbitration's] limited discovery provisions … disadvantage employment discrimination plaintiffs because [they] bear the burden of persuasion while at the same time are usually the party with less information"); Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 ME. L. REV. 531, 537 (2010) ("arbitration is not a proper forum for the resolution of disputes implicating important civil rights").
[131] *See* Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability without Equivalency*, 64 MONT. L. REV. 449, 486 n.231 (2013).
[132] *See* Eric Esposito, *14 Penn Plaza v. Pyett: Into the Abyss Between Judicial Process and Collectively Bargained Agreements to Arbitrate Individual Statutory Claims*, 38 RUTGERS L. REC. 173, 184 (2011).
[133] *Id.*

agreed upon at the bargaining table, arbitration grievants may find that the union has bargained away their ability to recover certain damages, or has substantially limited the amount of time available to bring forth a claim. [134]

Arbitration has also been confronted as being contrary to goals regarding the vindication of public policy and the development of public awareness of the law and violations of such. [135] The private nature of arbitration, and the general lack of published opinions, work counter-intuitively to Congress' objective of eliminating the "vestiges" of discrimination in the workplace. [136] Another major concern is the lack of voluntariness in arbitration clauses, both for individual employees and those represented by a union. [137] Even unionized employees suffer in this regard, because although unions and employers bargain as equals [138], employees have no say over the bargaining process or resulting CBA. [139]

Clearly arbitration of statutory claims, whether individually or collectively through a union, still has some serious reservations

---

[134] *See* Sternlight, *supra* note 36, at 1652 (arbitration clauses "may shorted plaintiffs' statutes of limitation; bar recovery of punitive damages, compensatory damages, or attorney fees; or bar recovery of injunctive relief").
[135] *See Gardner-Denver*, 415 U.S. at 45; Comsti, *infra* note 135.
[136] *See Emporium Capwell*, 420 U.S. at 69; *see generally* Sternlight, *supra* note 36, at 1658 (discussing difficulties in conducting empirical research on the actual effects, positive or negative, of arbitration).
[137] *See* Cherry, *supra* note 130, at 278-79 ("there is very little 'freedom' of choice involved in most arbitration contracts, which in reality are little more than contracts of adhesion … imposed as conditions of employment"); Jacobs, *supra* note 130, at 537 ("arbitration clauses in 'adhesion' … employment agreements are not the product of voluntary bargaining"); *see generally* THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, NATIONAL STUDY OF PUBLIC ATTITUDES ON FORCED ARBITRATION (2009), http://employeerightsadvocacy.org/publications/national-study-of-public-attitudes-on-forced-arbitration/ (59% of Americans oppose forced arbitration clauses in the fine print of employment or consumer contracts).
[138] *See* Comsti, *infra* note 140, at 19 ("Labor arbitration is premised on an equal bargaining relationship between a union and an employer"); *see generally* Berger, *supra* note 125, at 81 (Both individual and union represented employees suffer from issues of involuntariness. In the former, the employer has all of the power; the union, in the latter).
[139] *See* Esposito, *supra* note 132, at 189 (Employees, generally, have no rights to vote on the CBA, or even various aspects of it).

to overcome if it is to be readily accepted in the legal community. Is such a renovation even feasible? If so, what are the best options for success? Further, if there are critics of arbitration, there must also be supporters. What are the argued advantages of the arbitration process, and how, if at all, would any proposed changes to arbitration effect current benefits?

In the first half of Part II, this article discussed sexual orientation claims within a CBA and the attendant need for protections. That subject will now be revisited as a preliminary step in the overall renovation of the collective bargaining and arbitration process. From there, a series of recommendations will ensue that, compositely, will effectively mitigate the prevailing complaints against arbitration as a forum for the resolution of statutory claims.

III. NO LONGER SO ARBITRARY: RENOVATING THE COLLECTIVE BARGAINING AND ARBITRATION PROCESSES

A. *Trickle-down Reformation*

As alluded to in prior sections, one of Congress' primary goals in establishing Title VII, and its sister anti-discrimination statutes, was to promote "the overriding public interest in equal employment opportunity[ies]" and "vindicate[] the public interest in preventing employment discrimination." [140] A complementary goal of "peace" in employment was enshrined in the NLRA, specifically with regards to the adoption of arbitration within a CBA. [141] Hence, it is only reasonable to conclude that these ideals and policy interests were intended to work in concert; bargained for statutory protection, enforced and vindicated through arbitration.

---

[140] *See* Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 23 (2014) (quoting *General Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 326 (1972).

[141] *See United Steelworkers*, 363 U.S. at 578 ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement").

Constitutional mandates of preemption and supremacy command that sweeping and comprehensive transformation of the treatment of statutory claims within the collective bargaining and arbitration process must start with the federal government; a Supreme Court ruling and/or legislative enactment [142]. As such, the forthcoming proposals of this article must commence with an initial reaffirmation of the need for the Supreme Court to, once again, don its hat of statutory interpretation and issue a ruling that brings sexual orientation discrimination under the protective umbrella of Title VII's "because of … sex" provisions. This would establish a base standard, an even playing field, under which all other labor provisions can be implemented.

Despite its broad application, the reform process does not conclude at the federal level. As mentioned previously, even though provisions may be established at both federal and state levels, employees under a CBA arbitration clause may not necessarily benefit from the established laws. [143] Hence, to enjoy the full benefit of sexual orientation discrimination provisions, as well as any other statutory right, revisions have to also be made at the employer/union bargaining level.

B. *Collectively Bargained For, Statutorily Arbitrated*

i. What Is 'Good' About Arbitration …

As alluded to in the introduction to this article, arbitration, while obviously flawed, is truly a beneficial forum for the resolution of many legal issues. Part II(B)(ii) discussed many of the shortcomings within the arbitration process, yet this author would be remiss in the analytical principles of scholarly writing if even a brief high-level overview of the advantages of arbitration were neglected.

The benefits of arbitration expand from a central premise that arbitration is less expensive and faster than traditional

[142] U.S. CONST. art. VI, § 2.

[143] *See generally* Part II(B), *supra*; *see also* Cherry, *supra* note 130, at 280 ("arbitrators are not bound to follow the law or even be cognizant of it").

litigation. [144] These two foci stem from arbitration's "simplicity" and "informality," [145] and manifest further in terms of accessibility to justice, predictability of outcome, and heightened confidentiality. [146] Further, the informality aspect of arbitration lends itself to the NLRA's overarching goal of labor peace. [147] Finally, there are also arguments that arbitration tends to favor employees, however the limited empirical studies available have remained inconclusive on the matter. [148]

Regardless of where one falls on the "pro" versus "con" side of arbitration, it cannot be disputed that there are advantages to the process. All parties—employer, union, and employee—benefit in some fashion. Nevertheless, even good things can be improved upon. The barrage of criticism in the prior section illustrates that for many the bad far outweighs the good, particularly with respect to arbitrating statutory claims. What, then, can be done?

ii. … And What is 'Best'

---

[144] *Id.* at 276-77 ("arbitration generally reduces legal fees" and "provides a quicker resolution than the court system"); Coleman, *supra* note 123, at 229 (arbitration "is less expensive and faster than litigation"); France, *supra* note 131, at 486 ("A speedier resolution [of legal disputes] is a savings, not only in expenses but also in the personal and emotional costs that often accompany litigation"); Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 A.B.A. J. LAB. & EMP. L. 173, 183 (2010) ("An arbitration case can often be resolved in a matter of months").

