

A Publication of the

Committee on

# CONFLICT MANAGEMENT

discovery.

- It is noteworthy that the mediation here did not cost a penny. In mediation, the parties stood a good chance, say 50 to 70% , of settling the case, but when they did not settle, they got more than the cost of the mediation back in the

the Southern District of New York for the period April 1, 1997 to July 31, 2001, (ii) a survey of securities industry arbitration awards based on available National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitration awards made between January 1989 through February 2002 in

damage verdicts skewed the average upward. In those cases where plaintiff prevailed, the median attorneys' fees award was \$69,388 and the average attorney fee award was \$149,756. The median time from filing to verdict was twenty-five months, the average time to verdict was twenty-eight months.

**Employment Disputes In Securities Industry Arbitrations**

We also surveyed outcomes of the arbitration of employment disputes in the securities industry. Our data was compiled from reported NASD and NYSE arbitration awards made between January 1989 through February 2002 in five hundred seventy-two (572) employment cases. These cases displayed an array of employment related claims, as reflected in Table I.

**Table I**  
**Securities Arbitration Awards In Employment Cases**  
(Reported from January 1989 through February 2002)

Type	Median Arbitration Award	Average Arbitration Award	Total Decisions	Claimants Awarded: Number (Percent)
Wrongful Termination	\$77,703	\$528,351	350	139 (39.71%)
Sex Harassment	\$45,000	\$96,539	50	13 (26.00%)
Sex Discrimination	\$51,214	\$98,951	81	24 (29.63%)
Age Discrimination	\$160,313	\$258,352	102	33 (32.35%)
Race Discrimination	\$50,000	\$85,000	26	4 (15.38%)
Whistleblowing	\$98,500	\$105,125	13	4 (30.77%)

Of the 572 employment cases we examined, claimants received monetary relief in approximately 44% of the cases, and respondents prevailed in approximately 56% of the cases. The median award to prevailing claimants was \$75,000 and the average award was \$385,193. The average award is substantially skewed by one 1990 NASD panel award of \$38,000,000. Data concerning the duration of the cases and the hearings, are provided in Table II.

**Table II**

**Duration Of Proceedings In Securities Arbitration Of Employment Cases**

(Reported from January 1989 through February 2002)

TIME FROM STATEMENT OF CLAIM TO DECISION & NUMBER OF HEARING SESSIONS				
FORUM	Median Time to Decision	Average Time to Decision	Median # of Hearing Sessions	Average # of Hearing Sessions
BOTH NYSE AND NASD	1 Year 4 Months	1 Year 7 Months	8	11.85
NYSE	1 Year 1 1/2	1 Year 4 1/2	10	13.91
NASD	1 Year 4 1/2 Months	1 Year 8 Months	8	11.27

In order to draw a more time-relevant comparison with our study of court outcomes in the Southern District of New York, we isolated arbitration made between April 1, 1997 through July 31, 2001, the same period as the court case study. In this time frame, there were a total of 186 arbitration awards with claimants prevailing in 46% of the cases and respondents prevailing in 54% of the cases. Median damages in this subset of the data for prevailing claimants were \$100,000 and average damages were \$236,292. Median attorneys' fees awarded to successful claimants were \$76,684 and average fees were \$36,282. Median time from filing to decision was 16½ months and average time to decision was 20½ months.

**Comparison Of Dispute Resolution Outcomes In Litigation And Arbitration**

We compare the data from the Federal Court Survey and the Securities Industry Arbitration Survey for the April 1, 1997 through July 31, 2001 time period in Table III. While no one should use information such as this to draw final conclusions about such a complex issue, the data do present a counter-point to some of the stereotypical criticisms expressed by opponents of private arbitration systems such as that in the securities industry.

First, the results from our Southern District of New York survey indicate that only a very small percentage (3.80%) of filed employment

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discrimination cases ever progress as far as a jury verdict. With so few cases ever reaching a jury for decision, its importance as a dispute resolution forum in the aggregate appears to be vastly overstated.

**Table III**

**COMPARISON OF OUTCOMES**

outcomes from the use of public and private tribunals in the adjudication of employment disputes. We must also ask whether these differences are statistically significant. An ideal statistical experiment would randomly assign cases alternately to private and public forums for the adjudication of these disputes. Clearly, this is impractical. In drawing upon actual cases, it would be preferable to have additional information such as the type of claims made in the Federal cases, and how their distribution corresponds to

additional control variables in a regression model is not likely to change the finding that for this sample the plaintiff has a greater chance of winning if a claim is brought to arbitration than to trial.

In order to further show the impact of these estimates, we simulated the expected dollar outcome of going to arbitration versus the federal courts by multiplying the likelihood of winning times the expected payoff. This produced a comparison of \$127,704 for the federal courts versus \$110,500 for arbitration. However, if the "payoff" includes both the compensatory award and legal fees, the plaintiffs receive more, on average, with arbitration. Clearly, these estimates show that for this kind of employment-related alternative dispute resolution procedure, plaintiffs are well served by arbitration relative to the federal courts both in terms of speedy justice and the likelihood of a positive outcome for plaintiffs.

### Conclusion

Although our studies present limitations,

arbitration awards for a nearly three year period, the success rate for civil rights plaintiffs in federal court in New York, in the relatively small number of cases that go to a jury for decision, is in fact lower than the success rate for discrimination claimants in arbitration. Moreover, the process benefits of faster dispute resolution and lower transactional costs (i.e., attorneys' fees expended) are also borne out by our surveys. While the statistical information presented herein is by no means intended to finally resolve the broader policy debate on the benefits or disadvantages of pre-dispute arbitration, it does provide a strong rebuttal to those opponents of arbitration who have argued with absolutely no empirical support that private arbitration systems are structurally biased.

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<sup>1</sup> L Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L.Rev. 223 (Winter 1998).

<sup>2</sup> William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 J. DISP. RESOL. 40 (1995).