

# **Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective**

Charles D. Coleman\*

A funny thing is happening to employers on the road to mandatory employment arbitration: some of them are beginning to wonder if they took the wrong route. As the courts have opened the gates to mandatory employment arbitration, the focus for many employers has shifted away from whether an employer may legally require arbitration of employment disputes to whether it makes good business sense to do so. Many employers are realizing that mandatory arbitration may not be the right path to resolving employment disputes because it may be just as expensive and take almost as long as the congested and costly toll road of litigation.

This Article will examine the advantages and disadvantages of mandatory employment arbitration from an employer's point of view. It will review the general policy arguments for and against mandatory employment arbitration and will focus on two key factors in analyzing the relative advantages of mandatory employment arbitration over litigation: the cost and the period

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\* Senior Counsel, Raytheon Company. The views expressed in this paper are those of the author and do not necessarily reflect the views of Raytheon Company. An earlier version of this Article was presented at the American Bar Association Section of Labor and Employment Law Third Annual CLE Conference on November 7, 2009, in Washington, D.C. The author wishes to acknowledge the assistance of William C. Murley, Senior Counsel, Raytheon Company, in the preparation and review of this Article.

of time required to resolve an employment dispute. It will include an analysis of the still somewhat limited available data regarding those two key factors, including new data provided by one major employer. The Article also will examine the impact of several recent Supreme Court decisions on an employer's ability to obtain dispositive motion relief in litigation and the difficulties of having an arbitration award reviewed on appeal. The Article will then conclude with a discussion of why voluntary arbitration of employment disputes, as a component of a broader alternative dispute resolution (ADR) process, may be a better choice for employers than mandatory arbitration.

### **The Legal and Business Environment Regarding Mandatory Employment Arbitration**

As several commentators have noted,<sup>1</sup> over the nineteen years since the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>2</sup> and particularly since its 2001 decision in *Circuit City Stores, Inc. v. Adams*,<sup>3</sup> it has become clear that the law permits employers outside of the transportation industry to require that employees arbitrate employment disputes, provided certain due process requirements are met. Lower courts, both federal and state, have increasingly given their approval of mandatory employment arbitration.<sup>4</sup> The Supreme Court reiterated its approval of mandatory employment arbitration just this past term in *14 Penn Plaza*

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<sup>1</sup> See, e.g., David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1558–59 (2005).

<sup>2</sup> 500 U.S. 20 (1991).

<sup>3</sup> 532 U.S. 105 (2001).

<sup>4</sup> See, e.g., Sherwyn, Estreicher & Heise, *supra* note 1, at 1558 n.5.

*LLC v. Pyett*, holding that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”<sup>5</sup>

Given the legal environment permitting employers to require mandatory arbitration of employment disputes, many employers have implemented such programs. A 2008 survey of corporate counsel by Fulbright & Jaworski found that of the 251 participants from the United States, twenty-five percent had company-required arbitration of non-union employment disputes.<sup>6</sup> Many employers have incorporated mandatory arbitration as part of a broader ADR process. It is generally acknowledged that most large companies in the United States use some form of ADR to resolve employment disputes.<sup>7</sup>

### **Advantages and Disadvantages of Mandatory Employment Arbitration**

Employers cite several reasons for including mandatory employment arbitration in their ADR processes. A non-exhaustive list of the reasons includes greater privacy, increased

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<sup>5</sup> 129 S. Ct. 1456, 1474 (2009).

<sup>6</sup> FULBRIGHT & JAWORSKI, FIFTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 44 (2008), *available at* <http://www.fulbright.com/litigationtrends> [hereinafter LITIGATION TRENDS].

<sup>7</sup> *See, e.g.,* David B. Lipsky, *Presidential Address: Conflict Resolution and the Transformation of the Social Contract*, 59 LAB. & EMP. REL. ASS’N 9 (2007), *available at* [http://www.press.uillinois.edu/journals/irra/proceedings2007/lipsky\\_address.html](http://www.press.uillinois.edu/journals/irra/proceedings2007/lipsky_address.html) (“We discovered that virtually every major corporation in the United States now uses ADR to resolve employment disputes . . .”).

predictability, enhanced settlement potential, and possible insurance discounts.<sup>8</sup> The two factors cited perhaps most often by employers in support of mandatory arbitration are that it is less expensive and faster than litigation.<sup>9</sup> These factors are examined more closely below.

There are, of course, several potential disadvantages of mandatory employment arbitration.<sup>10</sup> One disadvantage is employee resistance and skepticism, particularly when a program is in its initial stages. Another disadvantage is that there is some remaining—albeit decreasing—legal uncertainty regarding the implementation and administration of mandatory employment arbitration. In the view of many employers, two of the more significant disadvantages include the limited ability to obtain summary judgment and other dispositive motion relief in arbitration, and the narrow grounds for appeal in the event of an adverse arbitration award. These disadvantages will be discussed in more detail later in the Article.