[145] *See 14 Penn Plaza*, 556 U.S. at 269.

[146] *See* Coleman, *supra* note 123, at 228; Sternlight, *supra* note 36, at 1653; Mathison, *supra* note 144, at 186.

[147] *See United Steelworkers*, 363 U.S. at 578; Mathison, *supra* note 144, at 186 ("Where the parties may need to continue to work together, as do employers and unions, the informality of arbitration can help the parties preserve their relationship … [which is] especially important in the context of a collective bargaining relationship").

[148] *See* Maltby, *supra* note 5, at 117 ("employees who arbitrate their claims are 50% more likely to win than those who go to court"); Jacobs, *supra* note 130, at 540 (showing that, statistically, employees prevailed more often than not against employers); *but see* Eigen, *supra* note 121, at 259 ("arbitrators are more likely to side with employers than employees"); Sternlight, *supra* note 36, at 1650-51 (discussing empirical evidence that suggests a tendency of employers faring better than employees in arbitration).

If one were to distill down the arguments presented against the arbitration of statutory claims, a general summation would fall under the following three subheadings: (a) the lack of informed and voluntary judicial waivers in a CBA; (b) arbital substantive and procedural shortcomings; and (c) remedial inadequacies for a union's refusal to arbitrate. Essentially, these three areas cover issues before arbitration, during arbitration, and when arbitration is denied by the union. The remainder of this article will address the resolution of issues within these subheadings as individual steps of a progressive, overall recommendation.

a. Judicial forum waivers under a CBA

Waivers of the right to bring an employment dispute to court—requiring, instead, the use of internal grievance processes and arbitration—are the new *status quo*. The lack of informed and voluntary consent to an arbitration clause, whether individually or via a union/employer bargained CBA, has been shown to be a serious issue within the legal community. The arbitration clause is usually built into, and a requisite condition of, the employment contract or CBA. The employee rarely, if ever, has any say in the matter and, quite often, never even knows the clause exists until a dispute arises.

Additionally, it was shown that the arbitration process becomes especially heinous when dealing with disputes involving the violation of statutory rights. To help alleviate this issue, the Supreme Court instituted a threshold requirement that judicial forum waivers "clearly and unmistakably" state the inclusion of statutory rights as matters of arbitration. [149] However, this provision is insufficient to fully address the problem of informed and voluntary consent.

This article refers to the Court's ruling as a "threshold requirement," because it merely walks to the door of informed and voluntary consent but fails to guide parties through it, nor to explain what is to be expected beyond. This author would first propose that the Court clarify and require that the phrase "clearly

[149] *See 14 Penn Plaza*, 556 U.S. 274.

and unmistakably" mirrors the *Penn Plaza* language, by comprehensively delineating all of the statutory rights to be included in the waiver. [150] Additionally, the author concurs with one scholar's suggestion that employers and/or unions also need to "explicitly and painstakingly" explain the waiver. [151] This explanation should include, but not be limited to: what the arbitration process is; the advantages and disadvantages of arbitration over litigation; the availability of an attorney and/or union grievance representative; the degree of the employee's control and input, in both the process and representation; the costs associated with arbitration and who will pay them; the available remedies and ability to appeal; and, if unionized, the employee's rights should a union decline to arbitrate his claim. Further, the arbitration clause should be conspicuous; contained within its own identifiable section or heading, or otherwise visibly set apart and noticeable.

The author acknowledges that this recommendation does little to eliminate the voluntariness issue, particularly with an employee who has limited employment prospects. However, it goes a long way to ensure that an employee is, at minimum, aware of the rights he or she is relinquishing and the effect such waiver may have on employment disputes. Moreover, the requirement to thoroughly explain the contents and ramifications of a waiver will help assuage questions of unconscionability on the part of the employer and/or union. The author also refutes potential arguments that such an obligation would excessively burden an employer or union, as this process can easily and quickly be streamlined into already established human resource pre-employment procedures.

b. Arbitration ground rules

Arbitration of statutory claims is criticized on both procedural and substantive grounds. Opponents cite to the limitations on discovery and evidence. They also take issue with an arbitrator's lack of compliance with, or even knowledge of, relevant statutory law. Moreover, attorneys are rarely present at

[150] *See id.* at 252.
[151] *See* Cherry, *supra* note 130, at 292.

arbitration, so employees must rely on union grievance representatives to process claims. And even if counsel is present, the employee still has no control over how his claim will be handled.

Resolution of these issues turns on comprehensive provisions, bargained for and expressed within a CBA. Unions and employers, alike, should zealously advocate for CBA language requiring an arbitrator of statutory claims to adhere to relevant local, state and/or federal law. The scope of the arbitrator's authority, inclusive of remedies, should be clearly established in writing. [152] In addition to setting the parameters of arbital review, a limited discovery provision, similar to that of the Uniform Arbitration Act (UAA), should be established. [153] Parties should stipulate a finite number of requests for admissions, production and/or interrogatories sufficient for the proper development of the case, but also mindful of preserving the cost-effective benefits of arbitration. [154] Additional language can be provided that allows for an arbitrator to consider granting more discovery, as needed.

Similarly, the FAA provides arbitrators with subpoena power. [155] This, like the discovery provisions above, should be included with specific and finite language that limits compelled witnesses to maybe one or two per side. Again, conditions can be set for additional subpoenas under certain circumstances. Further, this author agrees with various scholars who have suggested modified depositions that are used, not for discovery purposes, but as evidence for when a compelled party is unable to attend the arbitration hearing. [156]

---

[152] *See generally* Mathison, *supra* note 144, at 196 (parties should "clearly and explicitly provide the scope of the arbitrator's authority … include[ing] the authority to render a decision under the [applicable] statutes").
[153] *See* UAA § 17(c) (allowing for discovery "appropriate [to] the circumstances" and accounting for party needs and maintaining a "fair, expeditious, and cost effective" proceeding); *see also* Ebe, *supra* note 33, at 90; Cummins, *supra* note 118, at 172.
[154] *See generally* France, *supra* note 131, at 486 ("[Discovery is] considered by many to be the costliest part of a lawsuit").
[155] *See* 9 U.S.C. § 7.
[156] *See* Ebe, *supra* note 33, at 90; *see also* Esposito, *supra* note 132, at 192.

