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## Arbitration Costs and Forum Accessibility: Empirical Evidence

Christopher R. Drahozal  
*University of Kansas School of Law*

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## ARBITRATION COSTS AND FORUM ACCESSIBILITY: EMPIRICAL EVIDENCE

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Christopher R. Drahozal\*

*"Arbitration is one of the most cost-effective means of resolving disputes."*

—Senator Jeff Sessions (R-Ala.)<sup>1</sup>

*"The greatest strength of arbitration is that the average person can afford it."*

—Lewis Maltby, National Workrights Institute<sup>2</sup>

*"[F]or people who are victims of consumer rip-offs and workplace injustices, arbitration costs much more than litigation—so much more that it becomes impossible to vindicate your rights."*

—Joan Claybrook, Public Citizen<sup>3</sup>

### INTRODUCTION

So which is it? Is arbitration cheaper than litigation, or more expensive? Does arbitration enhance access to justice for consumers

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\* John M. Rounds Professor of Law, University of Kansas School of Law. This Article is based on a presentation at the Annual Meeting of the Association of American Law Schools in New York on January 4, 2008. Thanks to Omri Ben-Shahar for organizing the panel, and to my co-panelists for helpful discussions. I also appreciate helpful comments on this topic from Paul Bland, Bo Rutledge, Jean Sternlight, Steve Ware, and Mark Weidemaier, and Pam Tull's help in tracking down several of the studies discussed in this Article.

1. 153 CONG. REC. S4614 (daily ed. Apr. 17, 2007) (statement of Sen. Sessions).

2. Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 926 (Norman Brand ed., 2002).

3. PUBLIC CITIZEN, *ARBITRATION MORE EXPENSIVE THAN COURT* (May 1, 2002), [http://www.citizen.org/pressroom/print\\_release.cfm?ID=1098](http://www.citizen.org/pressroom/print_release.cfm?ID=1098). Public Citizen criticized arbitration as too expensive and as precluding individuals from bringing claims in its report *The Costs of Arbitration*. See generally PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* (2002), available at <http://www.citizen.org/documents/ACF110A.PDF> [hereinafter *THE COSTS OF ARBITRATION*]. For comments on the Public Citizen study, see Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiad on the "Cost of Arbitration"*, DISP. RESOL. J., Nov. 2002–Jan. 2003, at 8; Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 770 (2003); AM. ARBITRATION ASS'N, *FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION* (Jan. 2003).

and employees, or does it prevent them from vindicating their legal rights?

In this Article, written for this symposium issue on “Empirical Studies of Mandatory Arbitration,” I examine the available empirical evidence on these two questions.<sup>4</sup> I take “mandatory arbitration” to refer to pre-dispute arbitration clauses in consumer and employment (and maybe franchise<sup>5</sup>) contracts.<sup>6</sup> Accordingly, I limit my consideration of the empirical evidence to those types of

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4. For other surveys of empirical research on arbitration costs and forum accessibility, see Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 353–59 (2006); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 424–25 (2007); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631 (2006); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008).

5. The proposed Arbitration Fairness Act of 2007 would make pre-dispute arbitration clauses unenforceable in franchise (as well as consumer and employment) contracts. See H.R. 3010, 110th Cong. § 4, (2007); S. 1782, 110th Cong. § 4 (2007).

6. Consumer and employee advocates use the phrase “mandatory arbitration” to refer to pre-dispute arbitration clauses in consumer and employment contracts—as compared to “voluntary arbitration” between sophisticated parties. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005). According to Jean Sternlight, for example, “it is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts.” Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642–43 (1996). In fact, this usage of “mandatory arbitration” is a misnomer. True “mandatory” arbitration is arbitration mandated or required by law, not arbitration provided for in a standard form contract. As the leading arbitration treatise explains:

[Terms such as “compulsory” or “mandatory arbitration”] are properly, that is, clearly, used to describe arbitration imposed on the parties by law with no consent or manifestations of consent. Sometimes, however, they are used by judges or others respecting consensual arbitration such as FAA arbitration. This tends to happen when the person using the term is concerned about the circumstances that generated the consent, or about the genuineness of consent manifested, as in adhesion contracts. These concerns and their being raised are, of course, perfectly legitimate, as is a recognition of the coercive character of consenting to be bound by contracts. Where, however, the very issue is the genuineness of consent or the harshness of the alternatives to consent, using such terms as *compulsory* or *mandatory* in such circumstances is, at best, highly confusing. At worst, it constitutes question-begging: The very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect. To call the arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis. It is far better to call these terms “pre-dispute” arbitration agreements.

IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 17.1.2.2, at 17:8–17:9 (Supp. 1999). Nonetheless, the phrase certainly has become part of common usage, to the point where businesses actually use the phrase in their arbitration clauses. *E.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1215–16 (9th Cir. 2008) (quoting arbitration clause in T-Mobile contract).

contracts. I do not discuss empirical studies of international arbitrations, which almost always arise out of agreements between commercial entities.<sup>7</sup> Nor do I discuss empirical studies of court-annexed arbitrations, which may not derive from party agreement and do not ordinarily proceed to a binding award.<sup>8</sup>

As others have commented,<sup>9</sup> the empirical evidence on the cost of arbitration is limited, although the number of studies has increased in recent years. The challenges of empirical research in this area certainly have not diminished. In particular, as with all attempts to compare arbitration with litigation, researchers face the challenge of selection bias—parties choose between litigation and arbitration, likely leading to different types of cases ending up in litigation than in arbitration and vice versa.<sup>10</sup> As a consequence, definitive conclusions on the comparative cost of arbitration and litigation, as well as on the accessibility of arbitration to consumers and employees, are difficult to reach.

Subject to this caveat, the available empirical evidence suggests the following tentative conclusions. First, the upfront costs of arbitration will in many cases be higher than, and at best be the same as, the upfront costs in litigation. Whether arbitration is less costly than litigation thus depends on how attorneys' fees and other costs compare, and the evidence here is inconclusive. Second, for employees and consumers with small and mid-sized claims, the

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7. See TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter Drahozal & Naimark] (collecting empirical studies on international commercial arbitration).

8. Here I differ from Rutledge, *supra* note 4, at 55 ("Even accepting the above-noted differences between court-annexed and commercial arbitration, none appears fatal to the explanatory value of the research. If anything, the differences between the two regimes suggest that commercial arbitration could generate even larger reductions in process costs." (citation omitted)). My view is that parties are likely to behave differently in court-annexed arbitration than they are in binding arbitration proceedings, as the binding nature of the result gives them a greater incentive to invest resources in the outcome than they might in non-binding court-annexed arbitrations.

9. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399, 405 (2000) ("What little empirical evidence that does exist shows that the costs of using arbitration are unpredictable because economic and non-economic factors dictate the actions of parties."); Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 Rutgers L. Rev. 369, 406 (1999) ("The little impressionistic empirical evidence available suggests that commercial arbitration costs are no lower systematically than litigation costs.").

10. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 757 (2001) ("Empirical studies are vulnerable to the possibility that the studied cases going to arbitration are systematically different from the studied cases going to litigation."); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1565 (2005) ("Critical research design concerns persist, however, as the stream of adjudicated and litigated cases is likely to differ systematically.").

availability of low-cost arbitration makes arbitration an accessible forum, and possibly a more accessible forum than litigation. But for consumers with large claims, and for employees not able to use low-cost arbitration, the evidence is less clear. For such claimants, administrative fees and arbitrators' fees likely will exceed court filing fees. The question is whether other cost savings in arbitration offset the higher upfront costs. Moreover, even if arbitration is more affordable on net, it still may not be a more accessible forum than litigation. Accessibility depends not only on dispute resolution costs, but also on expected recoveries. Third, whether arbitration is an accessible forum for claims that can only be brought on a class basis remains uncertain. The extent of such claims, as well as whether class arbitration is a suitable substitute for class actions, needs further research.

Part I provides an overview of the costs of arbitration, illustrated using the arbitration rules of the American Arbitration Association (AAA). It also discusses the empirical evidence on how parties modify those rules by contract. Part II considers the available studies on how the costs of arbitration compare to the costs of litigation. Part III looks more directly at the question of whether arbitration is an accessible forum for consumers and employees. Finally, Part IV examines the limited empirical evidence on the use of class arbitration as a substitute for class actions in court.