### **Mandatory Employment Arbitration From the Employee’s Perspective**

Advocates for employees argue that mandatory arbitration of employment disputes is unfair to the employees for several reasons.<sup>11</sup> They claim that requiring an employee to arbitrate

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<sup>8</sup> See A. Michael Weber, *Rise of ADR for Workplace Disputes*, 240 N.Y.L.J. 23–24 (July 17, 2008).

<sup>9</sup> See generally Sherwyn, Estreicher & Heise, *supra* note 1, at 1564 n.26.; Weber, *supra* note 8.

<sup>10</sup> Weber, *supra* note 8.

<sup>11</sup> A discussion of the arguments that arbitration does not allow for the development of the law, is private, and does not provide for public accountability is beyond the scope of this Article.

employment disputes constitutes a contract of adhesion that is fundamentally unfair to the employee due to the greater bargaining power of the employer. Courts have generally rejected that argument and held that an employer may require mandatory arbitration of employment claims if the arbitration agreement or program complies with certain procedural requirements that prevent procedural or substantive unconscionability.<sup>12</sup> Some commentators have noted that mandatory employment arbitration is consistent with other aspects of employment over which employees rarely negotiate, such as health and life insurance, pension or 401(k) plan provisions, vacation, sick pay, severance, and noncompetition agreements, all of which employers typically present to employees on a take-it-or-leave-it basis.<sup>13</sup>

Employee advocates claim the expense of mandatory employment arbitration poses an undue burden on employees. Yet many mandatory arbitration programs do not require the employee to pay any of the arbitrator fees and costs associated with the arbitration, or require only a nominal payment that is generally equal to or less than the filing fee an individual would

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<sup>12</sup> *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”). *But see Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (finding that Circuit City’s Dispute Resolution Agreement was “procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely.”).

<sup>13</sup> Sherwyn, Estreicher & Heise, *supra* note 1, at 1564.

have to pay if he or she filed a lawsuit in court. Employees generally are required to pay their own attorneys' fees and other costs in most mandatory arbitration programs, unless fees and costs are available to them under statute, but that would also be the case if the employee attempted to resolve the matter in court.

Employee advocates also contend that some mandatory arbitration programs attempt to limit damages by disallowing certain types of damages or placing caps on damages below those set by statute or applicable case law. Many, if not most, mandatory employment arbitration programs now permit employees to recover damages on the same basis as allowed by law. To the extent an employer attempts to limit damages in mandatory arbitration or otherwise limit remedies beyond what is allowed by law, the courts have struck down or severed the unenforceable limitations on remedies.<sup>14</sup> Courts also have disallowed provisions in mandatory arbitration programs that attempt to reduce the period of limitations or otherwise shorten the length of time available to an employee to take any action in connection with an employment claim.<sup>15</sup>

Another argument advanced by critics against mandatory employment arbitration is that employees do not fare as well in arbitration as they do in litigation, particularly when compared to trial by jury. A number of studies have analyzed this argument, but given the differences

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<sup>14</sup> *See, e.g., Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (holding that an arbitration agreement provision limiting remedies can be severed, especially if the arbitration agreement provides specifically for severance of provisions found to be in conflict with applicable law); *Paladino v. Avnet Computer Tech.*, 134 F.3d 1054, 1058 (11th Cir. 1998).

<sup>15</sup> *See, e.g., Adams*, 279 F.3d at 894–95.

between arbitration and litigation, it is difficult to support or refute the conclusion that employees have a higher rate of success in litigation compared to arbitration. Those who have examined the success rate of employees in arbitration versus litigation have noted several problems in ensuring the process is a true apples-to-apples comparison. It is extremely rare that the same case is both arbitrated and litigated.

Researchers have attempted to compare matters that are as similar to each other as possible but which have proceeded down alternative paths of either arbitration or litigation. Challenges remain in ensuring that the comparison is fair. One challenge is accounting for the fact that cases in the litigation system are routinely dismissed prior to trial by means of a motion for summary judgment or other dispositive motion, whereas pre-hearing adjudication is rare in the arbitration system. Any comparison of win/loss rates at trial versus win/loss rates in arbitration are therefore suspect, since many of the wins for employers, who file the vast majority of the dispositive motions in employment litigation, are not included in the trial win/loss figure.<sup>16</sup> Some commentators who have studied the issue and who have made a series of assumptions to level the playing field between litigation and arbitration have concluded that plaintiffs (employees) do not fare significantly better in litigation.<sup>17</sup>

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<sup>16</sup> See Sherwyn, Estreicher & Heise, *supra* note 1, at 1564–69 (citing Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998)) (discussing a 1994 study of federal courts in which definitive judgments were issued in 3,419 cases, of which sixty percent arose as a result of dispositive motions in which employers prevailed ninety-eight percent of the time).

<sup>17</sup> *Id.* at 1564.