Concerns about employee control of the arbitration process should be addressed by an allowance of retained counsel, at the employee's expense. [157] This provision would serve dual purposes. It offers security to the employee that his statutory rights will be properly addressed, and obviates concerns that a union may act with regard to the collective over the individual.

Finally, parties should strongly consider incorporating language that requires arbitrators to publish opinions for claims dealing with statutory discrimination. A major function of court opinions, beyond establishing common law precedent, is the education and awareness-building of the general public. Explaining the law, identifying its violators, and educating how those violations will be handled serves a vital function in society; a function particularly critical when dealing with discrimination.

The author fully understands and acknowledges the potential burden these proposals place on the arbitration process. Further, it is acknowledged that a blanket, bright-line, rule cannot be established for the implementation of these suggestions. However, given the importance of vindicating statutory rights, as evidenced by both federal legislative and judicial action over the decades, the author feels that good faith adherence to these recommendations is paramount. And, again, the author stress that these provisions are specific to the arbitration of statutory claims. The processes in place for handling all other, general, grievance claims would not be altered.

c. The *Kravar* example

A question raised by the Supreme Court's holding in *14 Penn Plaza* was: if unions should now be required to arbitration all employment claims? Many employers would probably prefer the answer to be in the affirmative. However, logistically and financially, it would be an extreme burden on a union; especially smaller unions. Further, it strips away the union's discretionary

[157] *See generally* Green*, supra* note 5, at 410 (suggesting that a judicial forum waiver "must include some affirmative agreement by the union and employer to provide the employee with representation through arbitration as final resolution").

power to act as gatekeeper for employment grievances. This, then, leads to another query: if a union is not required to arbitrate all claims, or elects not to, does such an event constitute a prohibited "substantive waiver" of the employee's statutory rights? The Supreme Court skirted around issuing a ruling on that matter, leaving lower courts and scholars, alike, bereft of guidance. A district court in New York decided to rise to the challenge.

In *Kravar v. Triangle Services* [158], Ms. Kravar sued her employer, Triangle, for discrimination based on national origin. [159] Kravar was covered by a CBA that required all discrimination claims to be submitted to arbitration. [160] Triangle moved to compel arbitration, was denied, and appealed to the Second Circuit. [161] In a sworn affidavit, Kravar stated that she attempted to arbitrate her claims, but was denied by the union. [162] Pending resolution with the Second Circuit, the Supreme Court decided *14 Penn Plaza*, a case almost factually identical to Kravar's. [163] Although the Court's overall holding in *14 Penn Plaza* was adverse to Kravar, the Second Circuit held that the arbitration mandate in Triangle's CBA was unenforceable because "the CBA operated as a waiver over Ms. Kravar's substantive rights." [164] Since the CBA demanded arbitration of all claims and the union, within its discretionary power, declined to arbitrate Kravar's claim, she was left with absolutely no forum in which to vindicate her rights. [165]

Under the guidance and example of *Kravar*, this article proposes that, until the matter is properly addressed by the Supreme Court, district and circuit courts dealing with fact patterns similar to *Kravar* and *14 Penn Plaza* should decline to enforce arbitration clauses in those CBAs. As mentioned by one scholar, judicial modeling of *Kravar* has benefits to all parties involved;

[158] No. 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 *1 (S.D.N.Y. May 19, 2009).
[159] *Id.* at *2.
[160] *Id.* at *3-4.
[161] *Id.* at *5.
[162] *Id.* at *8.
[163] *Id.* at *6.
[164] *Id.* at *9; *see also 14 Penn Plaza*, 556 U.S. at 273.
[165] *Kravar*, 2009 U.S. Dist. LEXIS 42944 at *9.

employee, union, and employer. [166] The employee benefits by being granted the right to pursue his statutory claim in a judicial forum, while retaining the collective benefits of unionization. [167] Additionally, the employee suffers no added burden, as he is in the same situation he would be in had there never been a CBA to begin with. [168] Further, if the employee genuinely wished to arbitrate his claims, he is still free to pursue a DFR claim with the NLRB. [169] The union benefits simply by virtual of the fact that it retains its discretionary power to filter employee claims. [170] The employer suffers some threat to the cost-effectiveness it bargained for by choosing arbitration, however, this is off-set by two new tools at its disposal. [171] The employee now has the burden of footing his own litigation bill, and the employer regains to prospect of summary judgment dismissals. [172]

Some scholars have offered proposals similar to, or incorporating portions of, the above recommendations—"opt-out" provisions [173] and two-track arbitration processes [174], to name a couple. These all have merit and essentially end with the same

---

[166] *See* F. Ryan Van Pelt, *Union Refusal to Arbitrate: Pyett's Unanswered Question*, 2010 J. DISP. RESOL. 515, 530-31 (2010).
[167] *Id.* at 531.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* (Employer concerns about frivolous claims must pass these two thresholds. If an employee is not discouraged from bringing his claim by the prospect of looming court and attorney fees, the employer still can rely on summary judgment to eliminate unsubstantiated claims).
[173] *See generally* Cummins, *supra* note 118, at 171. During the union/employer bargaining process, the parties would include an "opt-out" provision specifically for statutory claims. This provision would simply state that, in the event a union declines to arbitrate a statutory claim, the employee can opt-out of the arbitration process and pursue judicial resolution.
[174] *See generally* Esposito, *supra* note 132, at 189 (discussing how bargaining parties can implement a two-track arbitration process. Statutory claims would fall into a second arbitration "track" which would adhere to modified procedures (i.e., presence of an attorney, limited discovery/evidence, etc.); Green, *supra* note 5, at 410-11 (discussing a provision within a mandatory arbitration clause that allows an employee to "pursue his or her own claim in court or arbitration if the union chooses not to").

result. This article simply supports a more comprehensive approach that has the potential for covering all of the disadvantages of arbitration without unduly encroaching upon, or negating, its inherent gains.

Conclusion

In the realms of American labor and employment, the preservation of peace, fairness, and the elimination of all forms of discrimination have been the principal driving forces of Congressional legislation. Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act have worked in concert to both provide and enforce protections in the workforce. Both Acts have been interpreted by the Supreme Court to provide maximum effectiveness that is reflective of public policy, as well as true to the language by which it was written.

As society has changed and evolved, so too has the interpretation and application of the laws. Legal concepts of "sex" have expanded from a simple view of what it means to be biologically "male or female" to an array of notions, such as: sex stereotyping, sexual harassment, sexual assault, sexual association, and sexual orientation. The colonial origins of collective bargaining and alternative dispute resolution, namely arbitration, have underwent similar renovations. From distrust and hostility, to grudging acceptance, and now to preference and expectation, collective bargaining and arbitration have become the staples of labor relations.