## I. OVERVIEW OF ARBITRATION COSTS

Arbitration is private dispute resolution. Unlike in litigation, which is subsidized by the government through its provision of courts, the parties bear the full costs of the arbitration process.<sup>11</sup> Those costs have three main components: administrative fees charged by the arbitration provider, if any; fees charged by the arbitrator or arbitrators; and attorneys' fees and other litigation costs. This section provides an overview of each of these costs.

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11. E.g., CPR Institute for Dispute Resolution, *Defenders and Proponents Square Off on New Report*, 20 ALTERNATIVES TO THE HIGH COSTS OF LITIG. 91, 104 (2002) (quoting India Johnson, Vice President, American Arbitration Association) ("It's a private service provided on an individual basis and paid for case-by-case."). But see Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 358 (1996) (arguing that government subsidizes private dispute resolution to some degree).

### A. Administrative Fees (including Cost-Shifting Rules and Waivers)

The first component of the costs of arbitration is the fee charged by the provider that administers the arbitration, if any.<sup>12</sup> To illustrate, Table 1 sets out the administrative fees under the Commercial Arbitration Rules of the American Arbitration Association.<sup>13</sup> As is common, the administrative fees vary with the amount in dispute—the higher the amount in dispute, the higher the fee. For large claims the administrative fees can be substantially higher than court filing fees: a claimant bringing a \$500,001 claim in arbitration will have to pay a \$6000 filing fee and a \$2500 case service fee, while the fee for filing suit in federal court is \$350 regardless of the amount in dispute.<sup>14</sup>

TABLE 1  
FEE SCHEDULE—AAA COMMERCIAL ARBITRATION RULES<sup>15</sup>

Amount of Claim	Initial Filing Fee	Case Service Fee
Above \$0 to \$10,000	\$750	\$200
Above \$10,000 to \$75,000	\$950	\$300
Above \$75,000 to \$150,000	\$1800	\$750
Above \$150,000 to \$300,000	\$2750	\$1250
Above \$300,000 to \$500,000	\$4250	\$1750
Above \$500,000 to \$1,000,000	\$6000	\$2500
Above \$1,000,000 to \$5,000,000	\$8000	\$3250
Above \$5,000,000 to \$10,000,000	\$10,000	\$4000
Above \$10,000,000	\$12,500 plus .01% of amount above \$10,000,000 (capped at \$65,000)	\$6000

All the major arbitration providers now offer some form of low-cost arbitration for consumers and employees.<sup>16</sup> For example, the

12. Parties that do not contract for the use of a provider organization's services obviously do not need to pay fees to such an organization. These parties, however, would likely face increased arbitrators' fees because the arbitrator will have to provide some degree of administrative services.

13. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 133, 135–46 (2004) (surveying leading institutional rules).

14. 28 U.S.C. § 1914(a) (2000).

15. Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures (amended and effective Sept. 1, 2007), available at <http://www.adr.org/sp.asp?id=22440> [hereinafter Commercial Arbitration Rules] (under section entitled "Administrative Fees").

16. Am. Arbitration Ass'n, Consumer-Related Disputes Supplementary Procedures (effective Sept. 15, 2005), available at <http://www.adr.org/sp.asp?id=22014> (Rule C-8)

AAA caps the combined administrative and arbitrators' fees for consumer claims of up to \$10,000 at a total of \$125 and for consumer claims of up to \$75,000 at a total of \$375.<sup>17</sup> The business pays any costs above the cap. Consumer claims above \$75,000 are subject to the standard commercial fee schedule in Table 1. For employees who arbitrate under employer-promulgated plans (as opposed to individually-negotiated employment contracts), the AAA caps the fee for the employee at \$150, with the employer paying the rest of the administrative and arbitrators' fees.<sup>18</sup>

Some empirical evidence is available on the administrative fees actually paid by parties in consumer and employment arbitrations. According to Elizabeth Hill, the mean filing fee for employees arbitrating under employer-promulgated plans before the AAA was \$376, while the mean hearing fee for such arbitrations was \$210.<sup>19</sup> Her data predate the low-cost arbitration described above, and so likely overstate the amount employees would pay today. Mark Fellows of the National Arbitration Forum (NAF) reports the arbitration fees paid by consumers and businesses in NAF arbitrations in California from 2003–2004 as follows: consumers bringing claims against businesses paid an average of \$46.63 in fees, while businesses bringing claims against consumers paid an average of \$149.50 in fees.<sup>20</sup>

Arbitration rules commonly provide both that (1) the provider organization will waive the administrative fees upon a sufficient

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[hereinafter Consumer Rules]; JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Fairness ¶ 7 (revised Jan. 1, 2007), *available at* [http://www.jamsadr.com/rules/consumer\\_min\\_std.asp](http://www.jamsadr.com/rules/consumer_min_std.asp) (“[W]hen a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees.”); Nat’l Arbitration Forum, Fee Schedule to Code of Procedure (Aug. 1, 2007), *available at* <http://www.arb-forum.com/resource.aspx?id=606> (For consumer claimants, the consumer “pays the Filing Fee and one-half the fee for a Participatory Hearing selected by the Consumer up to a total of \$250 (two hundred fifty dollars), unless otherwise provided by agreement of the Parties or by applicable law.”).

17. In addition, the AAA’s Consumer Due Process Protocol permits consumers the option of going to small claims court instead of arbitrating small claims. Am. Arbitration Ass’n, Consumer Due Process Protocol (Apr. 17, 1998), *available at* <http://www.adr.org/sp.asp?id=22019> (Principle 5).

18. Am. Arbitration Ass’n, Employment Arbitration Rules and Mediation Procedures (amended and effective July 1, 2006), *available at* <http://www.adr.org/sp.asp?id=32904> (Costs of Arbitration (including AAA Administrative Fees) For Disputes Arising Out of Employer-Promulgated Plans).

19. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 798, 812 (2003).

20. Mark Fellows, *The Same Result As In Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METROPOLITAN CORP. COUNS., July 2006, at 32, *available at* <http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf>.

showing of hardship<sup>21</sup> and (2) the arbitrator can reallocate the administrative costs (and arbitrators' fees) in the award.<sup>22</sup> I am not aware of any empirical evidence on how often or under what conditions waivers are granted. Some evidence is available on the extent to which cost-shifting rules are used. According to Hill:

AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and some or all of the filing fees in 85.12% of the cases. Thus, virtually all forum costs were reallocated to the employer in 70.25% of the cases.<sup>23</sup>

By comparison, a study of securities arbitration awards by O'Neal and Solin found that in 3956 out of 13,810 (28.6%) cases "arbitration panels awarded claimants nothing but assessed forum fees to claimants."<sup>24</sup> The average administrative fee in those cases was \$2742.<sup>25</sup>

### *B. Arbitrators' Fees*

The second component of arbitration costs is the fee charged by the arbitrators. Unlike in litigation, where the government pays the judges' salaries, the parties themselves must pay the arbitrators. The arbitrators' fees are not included in the administrative charges of the AAA under its Commercial Arbitration Rules, although the capped amount the consumer or employee has to pay under the AAA's consumer and employment rules covers both administrative fees and arbitrators' fees, as described above.<sup>26</sup>

In 2001, the AAA conducted a series of surveys concerning the fees charged by arbitrators on its commercial and employment

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21. Am. Arbitration Ass'n, Administrative Fee Waivers and Pro Bono Arbitrators, *available at* <http://www.adr.org/sp.asp?id=22040> (last visited Mar. 26, 2008).

22. E.g., Commercial Arbitration Rules, *supra* note 15 (Rule R-43(c)).

23. Hill, *supra* note 19, at 812. Again, the data predate the AAA's low-cost employment arbitration.

24. Edward S. O'Neal & Daniel R. Solin, Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare 17 (2007), *available at* <http://www.slcg.com/pdf/news/Mandatory%20Arbitration%20Study.pdf>.

25. *Id.*

26. See *supra* text accompanying notes 16–18. Indeed, the AAA applies the consumer's or employee's payment solely to the arbitrators' fees. See Consumer Rules, *supra* note 16 (Rule C-8).



panels.<sup>27</sup> Table 2 summarizes the results. The mean and median fees of the responding arbitrators exceeded \$1000 per day, and ranged as high as \$5000 per day for one commercial arbitrator. Although most of the respondents were members of the AAA's commercial panel, the fees of survey respondents from the AAA's employment panel did not differ materially.

