Making Arbitration More Efficient Won't Make It More Just

By **Kelsey Constantin and Spencer Pahlke** (November 4, 2021)

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An Oct. 6 Law360 guest article titled "Time To Restore Arbitration's Promise Of Efficiency For All" advocates for a vision of arbitration that prioritizes efficiency over justice — a system in which disputes are ended, but not necessarily fairly resolved.

It is strange to see complaints about the arbitration system from the perspective of business, given that it was business that created forced arbitration and subjected consumers to it.

The Rise of Arbitration

In considering the article's criticisms of the current state of arbitration, it is important to look at why and how the process came to be. Over the last 15 years, thousands of businesses across the country — from big corporations to smaller storefronts — have increasingly used arbitration, where rules they designed themselves are self-serving.

Businesses insert arbitration clauses into consumer and employment contracts, forcing citizens to give up their legal right to a day in court. These clauses make it difficult for people to obtain a recovery when they have been injured, deceived or otherwise harmed.

Arbitration has permeated virtually every aspect of life. When something goes wrong at work, at school, or at the hospital, or with your cellphone, car, or house, chances are you signed a contract mandating you to arbitrate.

Even especially immoral cases end up in arbitration, and not by coincidence. Arbitrations are confidential. That means instances of sexual assault and harassment, elder abuse and dangerous working conditions, for example, are kept secret, to the detriment of the public. Private entities' bad conduct remains unknown, preventing appropriate deterrence.

Despite the confidential nature of arbitration, a 2015 study by the New York Times of more than 25,000 arbitrations across the country between 2010 and 2014 revealed biases inherent in the process.[1] Companies have paid employees to testify in their favor. And when claimants have asked the courts to intervene, they have almost always lost.

Records showed that 41 arbitrators each handled 10 or more cases for one company. Companies are repeat players in arbitration, whereas arbitrators will never see the claimants again. Thus arbitrators have an economic interest in deciding in favor of the repeat players.

With the deck stacked against them like this, it is understandable why claimants want to avoid arbitration. It is also understandable why claimants and their counsel must resort to using tools to mirror litigation — because they would otherwise be severely disadvantaged in a forum devised to make recovery difficult. Any associated inefficiences can be traced back to the profit-driven underpinnings of arbitration.

The Players

The Oct. 6 article denounces the use of formal discovery in arbitration, citing additional time and cost, and blames litigators for bringing the tools of their trade from the civil justice system into arbitration. The author views the wider scope of traditional discovery as a hindrance to efficiency in arbitration, thus straying from the original promise of a streamlined process.

But this criticism requires one to question the meaning of efficiency. And efficiency at what cost?

One cannot ignore why discovery is often costly and time-intensive in the first place — because defendants typically do not voluntarily produce all of the incriminating information against them without significant back and forth. Suggesting, as the article does, that adversarial parties will exchange all information material to rendering a decision, merely because they are in arbitration as opposed to court, ignores the fact that arbitration is still an adversarial process.

Should claimants be precluded from obtaining the information necessary to prove their case, simply because doing so would incur more cost and time? If efficiency in the context of civil justice means the quickest and cheapest outcome for the defendant, then the author is correct; formal discovery has no place in arbitration.

But if, in keeping with fundamental fairness, efficiency instead means ensuring accurate and appropriate results through a proportionate amount of work, the tools of discovery must be at the injured consumer's disposal, no matter the forum of dispute resolution.

The author's imagined default process in arbitration for exchanging information could never offer claimants even the chance at getting the information necessary to prove their case. Formal discovery tools do. And they in turn, ensure the arbitrator can make a fully informed decision, which is the goal of any legal justice system — not cutting corners to save time and money.

The Numbers

The author seems to sympathize with companies that face mass arbitration. But mass arbitration exists in the first place because companies write class action bans into their contracts.

The U.S. Supreme Court's 2011 ruling in AT&T Mobility LLC v. Concepcion made arbitration even more attractive to companies, because it allowed them to add a clause banning class actions.[2] No one, realistically, will file a claim to recoup small amounts of money that will be greatly outweighed by the costs of litigation.