Inclusion of sexual orientation protection, within the purview of Title VII discrimination prohibitions, honor the goals of the federal government to remove all "vestiges" of discrimination from the workplace. It flows logically and reasonably from the language of the statute, even if its originators did not conceive of such a use at that time. Further, it is the culmination of an interpretive framework established by a long line of Supreme Court cases.

In much the same way, arbitration has been instituted as the more evolved and effective method of employment dispute

resolution. Its application to statutory claims has been, rightfully, challenged. However, through changes in perception and procedure, such a function has been shown to not only be possible, but also beneficial to all parties involved. American jurisprudence is an entity of innovation and renovation. It is only through the continued evolution, improvement, and interaction of these legal precepts will full and comprehensive realization of Congress' goal be reached.

Introduction

The subject matter of this article is the Convention on International Settlement Agreements Resulting from Mediation, popularly known as the Singapore Convention. The Convention was promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in June 2018. The objective for the Singapore Convention is to do for international mediation what the New York Convention has done for international arbitration – the recognition and enforcement of commercial arbitration awards and mediated settlements. This excellent article by **Ahdieh Alipour Herisi** provides a comprehensive overview of the Singapore Convention, with particular attention to its major provisions.

In addition, the article provides a comparison with the provisions of the New York Convention. The Singapore Convention applies to "international" transactions (with modest exceptions), while the New York Convention is limited to "foreign" transactions. The Singapore Convention does not require a seat for a mediation; this delocalization means that a failure to follow local mediation rules will not be a basis for refusing enforcement of a mediated settlement. Settlement agreements that are rendered as arbitral awards can be directly enforced through the Singapore Convention as well as the New York Convention.

Widespread adoption of the Singapore Convention is probable, and it will soon be seen as a major mediation milestone. It behooves mediation practitioners to become conversant with the Singapore Convention, and this carefully reasoned article is the place to start.

Professor Stephen Huber *and*
Rev. Wendy Trachte-Huber
Editorial Board, Member
Emeritus Fellow, American College of Civil Trial Mediators

AFTERMATH OF THE SINGAPORE CONVENTION: A COMPARATIVE ANALYSIS BETWEEN THE SINGAPORE CONVENTION AND THE NEW YORK CONVENTION

Ahdieh Alipour Herisi

I. Introduction:

In general, litigation is not the most efficient resolution in international commercial disputes. There are various reasons for this claim: Domestic courts usually do not have the expertise to decide such cases; naturally a domestic court will prioritize its own citizens' interest over a foreign national; it will be more advantageous for one party to litigate the matter in their own country, which will put that party in a better position than a foreign national who has more limited means to fight or prove their claims; and such procedure will be time-consuming and expensive for the parties in most cases. Even once parties go through all the procedure in court, enforcement of such court decree is subject to many limitations and needs to be reviewed on a case-by-case basis and depends heavily on the bilateral treaties between the countries in terms of recognition and enforcement of such court decrees. For the reasons mentioned, Alternative Dispute Resolution (ADR) will be preferred in most cases.

The alternative dispute resolution methods that exist are Negotiation, Mediation and Arbitration among others. The challenging part is enforcement of such agreements. Foreign arbitral awards enjoy the benefits of recognition and enforcement of the New York Convention, which so far made the arbitration one of the most favorable dispute resolution methods in international commercial disputes.

The fact that mediation agreements had to be enforced like a foreign agreement in court, puts mediation in a disadvantage compared to arbitration. The United Nations Convention on International Settlement Agreements resulting from Mediation ("the Singapore Convention") aims to cure this disadvantage and facilitate the enforcement of International Commercial Mediation

Agreements in a foreign country. However, the level of credibility of this Convention is dependent on how many countries will sign and ratify the Convention. The scope of the enforcement is broad and once the countries ratify the Convention, any international commercial dispute will fall under the definition (subject to limited exceptions) and will make such agreements enforceable. It also heavily is dependent on to what extent the states ratify the Singapore Convention subject to the reservations of Article 8 as explained below.

Although the Convention initially seems to be a solution for enforcement, it is still not clear if the current text will live up to the standards that the international mediation society expect it to. In this paper, the goal is to compare the Singapore Convention with the New York Convention and predict the possible problems that practitioners might face with in the future. Part II will provide a background of the Singapore Convention. Part III will focus on the scope of the Convention compared to the New York Convention. In Part IV, there will be an overview of the reservations subject to Article 8 of the Convention.

II. Background:

The United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention) is a bilateral treaty. The final draft of the Convention was approved by the United Nations Commission on International Trade Law (UNCITRAL) on June 26, 2018.[1]

The draft of the Convention was the result of three years of deliberations. In the drafting, 85 member states were involved as well as 35 international governmental and nongovernmental entities comprising the commission.[2] Once three member states ratify the Singapore Convention, it will take effect.[3]

[1] Patrick R. Kingsley, *The Singapore Convention on Mediation: Good News for Businesses,* January 9, 2019, law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/?slreturn=20190314192112.
[2] *Id.*
[3] *Id.*

The goal of the Convention is to promote mediation as a dispute resolution method for cross-border commercial disputes. Mediation is not only a faster and less expensive method, but it also is more likely to preserve the future relationship. [4] One of the barriers in using mediation by parties to an international commercial dispute is the problem with the enforcement. [5] This will be more problematic in the breach of contract cases[6] as parties have to take the outcome of the mediation (in case of settlement) to court for enforcement and end up with litigating a contract claim, while the initial dispute was also a contract claim and in such scenario using mediation does not save much time or costs for the parties.

The Singapore Convention in Mediation is equivalent of the New York Convention in Arbitration. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention[7] guarantees the recognition and enforcement of foreign arbitral awards for 60 years now. One of the reasons for arbitration being employed by international disputants in commercial disputes is the pragmatic mechanism drafted in the New York Convention. If successful, the Singapore Convention will play a similar role in international mediation.

In the interviews I had with the practitioners from different countries, it seems like that the Singapore Convention is going to be as popular with the States as the New York Convention and the general positive approach towards employing the Alternative

[4] *See, e.g.,* interventions of the United States and Belarus, in UNCITRAL Audio Recordings: U.N. Comm'n on Int'l Trade Law, 48th Session, July 2, 2015, 9:30-12:30, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f3e4531b-7187-411c-a063-27bb8e1bc546. The General Assembly has also noted that it produces savings for states in the administration of justice. G.A. Res. 57/18, U.N. Doc. A/Res/57/18 (Jan. 24, 2003) as cited in Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, Pepp. Disp. Resol. L.J, 2 (2018).
[5] *Id.*
[6] *Id.* at 3.
[7] The New York Convention.

Dispute Resolution will be common between the New York and the Singapore Convention.