TABLE 2  
ARBITRATORS' FEES IN AAA ARBITRATIONS<sup>28</sup>

	AAA Panel	Mean (per day)	Median (per day)	Range (per day)	n
Chicago, IL	Commercial	\$1800	\$1698	\$750-\$5000	60
Colorado	Commercial	\$1442	\$1500	\$600-\$2500	38
Hamilton County, OH	Commercial	\$1468	\$1400	\$600-\$2100	31
Indiana	Commercial	\$1308	\$1225	\$700-\$1800	26
VA, NC, MD, DC	Employment	\$1403	\$1500	\$700-\$2000	15

That arbitrators typically charge these fees does not necessarily mean that consumers and employees pay those amounts. First, for small consumer claims and employee claims under promulgated plans, the amount of fees is capped.<sup>29</sup> Second, some arbitrators are willing to serve pro bono, although the number of cases in which arbitrators do so in consumer and employment cases is not reported.<sup>30</sup>

27. Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 737-38 (2006) (summarizing findings).

28. The sources for data in the table are the following: Affidavit of Frank Zotto ¶ 13, Phillips v. Assocs. Home Equity, Case No. 01 CH 1444 (N.D. Ill. July 9, 2001) (reporting results of "random sampling of 60 arbitrators on the Commercial Panel in the Chicago, Illinois area"); Affidavit of Frank Zotto ¶ 10, Pope v. AutoNation USA, Case No. A-0001609 (Ohio Ct. Com. Pl. Aug. 15, 2001) (reporting results of "sampling of 31 arbitrators on the Commercial Panel in Hamilton County, Ohio"); Affidavit of Christine Newhall ¶ 6, Cowart v. Credit Counselors Corp., Case No. IP00-0701 (S.D. Ind. Apr. 18, 2001) (reporting results of "random sampling of 26 arbitrators on the Commercial Panel in the State of Indiana"); Affidavit of Frank Zotto ¶ 9, Calvo v. PIA Merch. Co., Case No. 2:00cv873 (E.D. Va. Oct. 4, 2001) (reporting results of "sampling of 15 arbitrators on the Employment Panel in the Virginia, North Carolina, Washington, D.C. and Maryland area"); Affidavit of Frank Zotto ¶ 7(h), Physicians Data, Inc. v. Quest Wireless, L.L.C., Case No. OOCV631 (Colo. Dist. Ct. June 28, 2001) (reporting results of "random sampling of 38 arbitrators on the Commercial Panel in the Denver, Colorado area"). All of the affidavits are included in the CD-ROM Appendix to F. Paul Bland, Jr. et al., *Consumer Arbitration Agreements: Enforceability and Other Topics* (4th ed. 2004); see also Ting v. AT&T, 182 F. Supp. 2d 902, 934 (N.D. Cal. 2002) (citing "average daily rate of arbitrator compensation in Northern California" as \$1899), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003).

29. See *supra* text accompanying notes 16-18, 26.

30. The AAA has reported that it "administered 386 pro bono construction cases in 2002," see Am. Arbitration Ass'n, Public Service at the American Arbitration Association 8

A pair of studies have looked at the arbitrators' fees actually charged in AAA employment (but not consumer) arbitration. According to Elizabeth Hill, the mean arbitrators' fee paid by employees arbitrating under employer-promulgated plans (before the cost caps imposed above) was \$1706.<sup>31</sup> Alexander Colvin's more recent study, examining employment data disclosed by the AAA per California law, found that "the median arbitrator fee amongst all cases was \$2,472 and the mean fee was \$6,105."<sup>32</sup> He added that "[i]n 96.6 percent of the cases in this sample the employer paid 100 percent of the arbitrator fees."<sup>33</sup>

### C. Attorneys' Fees and Other Litigation Expenses

The third component of the costs of arbitration is the attorneys' fees and other expenses paid by the parties. Attorneys' fees are not governed by the AAA arbitration rules; instead, they are a matter of parties' private contractual arrangements. Attorneys' fees and other expenses are important because, if arbitration is to be cheaper than litigation (or even no more expensive than litigation), they must be less than comparable costs in litigation. The other two components of arbitration costs almost always will be greater than or at best the same as comparable costs in court.

The following can be said about attorneys' fees in arbitration: First, some consumers and employees appear pro se in arbitration.<sup>34</sup> These parties by definition pay no attorneys' fees.

Second, many consumers and employees are represented by attorneys on a contingent-fee basis.<sup>35</sup> As a result, they pay no attorneys' fees upfront, and pay their attorney only a percentage of any award they eventually obtain.<sup>36</sup> I know of no empirical evidence

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(2004), available at <http://www.adr.org/si.asp?id=3448>, but I am unaware of similar data for consumer or employment cases.

31. Hill, *supra* note 19, at 798, 812.

32. Colvin, *supra* note 4, at 425.

33. *Id.*

34. *Id.* at 432 ("Overall in the sample of 2,760 cases, employees were represented in 2,066 cases (74.9 percent) and self-represented in 694 cases (25.1 percent)."); Hill, *supra* note 19, at 818 ("One third of the P cases in this sample were prosecuted pro se.").

35. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, Disp. Resol. J., May-July 2003, at 8, 12 (finding, in a sample of AAA employment arbitrations, that "most lower-income employees have agreed to representation on a contingency basis").

36. At least some anecdotal evidence suggests that attorneys advance arbitration costs for their contingent-fee clients. Drahozal, *supra* note 27, at 769-70. Compare Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 735 (2003) ("[M]any firms make no effort to seek reimbursement of expenses if there is no recovery."), and Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 532 n.3 (1978) ("In the event of defeat, the client

on the costs incurred by claimants' counsel in pursuing claims in arbitration (as compared to litigation).<sup>37</sup>

Third, the only evidence of the actual amount of parties' attorneys' fees in arbitration is from fee awards made to prevailing parties in arbitration. In her study of AAA employment arbitrations, Elizabeth Hill examined a sample of twelve attorneys' fee awards to employees who arbitrated pursuant to employer-promulgated plans. She reported a median fee award of \$6248 and mean fee award of \$14,464, with awards ranging from \$2713 to \$54,192.<sup>38</sup>

#### *D. Contract Provisions re Cost Allocation*

Arbitration rules provide only a partial picture of the contractual structure governing the costs of arbitration. The rules are standard form contract terms that parties can incorporate by reference into their arbitration agreements. In addition, however, the parties may add to or change those standard terms in their contracts—subject to possible constraints imposed by the due process protocols of arbitration providers.<sup>39</sup> This section examines empirical evidence on the terms governing costs in consumer, employment, and franchise arbitration agreements.

Linda Demaine and Deborah Hensler examined arbitration clauses from a variety of consumer contracts along an array of dimensions, including arbitration costs.<sup>40</sup> Table 3 reproduces their results. They found that just over half (30 of 52, or 57.7%) of the clauses included some provision on costs, with the most common requiring that the parties share all expenses equally (16 of 52, or 30.8%). Only a handful (3 of 52, or 5.8%) permitted the prevailing party to recover all expenses, while another pair of clauses (2 of 52,

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theoretically must refund all of these litigation expenses advanced by the lawyer. . . . [In] [a]ctual practice, however, . . . the client usually does not pay back these expenses."), *with* Hill, *supra* note 35, at 10–11 ("Even lawyers who represent employees on a contingency basis usually require that their expenses be paid up front.").

37. See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

38. Hill, *supra* note 19, at 798–99.

39. W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 656 (2007) ("In some cases, the result [of the due process protocol] may be an arbitration process that is less 'one-sided' than the clause itself would suggest."). No empirical evidence is available as yet on the extent to which contract terms are overridden or otherwise constrained by due process protocols.

40. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55, 71.

or 3.8%) permitted the prevailing party to recover some expenses. Only one clause (1.9%) capped the consumer's fees, and another four (7.7%) provided for some reimbursement of consumer expenses, although twelve (23.1%) contained express provisions addressing indigent claimants.<sup>41</sup>

TABLE 3  
ARBITRATION EXPENSES MENTIONED IN  
CONSUMER ARBITRATION CLAUSES<sup>42</sup>

	Number of Clauses	Percentage
Mention of expenses	30	57.7%
All expenses	16	30.8%
Divided equally	13	25.0%
Loser pays	3	5.8%
Partial expenses	14	26.9%
Non-fee expenses divided equally	1	1.9%
Initiator pays filing fee	3	5.8%
Initiator pays all arbitration fees	1	1.9%
Arbitrator decides fee allocation	2	3.8%
Provision for some consumer reimbursement of fees	4	7.7%
Loser pays some or all fees	2	3.8%
Cap consumer's portion of fees	1	1.9%
Provide for indigency	12	23.1%
No mention of expenses	22	42.3%

Bickner et al. surveyed thirty-six employers about their employment dispute resolution programs in 1996.<sup>43</sup> They reported that:

About half of the plans called for the employer to pay arbitration fees, the other half providing for shared costs. For the most part, shared costs mean a 50–50 split, but a few plans provided for disproportionate payment. . . . Several plans specified that the employer would pay if the fees imposed a financial hardship on the employee, while several interviewees expressed an informal willingness to pay part or all of an

41. Demaine and Hensler also found that half the clauses contained a provision permitting claimants to bring their claim in small claims court in lieu of arbitration if they so chose. Demaine & Hensler, *supra* note 40, at 65 ("Sixteen of the fifty-two clauses (30.8%) exempt small claims from the arbitration requirement. Half of these clauses state that either party may pursue an action in small claims court; the other half state that the business will refrain from invoking the clause if the consumer pursues an action in small claims court.").

42. *Id.* at 71.

43. Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 81.

employee's costs even where the plan did not specifically provide for doing so.<sup>44</sup>

Although the findings are dated, they provide some picture of the terms of employment dispute resolution plans.

Drahozal and Wittrock compared the arbitration clauses in a sample of franchise agreements in 1999 and 2007.<sup>45</sup> As Table 4 reveals, they found no dramatic changes in the nature of the cost provisions.<sup>46</sup> One notable difference from the consumer arbitration clauses studied by Demaine and Hensler was that a much higher proportion of franchise arbitration clauses permitted the prevailing party to recover its costs of arbitration.<sup>47</sup> Conversely, fewer of the franchise arbitration clauses included provisions dealing with indigent claimants. The relatively greater resources of franchisees as compared to consumers may explain the differing provisions.

TABLE 4  
COST ALLOCATION PROVISIONS IN  
FRANCHISE ARBITRATION CLAUSES

	1999	2007
Bear own costs with exceptions	6 (21.4%)	6 (21.4%)
Prevailing party	11 (39.3%)	11 (39.3%)
Franchisor as prevailing party	3 (10.7%)	5 (17.9%)
Share arbitrators' fees	1 (3.6%)	1 (3.6%)
Cost assistance by franchisor	0 (0%)	1 (3.6%)
No provision	7 (25.0%)	4 (14.3%)

44. *Id.*

45. Christopher R. Drahozal & Quentin R. Wittrock, Is There a Flight from Arbitration? 39-40 (Apr. 28, 2008) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform); see also Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 735-36 (reporting results for 1999 alone) ("[F]ifty percent (17 of 34) of the franchise agreements with arbitration clauses . . . contained fee-shifting provisions. . . . Thirty percent (10 of 34) of arbitration clauses contained some provision specifying how arbitrators were to assess costs.").

46. The number of clauses permitting the prevailing party to recover its costs remained the same, and there was a slight increase in the number of clauses permitting the franchisor as prevailing party to recover its costs.

47. As I have noted elsewhere, fee-shifting provisions are located in various parts of franchise agreements, not only the dispute resolution clauses. Drahozal, *supra* note 45, at 735 n.296. As a result, Table 4 may understate the use of fee-shifting provisions in franchise agreements.

### E. Total Arbitration Costs

In her study of AAA employment arbitrations, Hill sought to estimate the total costs faced by employees in addition to reporting the individual components of arbitration costs. Her estimated figures for each step of the process are based on the mean (or, in one case, median) fees paid by employees in the sample.<sup>48</sup> Note again that this cost data predated the AAA's imposition of a cap on administrative and arbitrators' fees paid by employees arbitrating under employer-promulgated plans.

Table 5 summarizes her estimates. Row 1 shows that 32% of employees paid nothing for arbitration—no attorneys' fees, no forum fees, no arbitrators' fees. Row 5 reflects an additional 29% of employees who paid no forum fees or arbitrators' fees, but who Hill estimates did pay attorneys' fees. Overall, based on Hill's estimates, 45% of employees paid less than \$1200 (including any forum fees, arbitrators' fees, and attorneys' fees) to bring a claim in arbitration, while the remaining 55% paid no more than \$8540 to bring a claim in arbitration. Excluding attorneys' fees (which Hill deems appropriate because most of the employees who had attorneys were represented on a contingent-fee basis), "[t]he remaining costs of arbitration, forum fees, average only \$2,292."<sup>49</sup>

TABLE 5  
TOTAL ARBITRATION COSTS FOR AAA  
EMPLOYMENT ARBITRATION<sup>50</sup>

Fees Paid by Employees	Cases <i>Pro Se</i>	Cases with Attorney	Total Cases (%)
1. None	29	10	39 (32.23%)
2. Less than Maximum Hearing/ Filing Fee (\$783)	5	2	7 (5.8%)
3. One-Half of Forum Fees (\$1146)	5	3	8 (6.61%)
4. All Forum Fees (\$6292)	1	0	1 (0.83%)
5. Attorneys' Fees (\$6248)	0	35	35 (28.9%)
6. Attorneys' Fees plus One-Half of Arbitrators' Fees (\$6776)	0	4	4 (3.3%)
7. Attorneys' Fees plus One-Half of Forum Fees (\$7394)	0	23	23 (19.0%)

48. Hill, *supra* note 19, at 799–800.

49. *Id.* at 803.

50. *Id.* at 801.

Fees Paid by Employees	Cases <i>Pro Se</i>	Cases with Attorney	Total Cases (%)
8. Attorneys' Fees plus all Arbitrator Fees (\$7954)	0	2	2 (1.65%)
9. Attorneys' Fees plus all Forum Fees (\$8540)	0	2	2 (1.65%)
10. Totals	40	81	121 (100%)

## II. COSTS OF ARBITRATION VS. COSTS OF LITIGATION

If all that is considered is administrative costs and arbitrators' fees, arbitration will almost always be more expensive than litigation. Those costs are highly subsidized in litigation, while the parties bear the full amount of those costs in arbitration. Accordingly, for arbitration to be cheaper than litigation, the parties must save on attorneys' fees and other litigation costs, and those savings must exceed the additional administrative costs and arbitrators' fees they must pay in arbitration.

This part examines the available empirical evidence comparing the costs of arbitration to the costs of litigation. That evidence consists of (1) surveys of parties and attorneys about their perceptions of arbitration and litigation costs; (2) studies of business experience with defense costs in arbitration and litigation cases; and (3) a direct comparative study of the costs of arbitration and litigation.<sup>51</sup> Not all of the evidence is limited exclusively to consumer and employee arbitrations, but it is the best available. The part concludes with a brief discussion of possible methodologies for a more accurate comparison of arbitration and litigation costs.

### A. Surveys

A number of surveys have asked parties and attorneys to compare the costs of arbitration and the costs of litigation. Table 6 describes the surveys, while Figure 1 summarizes the findings. The respondents in the studies ranged from adults who had participated in "voluntary" arbitration to trial lawyers to general counsel. The majority (if not the substantial majority) of survey respondents (51%–89%) stated that arbitration was "less expensive" or "more cost effective" than litigation. Most of the remaining respondents

51. After reviewing this same evidence, Peter B. Rutledge concludes as follows: "Virtually all of the available evidence—studies of analogous regimes, surveys, and case studies—suggests . . . that arbitration, as a necessary part of a broader fabric of alternative dispute resolution programs, can significantly reduce a company's process costs." Rutledge, *supra* note 4.

(11%–47%) reported “no difference” in cost. Few stated that arbitration was more expensive than litigation (0% to 11%).