And when claimants are then prevented from joining together as a group, companies have an incentive to cheat their workers or consumers, knowing the transaction costs alone would make justice unachievable. Businesses cannot ban citizens from bringing a class action against them, only to complain when they are hit with thousands of individual claims for arbitration.

This hypocrisy was called out last year in Abernathy v. DoorDash Inc., when Judge William Alsup of the U.S. District Court for the Northern District of California ordered DoorDash to arbitrate over 5,000 individual disputes with workers, and pay a $1,900 fee for each.[3] That companies would rather be sued in court than face millions in fees does not deserve

any sympathy. This result was by their own design.

The Clauses

The author of the earlier article discusses arbitration clauses in terms of what the "parties" do. But claimants have no power in drafting arbitration clauses. In fact, the entire piece essentially ignores this key failing of arbitration — that it is mandatory.

Whether the contract includes a class action ban, whether the contract defines the scope of discovery, who chooses the arbitrator, and every other clause is written by the company. Moreover, slight tweaking of the clauses will not fix arbitration, because it is a system designed by businesses to inure to their benefit.

Injured claimants, who may have mounting medical bills and urgent need for care, and employees, who may have been cheated out of wages and have rent due, face a ticking clock. Corporations do not. Corporations have the financial cushion to arbitrate, and no incentive to change the system so it is fair to consumers and employees, given that the process increases their profits.

The Solutions

In order to solve the inefficiencies of arbitration, the author sets out to rewrite the Federal Rules of Civil Procedure and Rules of Evidence, in an effort to "preserve the arbitral promise." None of the suggestions are realistic.

All of the recommendations center on changing the terms of the arbitration agreement. They also hinge on the incorrect assumption that both sides have equal say in drafting the terms. According to the author, "[f]undamentally, the parties control the process, because arbitration is a product of agreement."

In actuality, modern arbitration is a product of consumers and workers being forced to agree in order to obtain services, products and employment that they need. The only side that has power is the side that wants arbitration — corporations.

Of particular impracticality, the author proposes that the parties exchange "all material information necessary for the party to prove its case" without the need for formal discovery requests. In this nonadversarial fantasy universe, the parties would simply "gather what the arbitrator will need to issue an award."

Remember, claims are brought against businesses that are alleged to have caused some sort of harm. And claims are specifically in arbitration because for-profit entities wanted to exert more control over the playing field. Why would these businesses suddenly play fair and hand over all the information necessary to render judgment against them?

When, if ever, have defendants done this in the civil court system? And why would businesses suddenly change their practices in a forum designed by them in a way that defangs standard rules of discovery?

The true promise of our civil justice system is that of fairness. Though even our civil court system is not perfect, at its core is the fundamental notion that disputes should be resolved accurately and fairly — not that they should be resolved with the least cost to the corporate defendant.

In the civil court system, when one party does not produce evidence the law requires it to turn over, a neutral judge decides — based on legal precedent and statutory law — if the evidence must be produced. And the matter is then heard by a jury made up of 12 strangers who are representative of the community, not partisans who decide cases for repeat-player defendants.

Corporations have run from the civil court system to the safe haven of arbitration, some perhaps fearing that their conduct — if seen in the light of day — would result in jury verdicts that make that conduct uneconomical. But of course, that is one of the precise points of our civil justice system.

When wrongdoers must pay the full cost attendant to their conduct, they decide against cutting corners with safety, against turning a blind eye to harassment in the workplace and against shortchanging millions of consumers at once.

If corporations do not like the arbitration system they themselves have conceived, the solution is not an even more unfair version of the "arbitral promise."

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[1] Silver-Greenberg, Jessica and Corkery, Michael, In Arbitration, a 'Privatization of the Justice System', The New York Times (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[2] AT&T Mobility LLC v. Concepcion , 563 U.S. 333 (2011)

[3] Abernathy v. DoorDash Inc ., 438 F. Supp.3d 1062 (N.D. Cal. 2020)