"States are relying more and more in the paths to settlement provided by mediation, arbitration and negotiation. Moreover, there are currently 159 parties to the NY Convention which includes 156 of the 193 UN Nations (around 80% of the UN Nations). To this extent we can be certain that the ADR culture in more established than back in 1958 and so the United Nations Convention on International Settlement Agreements Resulting from Mediation will, undoubtedly, be more accepted taking advantage of the NY Convention advantages." [8] If this approach towards ADR be shown by the practitioners from the majority of the jurisdictions, the Singapore Convention will be playing a leading role in enforcement of the settlement agreement in the international commercial dispute resolution.

III. Scope of the Singapore Convention

The scope and definition of the Singapore Convention is a crucial part of this paper. The reason is that knowing to what disputes and to what extent the Convention applies, will be a key in deciding where and when the parties to a dispute can benefit from the Convention.

a. Article 1 of the Convention defines the scope of the Convention.[9]

The Singapore Convention uses the term "international" for the application of the Convention. This is different from the New York Convention that uses the term "foreign" [10] as opposed to

[8] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).

[9] Article 1. Scope of application "1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: (a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected."

[10] Article I (1) of the New York Convention States:

"international". According to the New York Convention the arbitral award must be made in a different state. This requires identifying a state that the arbitration award is made at, which results in requiring a seat of arbitration.

The progress in the Singapore Convention is that it does not require a seat[11] for mediation in order for the Convention to apply. Article 1 seems to aim to provide the Convention with a broad application by providing alternatives in order for an agreement to be considered international.

One of the benefits of delocalization of dispute resolution system is that it can promote the use of most cutting-edge methods, which is in line with the requirement of lowering the costs of the process. Although a Seat for arbitration can be a hypothetical place and everything else can happen online, it is still an added requirement that is removed in the Singapore Convention.

This feature can potentially facilitate the use of online dispute resolution as parties do not have to concern themselves with the idea of where the mediation is actually taking place and what procedural, or substantive domestic law might potentially affect the agreement depending on where the mediation is physically happening. Under the New York Convention, unlike the Singapore Convention, the same issue can be much more complicated as the countries are trying to regulate online businesses and in arbitration domestic laws are of more importance and govern certain matters related to the subject matter.[12]

"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

[11] *See, e.g.*, intervention of the Chair, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 14, 2016, 9:30-12:30, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/f5c9b0ea-5f54-4158-a198-d0ea83b3c9a3 (finding, for example, that too broad a clause risked abuse). as cited in Timothy Schnabel, *supra* at 21.

[12] *See,* Karen Stewart; Joseph Matthews, Online Arbitration of Cross-Border, Business to Consumer Disputes, 56 U. Miami L. Rev. 1111 (2002).

The significance of delocalization in the Singapore Convention that removed the requirement to have a seat goes beyond the facilitation of the process and lowering the potential costs. Under the New York Convention there is a seat requirement. This selection of the seat gives certain jurisdiction to the domestic court of the country where the seat is located. The courts member-state of the Convention that is the venue of the seat have the right to supervise arbitration activities within that state.[13] One of the activities that can be supervised by such court is setting aside of the award.[14] This is an exclusive power of the supervisory court and the other courts where the award is taken to in other member-states can only enforce or refuse to enforce and will not have such power over setting aside awards.[15] According to Article 2(a) of the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, a court could refuse enforcement of an arbitral award based on the fact hat it was set aside in the country where the award was made. [16] The New York Convention discusses refusal of recognition under Article V of the Convention.[17] Similar to the

[13] William Leung King Wai, Exercise of Residual Discretion under Article V of the New York Convention by Enforcement Court When Award Is Alive, Dead, and Undead in Seat, 7 China Legal Sci. 123 (2019), 123.
[14] *Id.*
[15] *Id.*
[16] Albert Jan van den Berg, "Should the Setting Aside of the Arbitral Award be Abolished?", ICSID review (2014) 4.
[17] Article V: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

Geneva Convention, according to Article V(1)(e) of the New York Convention, setting aside in the seat of arbitration can be a ground for refusal of the enforcement by other member-states.[18] Such exclusive competence has been confirmed in different court decisions. For instance, the US Supreme Court did not accept that the award has been set aside while the arbitral award was made in Geneva, Switzerland and was set aside by a court in Indonesia.[19] This holding shows that not only setting aside in a foreign country is an issue that the courts take into consideration while reviewing enforcement of a foreign award, but the exclusivity of such jurisdiction for the supervisory court is something internationally recognized.

One of the differences between the New York Convention and the Singapore Convention will be how the domestic courts will treat the issue of setting aside the assets in the country that the mediation has happened initially. The United States originally offered such recognition of setting aside that would result in similar recognition.[20] But eventually the final draft of the Singapore Convention did not include such proceeding. Thus, setting aside of the agreement is one jurisdiction will not be binding on other jurisdictions.[21] Obviously since there is no seat

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[18] *Id.*

[19] Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT Pln (Perseo), 364 F3d 274, 308–10 (5th Cir 2004).

[20] Timothy Schnabel, *supra* at 22.

[21] *Id.*

requirement in the Singapore Convention, the courts will not distinguish between the setting aside of the agreement in the country where the mediation took place or other places. And even in case there is such setting aside, and the courts decide to consider that in order to refuse enforcement, there is no binding rules on the domestic courts like what is entailed in the New York Convention.

The other effect of delocalization is that there is no refusal under that fact that the mediator did not comply with the local mediation requirements[22]. For instance, none of the parties can claim the agreement is not enforceable because there was a certain domestic rule. If a jurisdiction requires a certain license or requires the mediator to sign the agreement, this cannot be a ground for refusal of the enforcement. The only requirement that is in the Article 1 of the Convention other than the appropriate subject matter is that the agreement be written. Such requirement is helpful in international dispute resolution as the burden of proof and evidentiary requirements for oral agreements can be so different across the jurisdictions. The Convention is not even requiring notarized writing or any specific format. This means as long as there is some sort of written proof, that might satisfy the purposes of the Convention. Such a very low bar seems in line with the purposes of the drafters of the Convention in facilitation of the recognition and enforcement of the mediated agreements.

In order for the dispute to be considered international either the places of the businesses of the parties should be in different states[23] or if they have the same places of business their place of business should be different from either the state where a substantial part of the obligation of the settlement agreement is performed or the state where the subject matter is most closely connected to.[24] After stating the definition of "international" the Convention states the areas where the Convention does not apply under parts 2 and 3 of the Article 1. Transactions engaged by a

[22] *Id.*

[23] Article 1(a) of the Singapore Convention.
[24] Article 1(b) of the Singapore Convention.

party for family or personal uses as well as the transactions related to the family, inheritance and employment law does not fall within the scope of the application of the Convention. The reason for the UNCITRAL Working Group to exclude these issues related to family, inheritance and employment law is that the issues they raise are different from commercial disputes.[25] These categories are amongst the ones that are sensitive for member states that needed to be excluded.[26] The power imbalance in such categories among parties could potentially have dissuaded some states from applying the Singapore Convention.[27] [28]

Despite the default rule that is not requiring more than written agreement, a state while ratifying the Convention can require the parties to clarify that the Convention will apply to their agreement. This opt-in requirement will be explained in detail in the second part of this paper that deals with the reservations. Thus, potentially the member-state can limit the scope of the application of the Convention by using their rights to reservation.