TABLE 6  
SURVEYS OF PARTY AND ATTORNEY  
VIEWS ON ARBITRATION COSTS

Title of Study	Subjects Surveyed	Number of Responses
2005 Harris Interactive survey <sup>52</sup>	Adults who participated in arbitration “voluntarily” <sup>53</sup>	609 responses; sub-sample of national cross-section of adults
2003 ABA Task Force on ADR Effectiveness <sup>54</sup>	Trial lawyers, both plaintiff oriented and defense oriented <sup>55</sup>	627 responses; 10% response rate <sup>56</sup>
2004 Ernst & Young survey <sup>57</sup>	Consumer claimants involved in NAF arbitration	29 responses from 175 target respondents
2003 Corporate Legal Times email survey <sup>58</sup>	General counsel and other in-house counsel	Unspecified
1990 AAA survey <sup>59</sup>	Law firms in North Carolina and South Carolina	33 of 48 law firms contacted responded <sup>60</sup>

52. U.S. Chamber Inst. for Legal Reform, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 21 (2005), available at <http://adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>. The question asked was: “Thinking about the total costs (including filing fees and lawyers’ fees), do you think arbitration was cheaper or more expensive than going to court?” *Id.*

53. Online survey was of 609 adults who had participated in arbitration “voluntarily, due to contract language, or with strong urging by the court, but not ordered into arbitration by a court.” *Id.* at 4. Only 19% of the survey respondents participated in arbitration because a contract so required. *Id.* at 9.

54. ABA Section of Litigation Task Force on ADR Effectiveness, *Survey on Arbitration* 10, 19 (Aug. 2003). The question asked was: “do you consider voluntary arbitration to be more cost effective or less cost effective than litigation, when the total ‘process costs’ (legal fees, witness fees, discovery costs, arbitrator fees and costs, etc.) are compared to the value of the matter in controversy?”

55. The trial lawyers surveyed were members of the ABA Litigation Section: 60% represented an equal mixture of defendants and plaintiffs, 26% were “defense oriented”, and 14% were “plaintiff oriented.” *Id.* at 3.

56. Of those (87) who responded that arbitration was less cost effective, the most common reasons were: “Arbitrator’s fees and costs” 46.0%; “Administrative expenses” 17.2%; “Additional legal fees required” 11.5%; “Hearing costs” 4.6%; and “Other” 20.7%. *Id.* at 20.

57. Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 11–12 (2004), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>.

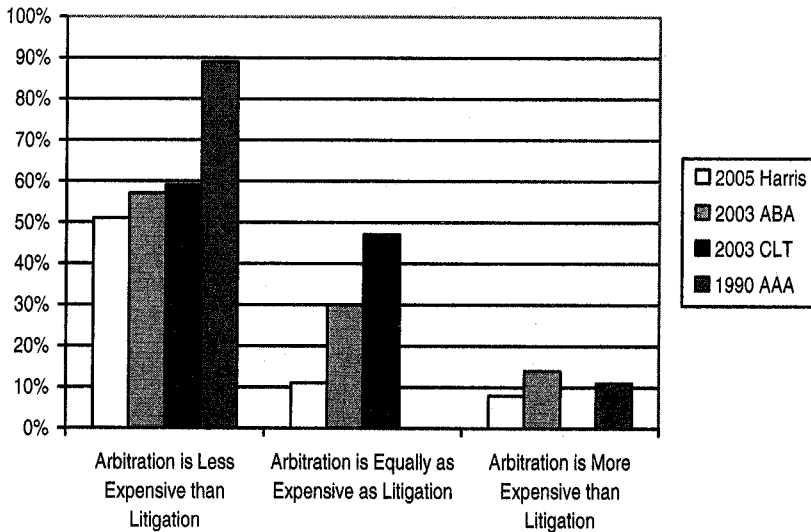
58. Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, CORPORATE LEGAL TIMES, Feb. 2004, at 44, 48, available at <http://www.cpradr.org/pressroom/press29.pdf>. The question asked was: “How do arbitration and summary jury trial processes compare to traditional adjudication processes, in terms of cost, time to resolution and fairness?”

59. Lisa Brenner, *Cost and Value of Arbitration*, 14 WORLD ARB. & MEDIATION REP. 111, 114 (2003). According to Brenner, “[t]he firms claimed an average of thirty-two percent savings in arbitration. They further estimated that forty-five percent of their case preparation time in litigation was spent on discovery, but only seventeen percent of their preparation time in arbitration was spent on discovery.” *Id.*

60. The percentage of respondents indicating that arbitration was equally as expensive as litigation or more expensive than litigation is not reported, so I assumed that all of the remaining 11% of respondents indicated that litigation was more expensive than arbitration.



FIGURE 1  
ARBITRATION COSTS: SURVEY RESULTS



The one survey described in Table 6 but not appearing in Figure 1 was an Ernst & Young survey of consumer claimants in NAF arbitrations.<sup>61</sup> The NAF has been harshly criticized for its consumer arbitrations, the vast majority of which are brought by businesses against consumers.<sup>62</sup> Ernst and Young conducted telephone interviews with twenty-nine consumer claimants (out of 175 target respondents).<sup>63</sup> Of the twenty-nine respondents, ten prevailed in an award, four did not, and fifteen settled.<sup>64</sup> Only four (14%) were represented by counsel in the arbitration; the rest proceeded pro

61. Jill Gross and Barbara Black recently reported the results of a survey of all parties involved in customer securities arbitrations completed between January 1, 2005 and December 31, 2006. Jill I. Gross & Barbara Black, *Perceptions of Fairness of Securities Arbitration* 12 (Univ. of Cincinnati, Research Paper No. 08-01, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090969](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090969) (25,283 surveys mailed and 3087 responses received, for a response rate of 13.0%). A subset of the respondents had been involved in a recent civil case as well as a securities arbitration. The survey asked those respondents whether they would choose arbitration in the future. *Id.* at 48. The possible responses included "I would choose arbitration over court" or "I would not choose arbitration" for various reasons—including "because it is more expensive." Of the 1077 respondents, 35.6% indicated they would choose arbitration over litigation and 7.3% that they would not choose arbitration because it was "more expensive." *Id.* The others either were not sure or would not choose arbitration for some other reason. *Id.*

62. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007), available at [http://www.citizen.org/documents/Final\\_wcover.pdf](http://www.citizen.org/documents/Final_wcover.pdf).

63. Ernst & Young, *supra* note 57, at 11.

64. *Id.* at 11–12.

se.<sup>65</sup> One of the survey questions was the following: "How would you characterize the costs associated with arbitration? (1 is very unaffordable and 5 is very affordable.)"<sup>66</sup> The mean response was 4.29, close to the "very affordable" end of the spectrum.<sup>67</sup>

While the survey results described in this section suggest that many parties and lawyers believe that arbitration costs less than litigation, one must be cautious in drawing conclusions based on these surveys. Most of the surveys are not limited to consumer and employment arbitration. Several of the surveys were unclear whether they referred to court-annexed arbitration, arbitration pursuant to a pre-dispute arbitration clause, or some other form of arbitration. Indeed, the 2005 Harris survey was limited to persons who participated in arbitration "voluntarily, due to contract language, or with strong urging by the court, but not ordered into arbitration by a court," which would include some but not all forms of court-annexed and contractual arbitration, and only one-fifth were required to arbitrate by contract.<sup>68</sup> And what people say they do or believe is not necessarily what they actually do or believe, which is an inherent limitation of any sort of survey.

### *B. Business Experience with Arbitration*

Several studies have examined how the costs of arbitration compare to the costs of litigation among businesses.<sup>69</sup> A 1988 study compared defense costs of customer-broker disputes in court with defense costs of "similar" disputes in arbitration and found that the "average cost of defending customer-broker disputes in court was \$20,000 per case as compared with \$8,000 per case in arbitration."<sup>70</sup> William M. Howard reported the following results from a survey of

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65. *Id.* at 13. Because so few respondents hired a lawyer, Ernst & Young did not report any responses on the amount that the claimants spent on legal fees, even though that was one of the questions on the survey instrument. *Id.* at 22.

66. *Id.*

67. *Id.* at 11. For criticisms of the Ernst & Young study, see Ctr. for Responsible Lending, Comments on Ernst & Young Arbitration Outcomes Report (Feb. 24, 2005), [http://www.responsiblelending.org/pdfs/ib025-Ernst\\_Young\\_Arbitration\\_Comments-0205.pdf](http://www.responsiblelending.org/pdfs/ib025-Ernst_Young_Arbitration_Comments-0205.pdf).

68. *See supra* notes 52–53.