After Article 1 of the Singapore Convention, Part 1 defines the scope of the Convention for the agreements that the Convention will apply, Part 2 and Part 3 of Article 1 define situations where the Convention does not apply. Considering the broad application of the Convention, it seems helpful in preventing disputes, specifically related to application and interpretation of the application, by adding this two last parts to the Convention. By

[25] Timothy Schnabel, *supra* at 24.
[26] *Id.*
[27] *Id.*
[28] Although the aforementioned categories might raise issues but I think the Convention still could consider them with specific requirements such as a seat of mediation for family law that requires the application of the private international law only for the family-related matters that at least help the enforcement of the family or employment mediation agreement where there is a party who has assets in different jurisdictions. I believe even if the Convention did not want to mix such sensitive issues and separate them from the commercial disputes, there are other efforts that can be done in order to helping the parties enforcing such as assisting states by a model law draft that they can adopt and facilitate the enforcement of the mediated settlements in those areas.

Part 2[29] the Convention is excluding certain subject matters from the application of the Convention, which is in line with the application of the Convention to "Commercial" disputes. While Part 3[30] is more of a procedural exclusion, which carves out the decisions of a court on a mediation agreement and arbitral awards.

b. Mixed-Mode Dispute Resolution under the Singapore Convention:

Mixed-mode dispute resolution can be an effective tool in providing the parties to a dispute with creative solutions. Such methods can be used in a variety of scenarios where the arbitrator sets the stage for settlement; arbitrator setting the stage for settlement of substantive disputes by handling key procedural issues; arbitrators setting the stage by promoting use of mediation; arbitrators setting the stage for settlement of substantive disputes by issuing preliminary views or arbitrator rendering the Consent Award. [31] In all such scenarios there is an interplay between different methods, which can be some binding and some nonbinding.[32] These scenarios can be due to the decision of the parties from the outset to use such methods or due to different stages of dispute resolution the parties select in their agreements and while parties start using these separate resolutions, such scenarios might occur. For example, the International Center for Dispute Resolution and Prevention (CPR), provides the parties with variety of sample clauses and explains the differences in depth. Some of such clauses that are named "CPR Model Multi-

[29] 2. This Convention does not apply to settlement agreements: (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (b) Relating to family, inheritance or employment law.

[30] 3. This Convention does not apply to: (a) Settlement agreements: (i) That have been approved by a court or concluded in the course of proceedings before a court; and (ii) That are enforceable as a judgment in the State of that court; (b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

[31] See, Thomas J. Stipanowich, Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring The Interplay Between Mediation, Evaluation And Arbitration In Commercial Cases,* Fordham Int'l L.J., 846-65 (2017).

[32] *Id.*

Step Dispute Resolution Clause"[33], try to offer the parties some very creative solutions in resolving their disputes. In addition to a "Stand-Alone Mediation Clause"[34], there are multiple different options such as "Negotiation-Mediation Clause with Designated Mediator Option", "CPR Model Two-Step Clause", which entails mediation following negotiation; and "CPR Model Two-Step Clause: Mediation and Arbitration[35]"[36]. Although these creative options are providing parties with multiple dispute resolution mechanisms, it does not necessarily mean that using such methods is the same as using mixed-mode dispute resolution. If the resolutions are using separately by separate neutrals, then such process are just different, unrelated, manners. While when there is some connection by sharing the information of using the same party-neutral, it will fall under the mixed-mode dispute resolution.

---

[33] International Institute for Conflict Prevention & Resolution, *CPR Model Clauses and Sample Language*, July 9, 2019, cpradr.org/news-publications/articles/2010-07-09-cpr-model-clauses-and-sample-language

[34] *Id.*

[35] CPR Model Two-Step Clause: "Mediation and Arbitration The parties shall endeavor to resolve any dispute arising out of or relating to this Agreement by mediation under the CPR Mediation Procedure [currently in effect OR in effect on the date of this Agreement]. Unless the parties agree otherwise, the mediator will be selected from the CPR Panels of Distinguished Neutrals. Any controversy or claim arising out of or relating to this Agreement, including the breach, termination or validity thereof, which remains unresolved [[45] days after initiation of the mediation procedure] [[30] days after the appointment of a mediator], shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution ("CPR") Rules for Non-Administered Arbitration [currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three independent and impartial arbitrators, of whom each party shall designate one] [three arbitrators of whom each party shall appoint one in accordance with the 'screened' appointment procedure provided in Rule 5.4] [three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if one party fails to participate in the mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above]. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state]."

[36] *Id.*

According to the Singapore Convention[37], even a mediated settlement that is enforceable as a judgment, it is excluded from the enforcement of the Convention as it is considered a judgment. Without such exclusion the party enforcing the settlement agreement, which was already enforced through judgement would have two avenues to enforce, i.e. the Hague Conference instrument, the 2005 Choice of Court Agreement Convention and the draft judgment convention and the Singapore Convention.[38]
The exclusion of the arbitration award similarly is to avoid the concurrent application of the Singapore and New York Convention.

On the other hand, because the Singapore Convention carves out two other despite resolutions methods, i.e. court proceedings and arbitral awards, it is important to make sure there is no situation in which there is ambiguity on what an outcome of the procedure might be, i.e. a settlement agreement or an arbitral award. At first glance, this seems obvious, but the potential problem can arise in hypothetical scenarios where a dispute resolution proceeding mixes more than one dispute resolution methods. The complexity of the international disputes requires third party neutrals to come up with creative methods to resolve such matters. In order to address such sophistication and complexity, the practitioners have tried to take advantage of the benefits of different methods and use mixed-mode dispute resolution.

The Singapore Convention is clear about the fact that the parties cannot use the Singapore Convention when parties to a settlement agreement ask an arbitrator to incorporate their terms in an arbitral award in order to benefit from the enforcement system of arbitration. The main reason is that such consent awards will be enforceable through the New York Convention.[39] The Convention

[37] Article 1(3)(a)
[38] *See, e.g.*, intervention of the European Union, in UNCITRAL Audio Recordings: Working Group II (Arbitration and Conciliation as cited in Timothy Schnabel, *supra* at 25.
[39] Thomas J. Stipanowich, Veronique Fraser, *supra* at 861

is trying to avoid overlap between the Singapore and New York Convention the same way they are avoiding such dual enforcement related to a court decree. However, in mixed-mode dispute resolution the enforceability might be an issue.[40] In general, for the scenarios where the parties clearly employ mediation as the whole dispute resolution mechanism but merely ask an arbitrator to render an arbitral award based on the settlement agreement, we might see less of those situation if the Singapore Convention takes effect and a great number of states sign into that. This potentially can solve issues related to enforcement of settlements that are not clearly arbitral award but are the result of mediation.