69. Business costs are only half the story, of course, and the fact that some businesses have lower dispute resolution costs when they use arbitration does not show that consumers and employees do as well. Nonetheless, in comparing the costs of arbitration to the costs of litigation, business experience with both certainly is relevant.

70. G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 521 n.24 (1989); *see also* William C. Hermann, Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697 app. at 722 (1990) (summarizing results of study).

lawyers who regularly represented parties in employment discrimination cases: "While the plaintiff's fees are typically contingent, the defendants' lawyers estimated that the average fee in litigating employment discrimination cases was \$96,000 as contrasted to \$20,000 in arbitration."<sup>71</sup>

Meanwhile, a pair of case studies examined cost savings by employers that implemented new dispute resolution programs for their employees. The programs were described as providing for "ADR," but arbitration was an element of both programs. According to the General Accounting Office, during the first three years after Brown and Root adopted an employee ADR program, it "reported that the overall cost of dealing with workplace disputes (including the annual cost of the ADR program itself) was less than half of what the company had been accustomed to spending on legal fees for employment-related litigation."<sup>72</sup> Similarly, David Sherwyn et al. studied the employment dispute resolution program adopted by an anonymous business and reported that "since instituting its DRP system, ADR Employer 1 has cut its outside counsel fees in half."<sup>73</sup>

### C. Comparative Studies

Perhaps the best known study comparing the costs of arbitration and litigation remains a 1983 study by Herbert Kritzer and Jill Anderson.<sup>74</sup> The study, conducted as part of the Civil Litigation Research Project,<sup>75</sup> compared the dispute resolution costs in a sample of roughly comparable cases in state court, federal court, and AAA arbitration. Information on the actual costs incurred by the parties was obtained from the parties' attorneys in each of the cases.<sup>76</sup> The study is not limited to consumer or employment cases, but does include consumer cases (i.e., insurance cases) in the sample.<sup>77</sup>

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71. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44.

72. U.S. Gen. Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 19 (1997), available at <http://www.gao.gov/cgi-bin/getrpt?GGD-97-157>.

73. Sherwyn et al., *supra* note 10, at 1589.

74. Herbert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SVS. J. 6 (1983).

75. Herbert M. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 LAW & SOC'Y REV. 503 (1980-81).

76. Kritzer & Anderson, *supra* note 74, at 8-9.

77. *Id.* at 8.

Kritzer and Anderson found that the lowest cost dispute resolution process varied depending on the amount at stake in the case. They stated:

Across the range of stakes values, no one institution emerges as most or least expensive. The AAA is least expensive for small cases, and most expensive for the remaining three categories. Federal court is least expensive in the \$5,000 to \$10,000 range, and state court is least expensive in the upper two ranges.<sup>78</sup>

Although these results might be viewed as consistent with the general description of arbitration costs in Part I,<sup>79</sup> a partial explanation derives instead from differences in the process provided. Kritzer and Anderson reported the actual average cost of the cases studied for both arbitration and litigation. In arbitration, however, "a much larger proportion of cases go through the 'complete process,' including a hearing and an award."<sup>80</sup> Thus, a partial explanation (at least) for the lower costs for some cases in litigation was that on average those cases ended earlier in the process, i.e., before trial. Parties were paying for the additional process provided in arbitration.

It is difficult to generalize from the Kritzer and Anderson results, both because of the age of the study and the types of cases studied. Nevertheless, it provides an interesting perspective on the comparative costs of arbitration and litigation.

#### *D. Future Research*

An important challenge for future empirical studies comparing the costs of arbitration to the costs of litigation (as well as other sorts of studies comparing arbitration and litigation) is the difficulty of controlling for differences in case characteristics: a case may be less costly to arbitrate (or litigate) not because of differences between arbitration and litigation, but because the case itself is simpler and less complex. Any study that retrospectively

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78. *Id.* at 17.

79. *See supra* text accompanying notes 16–18. That is, because of low-cost consumer and employment arbitration (although it did not exist at the time of the Kritzer and Anderson study), arbitration is no more expensive (and may be cheaper) than litigation for small and mid-sized claims. But for larger claims, the higher administrative and arbitrators' fees may make arbitration more expensive than litigation. As discussed in the text, however, at least in part the actual explanation is a different one.

80. Kritzer & Anderson, *supra* note 74, at 17.

compares cases in arbitration and litigation will face the difficulty that no two cases are alike.<sup>81</sup>

One approach to dealing with questions of comparability is to use simulations.<sup>82</sup> A sample of actual case files and actual attorneys' fee billings would be the starting point. Ideally, some of the files would be for cases in court and some for cases in arbitration. The actual billings would provide a baseline for comparison. The files then could be submitted to a sample of attorneys to estimate what their fees would be for handling the cases either in arbitration or litigation. The results of these simulations could then be compared to the actual costs for the dispute in question.

A second approach would be to use similar disputes arising out of a common set of contracts, some of which have arbitration clauses and some of which do not.<sup>83</sup> As a simple example, Jeffrey R. Cruz reports his experience with two cases that arose out of similar contracts for the design and construction of power plants, one of which was in arbitration and one of which was in litigation.<sup>84</sup> A much larger and more comparable sample of cases would be necessary to draw any meaningful conclusions about comparative costs.

A third approach would be to use random assignment of disputes between arbitration and litigation to overcome the comparability problem. Ian Ayres writes in *Super Crunchers* of companies that undertake randomized experiments to determine pricing, effective sales techniques, or attention-getting web pages.<sup>85</sup> Companies might randomly include arbitration clauses in contracts and study the disposition of any disputes that arise.<sup>86</sup> Or they might randomly assign disputes that arise to litigation and arbitration and study how the resolution of the disputes compares.<sup>87</sup>

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81. See *supra* text accompanying note 10.

82. Drahozal & Naimark, *supra* note 7, at 20.

83. *Id.*

84. Jeffrey R. Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, DISP. RESOL. J., Nov. 2005–Jan. 2006, at 10. Cruz does not address the comparative cost of the two cases, but concludes that in his pair of cases “[a]rbitration led to a resolution in much less time overall and allowed the parties to customize the process to a complex construction case.” *Id.* at 15.

85. IAN AYRES, *SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART* 46–63 (2007).

86. One complication from this approach is that the presence or absence of an arbitration clause might affect the number and nature of disputes that arise under the contracts. While that itself would be an interesting study, it would complicate any attempt to isolate differences in dispute resolution costs.

87. Actually, it may be that companies already have done so but have not reported the results publicly.

## III. ARBITRATION COSTS AND ACCESSIBILITY

Comparing the costs of arbitration with the costs of litigation certainly is important in evaluating the efficiency of the two processes.<sup>88</sup> But the question of cost is distinct from (although certainly related to) the question of whether arbitration is a more or less accessible forum for consumers and employees. Whether a claim is economically viable depends both on the cost of pursuing the claim and the claimant's potential recovery on the claim.<sup>89</sup> If the potential recovery is enough lower in arbitration, claimants may be less likely to pursue a claim in arbitration than in litigation even if the costs are lower as well. Thus, the discussion of arbitration costs in the previous part cannot be viewed in isolation in evaluating accessibility, but rather must be considered together with empirical evidence on expected outcomes and recoveries in arbitration.<sup>90</sup>

This part, by comparison, examines evidence that deals directly with the question of whether arbitration is a more or less accessible forum than litigation for consumer and employee claimants. No systematic empirical evidence is available on the number of claims that parties decline to bring because of the costs of arbitration (or the costs of litigation for that matter), although sources have described anecdotal reports of excessive costs precluding a claimant from pursuing a claim in arbitration.<sup>91</sup> Instead, the empirical evidence of accessibility consists of several types.

The first type is evidence of differing characteristics of claimants in arbitration and litigation. Eisenberg and Hill reported:

We were unable to compare litigation and arbitration results for lower-paid employees due to the lack of data about litigation commenced by employees in this economic group. We believe the absence of cases of this type is likely explained by the fact that lower-paid employees seem to lack ready access to court, as other researchers have reported.<sup>92</sup>

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88. Of course, if the overall efficiency of the processes were the inquiry, one would need to compare the total costs of the public court system, including judges' salaries and administrative expenses, to the total costs of arbitration, to make a proper comparison.

89. Drahozal, *supra* note 27, at 760–62.

90. See, e.g., W. Mark C. Weidemaier, *From Court Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REFORM 843 (2008).

91. The Costs of Arbitration, *supra* note 3, at 19.

92. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 45; see also Hill, *supra* note 19, at 804 (“72% of the employees in this sample who arbitrated pursuant to

In other words, the absence of court cases brought by lower-paid employees as compared to the presence of arbitration cases brought by such employees suggests that arbitration is a more accessible forum for such claimants.

The second type of evidence on accessibility is evidence of the amounts claimed by consumers and employees in arbitration.<sup>93</sup> Plaintiffs' lawyers interviewed by William Howard indicated that they normally required "minimum provable damages of \$60,000 to \$65,000" before they would be willing to bring an employment discrimination case in court.<sup>94</sup> By comparison, several sources find that claimants bring claims in arbitration seeking amounts far less than \$60,000. For example, the National Workrights Institute states:

The Institute looked at all AAA employment arbitrations for the year 2000 for which there was a stated demand. In the majority of these cases, (54%), the demand was less than \$75,000. Many cases (26%) involved claims of less than \$25,000. In other words, half of the people whose employment claims were heard by AAA that year would not have been able to bring their claims to court.<sup>95</sup>

While the evidence of claim amounts in arbitration seems reliable, it would be helpful to have additional evidence of the minimum amounts necessary for a claim to be brought in court.

Finally, a study of challenges to the enforceability of arbitration agreements on grounds of excessive cost brought in federal court "suggests that in a substantial majority of those reported cases in which courts invalidated the arbitration agreement on cost grounds, arbitration costs may well not have been a barrier to asserting the claim in arbitration."<sup>96</sup> The study found that cases in

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promulgated agreements were of low to middle income and did not earn enough income to gain access to the courts with an employment-related claim.").

93. This evidence is related to the first type, at least in employment cases, because the amount of an employee's claim is likely to depend on the employee's salary.

94. Howard, *supra* note 71, at 44.

95. Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?*, [http://www.workrights.org/current/cd\\_arbitration.html](http://www.workrights.org/current/cd_arbitration.html) (last visited Oct. 9, 2007); e.g., O'Neal & Solin, *supra* note 24, at 8 (noting that of 13,810 securities arbitration cases in sample, 3193 sought less than \$10,000 and 3158 sought between \$10,000 and \$50,000); see also Lewis Maltby, *Arbitrating Employment Disputes: The Promise and the Peril*, in *ARBITRATION OF EMPLOYMENT DISPUTES* 530, 533 (Daniel P. O'Meara ed., 2002).

96. Drahozal, *supra* note 27, at 777. For an earlier study of cost-based challenges, see Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 *UCLA L. REV.* 143, 196 (2002) ("[O]ur research . . . shows that resistance to mandatory arbitration agreements is an

which courts invalidate clauses on cost grounds are similar in important respects to those in which courts refuse to invalidate clauses.<sup>97</sup> A main difference seems to be the circuit in which the case was brought.<sup>98</sup> Although the study does not purport to address whether arbitration is an accessible forum, it does suggest that the courts are not doing a good job of identifying those cases in which arbitration costs are in fact a barrier to claimants bringing their claims.

#### IV. CLASS ARBITRATION

Because arbitration clauses prevent a case from proceeding as a class action in court, they have been touted as a means of reducing the risk that a company will face class action liability.<sup>99</sup> Conversely, however, the unavailability of class relief may be problematic for some employee and consumer claimants if their claim cannot be brought economically on an individual basis in arbitration.<sup>100</sup> There is no empirical evidence on the frequency of such claims. But much of the concern about the accessibility of the arbitral forum is actually a concern about the effect of arbitration clauses on the availability of class relief.<sup>101</sup>

The recent development of class arbitration (i.e., class actions in arbitration, rather than in court) provides a possible means by which claimants can vindicate small claims that could not be brought economically on an individual basis in arbitration (or in court). Although class arbitration has been around for several decades,<sup>102</sup> its use increased dramatically after the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle* in 2003.<sup>103</sup>

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uphill struggle, because courts continue to reject most of these challenges. However, notwithstanding the strong signals sent by *Gilmer* and *Circuit City*, courts are more receptive to these challenges than is generally understood.”).

97. Drahozal, *supra* note 27, at 777 (highlighting such factors as representation by counsel and the assertion of a claim under a statute permitting a prevailing claimant to recover attorneys' fees).

98. *Id.* at 756–57.

99. See, e.g., Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997).

100. Of course, class actions are not the only means of enhancing the incentives to bring small claims in court. For example, fee-shifting statutes provide an incentive for an attorney to take a case even if the amount at stake is too small for the claim to be economically viable otherwise. See *supra* text accompanying note 38.

101. Drahozal, *supra* note 27, at 775–77.

102. The California Court of Appeal ordered arbitration to proceed on a class basis in the well-known *Southland* case. *Keating v. Superior Court*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984); see also



The AAA Class Arbitration docket provides a source of data on the use of class arbitration.<sup>104</sup> Figure 2 shows the trend in filings of class arbitrations with the AAA.<sup>105</sup> Claimants filed roughly fifty cases a year from 2004 to 2006, and then filings declined somewhat to thirty-six in 2007. Whether the decline is permanent (perhaps due to increased use of class arbitration waivers)<sup>106</sup> or simply temporary is too early to tell. Certainly the docket is active, and provides a possible alternative for at least some claimants who cannot bring a class action in court because they have agreed to arbitrate.

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Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

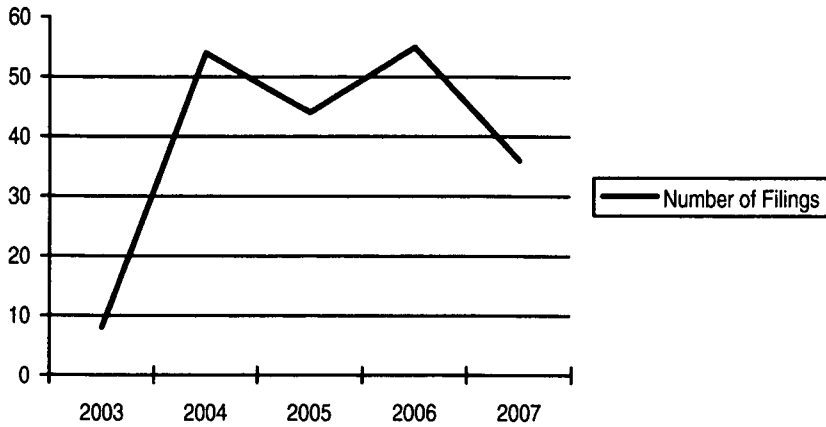
103. 539 U.S. 444 (2003). Effective October 8, 2003, the American Arbitration Association promulgated Supplementary Rules for Class Arbitrations. Am. Arbitration Ass'n, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* <http://www.adr.org/sp.asp?id=21936> [hereinafter AAA Class Arbitration Rules]. The AAA will administer class arbitrations "if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." Am. Arbitration Ass'n, Policy on Class Arbitrations (effective July 14, 2005), *available at* <http://www.adr.org/sp.asp?id=28779>. If the arbitration agreement "prohibits class claims, consolidation or joinder," the AAA will not administer a demand for class arbitration "unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association." *Id.* JAMS has also promulgated class arbitration rules. See JAMS Class Action Procedures (Feb. 2005), *available at* [http://www.jamsadr.com/rules/class\\_action.asp](http://www.jamsadr.com/rules/class_action.asp).

104. The AAA Class Arbitration Docket is available on the AAA web site, and includes not only the names of the parties and their counsel, but also copies of the demand for arbitration, notices of hearings (including the date, time and place of the hearing), and copies of any awards. See Am. Arbitration Ass'n, Searchable Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Jan. 29, 2008). Party filings are not available on the web site, nor are hearing transcripts or exhibits. The AAA Class Arbitration Rules depart from the usual practice of secrecy in arbitration: "The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations." AAA Class Arbitration Rules, *supra* note 103 (Rule 9(a)).

105. The data on AAA class arbitration filings in Figure 2 comes from the AAA Class Arbitration Docket. I appreciate Mark Weidemaier providing me with data through early 2007. I collected updated data as of March 6, 2008.