The more complex scenario is when the same third-party neutral if playing more than one role in dispute resolution. Although there are some scholars who question the possibility of the mediator playing the role of an arbitrator or vice-versa[41], in reality there are some scenarios that this "switching the hat" actually happens.[42] Although in some cultures such practices might seem unacceptable and the same neutral does not take part in mediation once she started arbitration, or start arbitration once she already has commenced mediation, different jurisdictions and legal cultures have different approached towards the same situation.[43] In scenarios of mediation followed by arbitration (med-arb) or arbitration followed by mediation (arb-med), the outcome might not always be recognized as the same by different jurisdictions.

Different jurisdictions also apply different domestic mediation and arbitration laws that will add to the complexity of analysis. As stated above, since the Singapore Convention does not require a seat for mediation, the domestic laws requirements do not

[40] Gary B. Born, International Commercial Arbitration 3021 (2d ed. 2014).
[41] Kristen M. Blankley, Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case, 63 BAYLOR L. REV. 317, 332-37 (2011).
[42] Thomas J. Stipanowich, Veronique Fraser, *supra* at 850.
[43] *See* Shahla Ali, The Arbitrator's Perspective: Cultural Issues in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES § 6.01-6.08 (Horacio A. Grigera Naon & Paul E. Mason eds., 2010) as cited in Thomas J. Stipanowich, Veronique Fraser, *supra* at 851.

apply to the enforceability under the Singapore Convention. However, it remains unclear if the domestic laws will apply in the initial recognition of mediation under mixed-mode dispute resolution.

As an example, in brazil, according to the article 7[44] of the Brazilian mediation statute of June 26, 2015, it is expressly prohibited for a mediator to serve as the third-party neutral in the same dispute resolution procedure. Since med-arb is not a common practice and the services offered by majority of arbitration services does not lead to a more cost-effective med-arb dispute resolution, the applicability of the Singapore Convention on such scenarios remain unclear. [45][46]

In conclusion, by applying different styles of mediation across jurisdictions and employing more than one method of dispute resolution, there will be some potential conflicts in terms of picking the right enforcement regime and even there might not be a consensus among different jurisdictions.

IV. Reservations to the Singapore Convention

One of the major issues that have been point of disagreement between many states during drafting the Convention was the reservations to the Singapore Convention. Article 8 of the Convention entails the reservations.[47] This Article is giving the

[44] Article 13. 140: *The mediator shall not become the arbitrator nor will he be able to function as a witness both in judicial and arbitration procedure that are related to the same dispute.*

[45] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).

[46] Since changing roles between mediator and arbitrator for the same parties and same dispute has some ethical considerations, there is not extensive discussions among scholars on that topic. For instance, the party who is sharing confidential information to a mediation, usually have higher incentive to share such evidence or information since s/he does not expect the same party to be the one deciding for the case. In Med-Arb the possibility of the mediator to decide for the same dispute in a future proceeding, might negatively affect the incentive of the parties in collaborating in the initial mediation.

[47] Article 8. Reservations

"1. A Party to the Convention may declare that:

states right to opt-out of the Convention. If a state ratifies the Convention with such reservation, it means the Convention will not apply unless the parties agree otherwise. During drafting the Conventions there were different ideas on opt-in versus opt-out. Some believed the Convention should always automatically apply unless parties out-out.[48] Thus there will be no need to have this reservation in Article 8; while some other believed the opt-in right is in line with party autonomy.[49] During the deliberations this issue was one of the topics that was debated among the Working Group at the UNCITRAL and different approaches were taken throughout the deliberations.[50]

Some of the practitioners are hopeful that the countries will join the Singapore Convention without using any reservations. For instance, in the interview with a Brazilian Professor, he stated the following with regards to the Brazilian practitioners' approach:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

[48] Hal Abramson, The UNCITRAL Convention on Cross-Border Mediation Settlement Agreements: The Process and Key Choices, 12

[49] *Id.*

[50] Timothy Schnabel, *supra* at 57.

"Brazil is relatively new to the ADR ways of settling disputes. Our arbitration statute is from 1996 and was only considered constitutional by the Brazilian Supreme Court in the year of 2000. Thus, only after the year of 2000 did Brazilians start relying in arbitration. Since then arbitration has advanced largely throughout the country and trustable and efficient arbitration and mediation chambers have established themselves in the market. Our mediation statute is from 2015 and is largely accepted and applied both by private parties and the judiciary. Therefore, there is no denying that Brazil will be one signatory of the Singapore Convention. Furthermore, I do not think that Brazil will use any reservations since the Singapore Convention and the Brazilian mediation statute are observing and applying the same mediation rules and principles." [51]

Even though the Brazilian approach merely is one jurisdiction, Brazil is a good example for countries who are implementing ADR and developing the use of amicable dispute resolution methods. As it will be explained below, however, the culture of mediation in different countries will be a determinative factor in deciding if the state is going to join the Singapore Convention and if so, will they join subject to reservations of the Article 8 or not.

Although it might seem obvious that promoting mediation requires automatic application of the Convention unless parties agree otherwise, hearing the deliberations[52] made me doubt that default rule that I had in mind. The reason is that one of the main purposes of mediation is to empower parties and to promote mediation, not to impose anything that they could not foresee or expect over the normal course of the dispute resolution. Some of the delegates believe that the application of the Convention would not be a default rule among different cultures.[53] These allegations

[51] Email Interview with Daniel Brantes Ferreira, PhD, Professor in Brazil (April 24, 2019).
[52] *See, e.g.*, intervention of Germany, in UNCITRAL Audio Recordings: Working Group II (Dispute Settlement), 65th Session, Sept. 16, 2016, 14:00-17:00, https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/aa875fca-e13c-49db-83f7-820bbe6dfe74 as cited in Timothy Schnabel, *supra* at 57.
[53] *Id.*

are backed by some scholarly articles that although mediation seems to be the same process throughout different parts of the world can be different due to different legal systems and different cultures. [54] Thus, mediators in different jurisdictions employ different default rules.[55]

Even though I personally believe that this is a legitimate concern that the parties should not be obliged to the consequences that they did not comprehend, but for two reasons I believe that should not be a basis for incorporating such reservation in the Convention.