106. See *infra* text accompanying notes 110–120.

FIGURE 2  
AAA CLASS ARBITRATION FILINGS



Little empirical work has been done on AAA (or other) class arbitrations. No published studies have looked at the outcomes of class arbitrations, presumably because (like class actions in court) most cases are settled. Some sort of evaluation would need to be done before the suitability of class arbitration as a substitute for class actions could be evaluated.

The only published study of AAA class arbitration awards was by Deruelle and Roesch, who examined all “clause construction awards” published on the AAA class arbitration docket.<sup>107</sup> “Clause construction awards” are awards that determine whether the parties’ arbitration agreement permits arbitration to proceed on a class basis.<sup>108</sup> Deruelle and Roesch reported that, “[a]s of June 15, 2007, AAA arbitrators have rendered 51 Clause Construction Awards concerning otherwise silent arbitration agreements, and in *all but two* of those decisions, the arbitrators have allowed classwide proceedings.”<sup>109</sup> Thus, when the arbitration clause is silent on the availability of class arbitration, AAA arbitrators have consistently permitted the arbitration to proceed on a class basis.

A possible response to the growth of class arbitration would be for the party drafting the arbitration clause to include language in

107. P. Christine Deruelle & Robert Clayton Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now—Part I*, METROPOLITAN CORP. COUNS., Aug. 2007, at 9, available at <http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf>.

108. AAA Class Arbitration Rules, *supra* note 103 (Rule 3).

109. Deruelle & Roesch, *supra* note 107, at 9.

the clause precluding the arbitration from proceeding on a class basis, in other words, language waiving class arbitration. Justice Stevens predicted as much during oral argument in *Bazzele*.<sup>110</sup> The available empirical evidence is mixed on the extent to which drafters include class arbitration waivers in their arbitration clauses.<sup>111</sup> In their study of consumer arbitration clauses, Demaine and Hensler found that “[s]ixteen of the fifty-two arbitration clauses (30.8%) explicitly prohibit class actions with the arbitration proceeding, and none of the remaining clauses explicitly provide for class actions.”<sup>112</sup> More recently, in the paper they prepared for this symposium, Eisenberg et al. reported that 100% (20 of 20) of the consumer arbitration clauses in their sample (principally in credit card and cell phone contracts) included class arbitration waivers.<sup>113</sup>

By comparison, Florencia Marotta-Wurgler, in her study of dispute resolution clauses in software licensing agreements, found that “[n]ot a single EULA out of 597 includes a class-action waiver.”<sup>114</sup> Based on her findings, Marotta-Wurgler argues that

[a]lthough much analysis remains to be done, these results immediately cast doubt on casual claims that sellers’ rampant

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110. Transcript of Oral Argument at 55, *Green Tree Fin. Corp. v. Bazzele*, 539 U.S. 444 (2003) (No. 02-634), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-634.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-634.pdf) (“Does this case have any real future significance, because isn’t it fairly clear that all the arbitration agreements in the future will prohibit class actions?”) (Stevens, J.).

111. Although courts (and some commentators) commonly refer to these sorts of provisions as “class action waivers,” it is more accurate to call them “class arbitration waivers.” It is the arbitration clause, without any additional language, which precludes the claimant from being party to a class action in court. Thus, the arbitration clause itself is the class action waiver. The additional language excluding class relief in arbitration is not a class action waiver, but rather a class arbitration waiver.

112. Demaine & Hensler, *supra* note 40, at 65. Mark Weidemaier found a much smaller frequency of class arbitration waivers in a sample of arbitration clauses in AAA class arbitrations. See W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 85 n.102 (2007) (“Of [a sample of 32 agreements in AAA class arbitrations], 5 of the 16 (31%) of the consumer agreements forbid class actions, but none of the 16 employment agreements contains a similar term.”). The smaller frequency of class arbitration waivers is not surprising, given that the AAA refuses to administer class arbitrations when the arbitration clause includes a class arbitration waiver, unless directed to do so by a court. See *supra* note 103.

113. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (2008). By comparison, none (0 of 13) of the employment contracts (which, given that their data source for these contracts was SEC filings, would have been employment contracts of corporate executives) and only 2 of 7 (28.6%) of the other “material” contracts in their sample included class arbitration waivers. *Id.*

114. Florencia Marotta-Wurgler, “Unfair” Dispute Resolution Clauses: Much Ado About Nothing?, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 51 (Omri Ben-Shahar ed., 2007).

use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims.<sup>115</sup>

There is evidence, however, that the use of class arbitration waivers has increased in recent years, at least in certain types of contracts. Drahozal and Wittrock compare franchise agreements from identical franchisors in 1999 and 2007.<sup>116</sup> Their results show that the percentage of franchise arbitration clauses with class arbitration waivers increased from 53.6% of the clauses in 1999 to 78.6% of the clauses in 2007.<sup>117</sup> Variations in the provisions of the class arbitration provisions are shown in Table 7.

TABLE 7  
CLASS ARBITRATION AND CLASS ACTION  
PROVISIONS IN FRANCHISE AGREEMENTS

	1999	2007
<i>Class arbitration waiver</i>	15 (53.6%)	22 (78.6%)
Waives class arbitration	11 (39.3%)	15 (53.6%)
Waives class relief; includes severability provision	0 (0%)	3 (10.7%)
Waives class relief; includes option re provider	0 (0%)	1 (3.6%)
No joinder or consolidation	2 (7.1%)	2 (7.1%)
Individual proceedings only	2 (7.1%)	1 (3.6%)
Permits class arbitration for specified type of claim; otherwise waives class arbitration	2 (7.1%)	2 (7.1%)
Permits consolidation and class actions in court, but waives class arbitration	1 (3.6%)	1 (3.6%)
None	10 (35.7%)	3 (10.7%)

One noteworthy variation is the inclusion in arbitration clauses of what has been called a “non-severability” provision, providing that if the class arbitration waiver is held unenforceable, then the entire arbitration clause is unenforceable.<sup>118</sup> Drahozal and Wittrock found that over 10% (3 of 28) of franchise arbitration clauses in

115. *Id.*

116. Drahozal & Wittrock, *supra* note 45, at 21–22.

117. *Id.* at 37.

118. In other words, the clause provides that the class arbitration waiver is not severable from the rest of the arbitration clause, rendering the entire arbitration clause invalid if the class arbitration waiver is invalid.

2007 included non-severability provisions,<sup>119</sup> while Eisenberg et al. reported that 60% (12 of 20) of the consumer arbitration clauses in their sample included such provisions.<sup>120</sup>

Given the number of courts that have held class arbitration waivers unenforceable, such non-severability provisions may result in an increasing number of cases returning to court as class actions.<sup>121</sup> Thus, the effect of arbitration clauses on the availability of class relief remains an open question.

## CONCLUSION

Any conclusions drawn from the empirical evidence on arbitration costs and accessibility are necessarily tentative given the limited research to date and the challenges inherent in such research. Nonetheless, the available evidence suggests the following about the costs of arbitration and whether arbitration is an accessible forum for consumers and employees.

1. For some categories of disputes, administrative fees and arbitrators' fees exceed the filing fees in court. But provider organizations have capped those fees for small consumer claims and many employee claims, so that upfront costs in arbitration for those claims should be very similar to upfront costs in court. Whether arbitration is more or less costly than litigation overall depends on how attorneys' fees and other costs compare. Survey evidence and business experience provides some evidence that the total costs of arbitration are lower than in litigation, but the evidence is too limited to draw definitive conclusions.

2. The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims. Consumers and employees bring claims in arbitration that would not be economical to bring in litigation. For employees and consumers with larger claims the evidence is less clear. Whether arbitration is a more (or less) accessible forum for such parties depends on how attorneys' fees and other costs, as well as expected recoveries, compare in arbitration and litigation.

3. Finally, the evidence is particularly uncertain for claimants whose claims are only economical to bring on a class basis. The

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119. *Id.* at 33–34.

120. Eisenberg et al., *supra* note 113, at 885.

121. For further discussion of this point, see Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Class Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. (forthcoming 2008).

extent of such claims is unclear, particularly when the availability of statutory fee-shifting provisions is taken into account. Nor has the suitability of class arbitration as a substitute for class actions been systematically studied. Finally, the growing use of class arbitration waivers (particularly when coupled with non-severability provisions) raises a host of issues that are only beginning to be studied. More research is needed—on class arbitration and on arbitration costs in general.