One is that a party who is entering an agreement in good faith, has no reason to be surprised by a strong mechanism that facilitates enforcement of such agreement. If a party is transferring assets to a different jurisdiction to game the system, and to make those assets not accessible or more difficult to access, especially to enforce an agreement that the very same person volitionally agreed to, then justice does not require lawyers to be worried about such state of mind. Secondly, even if there are lawyers of philosophies who want the parties to be guaranteed to have such information, it is better to educate the parties and mediators and alter the global culture to accepting the enforcement mechanism, i.e. the Singapore Convention as a default not an exception.

Despite the split of ideas among the delegates, the result is the possibility of such reservation. Therefore, under the final draft, a state can change the default to opt-in system, meaning the parties who want the Singapore Convention to apply need to specify that. If a state does not consider such reservation, the default will be an opt-out system, meaning the Convention will apply unless the parties state otherwise in their mediation settlement agreement.

Although the states are able to consider the reservation of opt-in system, it does not mean that the domestic courts can require a very specific language[56] that has to be entailed in the agreement.

---

[54] See Stipanowich, The International Evolution of Mediation, supra note 2, at 1204-26 (2015) (discussing data from International Academy of Mediators / Straus Institute Survey of Mediator Practices and Perceptions).

[55] Thomas J. Stipanowich & Veronique Fraster, *supra* at 842.

[56] Timothy Schnabel, *supra* at 58.

So long as the parties mention the Singapore Convention to be applied or in their choice of law refer to a jurisdiction[57] that does apply the Singapore Convention by default, that should suffice.

V. Conclusion

In conclusion, the Singapore Convention is a major step in promoting mediation as a streamline dispute resolution mechanism for international disputes. By defining a broad scope for including any commercial subject matter followed by a narrow exemption, the Convention is applicable to a vast majority of commercial settlement agreements. This broad scope and no requirement for a seat of mediation, unlike the New York Convention, makes it more convenient for the parties to benefit from the application of the Singapore Convention in a more affordable manner. Less formalities and confidentiality in mediation will be another reason for international mediation to be a favorable dispute resolution mechanism, thanks to the enforcement mechanism that the Convention will grant to international mediation agreements.

Moreover, the settlement agreements that are enforced through the New York Convention as they are rendered as arbitral awards, can be directly enforced through the Singapore Convention instead, which will be more in line with the actual intention of the parties and part-autonomy.

The strength of the Convention depends on how many countries will sign into the Convention and ratify it and that is still unknown. Moreover, the reservations if very often used by member states, can negatively affect the Convention. If many member states decide to ratify the Convention with an opt-in reservation, the default will be for the Convention not to apply, which can potentially be a hurdle in promoting the Convention. This will heavily depend on the domestic laws of each member state and how they will amend or change the contradictory domestic laws in the hierarchy of the domestic versus international conventions.

[57] *Id.*

Reservations can be potentially a hurdle in the general application of the Singapore Convention. This especially can be an issue when one of the parties is from a member state, which ratified the Singapore Convention without reservation, while the other party is from a jurisdiction, which has such reservations.

In conclusion, drafting the Singapore Convention was a big step forward for international mediation and the rest is up to the states to ratify and promote it and to the domestic courts to grant the international mediation agreement subject to the application of the Singapore Convention.

ABOUT THE AUTHORS

ALIPOUR HERISI, Ahdieh

Ati Alipour is a member of New York Bar. She was born in Iran and has experience studying and working in the U.S. and the Middle East. She has an LLM degree in Dispute Resolution from Pepperdine University in Malibu, California, and has completed her second LLM in Intellectual Property Law from Cardozo Law School in New York, where she was awarded the Jacob Burns Medal for excellence in the Mediation Clinic.

DETTWILLER, Stacey

Stacey Dettwiller is a student at The Ohio State University Michael E. Moritz College of Law. Prior to law school, she taught middle school for seven years; her research for this paper was inspired by both her experiences and her students. Stacey lives in Westerville, Ohio with her husband, Will, and two children.

GONZALEZ, Gina

Gina Nicolle Gonzalez was raised near Ft. Lauderdale, Florida and graduated as a "Double Gator" from the University of Florida Levin College of Law. She was an active member of the Florida Moot Court Team and was awarded the title "Best Oral Advocate." Gina developed an interest in medical malpractice during her final year of law school and sought to begin her legal career in personal injury. Gina currently practices personal injury law at Morgan & Morgan in Tampa, Florida and hopes to eventually enter the niche field of medical malpractice.

LEVINSON, Marsha

Marsha Levinson graduated from Santa Clara Law in May of 2019 in the top 10% of her class. Marsha took and passed the July 2019 California Bar. While at Santa Clara Law, Marsha served as a senior editor on her law review, participated in honors moot court, and served in numerous leadership roles including as president of the Women & Law organization. Marsha is currently working at Temmerman, Cilley & Kohlmann, LLP, which specializes in trust and estate planning and litigation, and hopes to supplement her career as a trust and estate attorney by mediating trust and estate disputes.

SCHWARTZMAN, Rachel

Rachel Schwartzman is a J.D. candidate at the Benjamin N. Cardozo School of Law, set to graduate in May 0f 2020. Ms. Schwartzman is passionate about Family Law and finds value in utilizing Alternative Dispute Resolution methods to make the divorce process more seamless for all parties involved. Ms. Schwartzman's interest in the ADR field was sparked by her position as a student mediator in Cardozo's Divorce Mediation Clinic, which operated in conjunction with the Office of the Court Administration. Ms. Schwartzman is also a Staff Editor of the Cardozo Journal of Conflict Resolution.

THOMPSON, Brandon

Brandon Thompson a recent graduate of William S. Boyd School of Law's part-time evening program; set to sit for the February 2020 Bar Exam. On a personal level, Brandon is an avid traveler, as well as a reader and writer of fantasy novels and short stories. Mr. Thompson currently works as a Judicial Law Clerk and hopes to transition into some type of Public Interest and/or Appellate work after the Bar.

ABOUT THIS PUBLICATION

Articles submitted to the College for publication must comply with formatting requirements and guidelines as determined by the Editorial Board. Reprints of published articles may be obtained by contacting the administrative office. Articles featured in this publication as well as submission information for future publications will be available on the Journal web-site at:

www.americanjournalofmediation.com.

The Editorial Board has printed each article as submitted by the author(s) who is (are) solely responsible for the accuracy of information contained therein. Grammar and spelling have not been changed, corrected or completed from the original submissions. Statements, comments, or opinions expressed are those of the respective authors and do not necessarily represent views of The American College of Civil Trial Mediators.

For information concerning publication of The American Journal of Mediation, featured authors, or The American College of Civil Trial Mediators, please contact the administrative offices:

Sarah E. Evans
Journal Administrator
1913 Optimist Lane, Charlotte, NC 28205
PH: 704-330-3726 cell
EM: nysbaacctmjournalcontest@gmail.com
Website: http://acctm.org/