Another complication in comparing the win/loss rates of the parties in litigation versus mandatory arbitration is the fact that many employers have policies that include a number of internal steps prior to arbitration. The steps may include some type of internal review by human resources officials, higher levels of management, or an ombudsman, and, in some cases, mediation by an outside neutral. These steps perform what has been described as a “filtering” function. One group of commentators has written:

Differences in internal filtering between arbitration and litigation systems likely skew win/loss arbitration results in favor of employers: Employers might use the internal filters to better determine if a case has merit and then to settle the meritorious cases. Therefore, such cases would not be arbitrated.<sup>18</sup>

The same commentators make the point that because of the likely lower costs of pursuing a claim to arbitration, arbitrated cases are likely to have less merit, on average, than litigated cases that settle.<sup>19</sup> Further, an employer with a longstanding program featuring such filtering mechanisms will have a higher win rate than a comparable employer lacking such internal filters.<sup>20</sup>

### **Employers Have No Inherent Preference for Arbitration Over Litigation Based on the Fairness of the Decision in Either System**

While it would be naive to suggest that employers do not analyze issues such as whether they have a better chance for success in litigation versus arbitration, this does not appear to be the most important factor for employers in assessing whether they should implement or continue a mandatory employment arbitration program. I think most employers recognize that any ADR process, including those with mandatory employment arbitration, must be fair and give

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<sup>18</sup> *Id.* at 1566 (footnote omitted).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

employees the opportunity to prevail if their case is meritorious. They realize that an ADR process is a means of resolving disputes with their employees or former employees. Employers understand the value in having a system that allows employees to resolve disputes with the employer, both those that involve alleged violations of law and those which do not rise to the level of a claim that could be brought in court. Employers also understand that if a fair and neutral decision-maker determines that the employer was wrong, then it should be required to provide the employee with an appropriate remedy. I do not believe employers have any particular bias for arbitrators as opposed to juries or judges in terms of which makes better decisions. In that sense, I think many employers are neutral in their preference for arbitration or litigation.

### **Employers Are Concerned With the Speed and Cost of Dispute Resolution Systems**

Employers are concerned about the high costs associated with resolving disputes with their employees. The primary costs to an employer include the attorneys' fees and costs associated with resolving the dispute, the opportunity costs relating to the employees' participation in the litigation or arbitration process, and paying any judgment or award.

Employers are also concerned with the time it takes to resolve a dispute. Disposition time impacts the cost of resolving the dispute due to the attorneys' fees that are incurred the longer a matter is litigated or arbitrated, and the back pay damages an employee accrues. Disposition time also goes to the issue of employee morale in the sense that "justice delayed is justice denied." Ideally, employers want to utilize the dispute resolution system that best reduces or avoids unnecessary costs and obtains resolution in the shortest period of time.

### **Mandatory Employment Arbitration May Not Be Faster or Less Expensive Than Litigation**

For many years the conventional wisdom has been that arbitration is a faster and less expensive alternative to litigation in resolving employment disputes. Studies based on limited and relatively old data have generally supported the conventional wisdom.<sup>21</sup> These assumptions have led many employers to adopt mandatory employment arbitration. Employers have done so with the knowledge that they rarely will be able to obtain summary judgment or other dispositive motion relief in arbitration, and that in most cases, arbitration awards are not subject to review on appeal. Employers have weighed the touted advantages of mandatory employment arbitration's lower cost and faster disposition time against the prospects of not being able to win on summary judgment or to appeal what they may consider to be an unfair arbitration award. They have generally come to the conclusion that the cost and speed advantages outweigh the disadvantages of not being able to prevail on a dispositive motion or appeal an unfair arbitration award.

The conventional wisdom may be changing. Many employers are realizing that the costs of arbitration can be substantial. The data from a recent survey and one company's own study are revealing. A 2008 survey of senior corporate counsel in the United States found that among the largest companies, twenty-three percent spent an average of between \$50,000 and \$100,000 arbitrating each employment dispute, and nineteen percent spent \$100,000 or more per dispute.<sup>22</sup>

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<sup>21</sup> See, e.g., *id.* at 1564 (“We conclude . . . that arbitration provides a quicker resolution than litigation . . . .”); 1572–73.

<sup>22</sup> See LITIGATION TRENDS, *supra* note 6, at 45. The figures for smaller companies indicated that almost one-third spent \$50,000 to \$100,000 per dispute, and a quarter of them spent more than \$100,000. A quarter of the mid-sized companies spent \$50,000 to \$100,000 and 12% averaged \$100,000 or more per dispute. *Id.*

A recent review conducted by a major U.S. employer<sup>23</sup> that shared its data with the author suggests that arbitration is just as expensive and actually takes longer to resolve a dispute than does litigation. The employer reviewed nineteen single-plaintiff employment disputes over a twelve-month period during 2006–07. The employer had an ADR procedure that included two separate lower-level reviews of disputes by the company’s human resources department; a third level of review by a three-member, vice-president level board; and, if not resolved at the board stage, mandatory arbitration. During the period in question, the employer allowed ten of the nineteen plaintiffs to proceed with litigation rather than compelling arbitration. As detailed in Table 1, *infra*, the total outside counsel fees for the nine arbitrated cases amounted to \$710,323.50. The total outside counsel fees for the ten litigated cases were \$631,443.38. Thus, the average outside counsel fees for the arbitration cases was \$78,924.83, and the average for the litigated cases was \$63,144.33. The range of the outside counsel fees for the arbitration cases was \$11,462.50 to \$283,583.45, and the range for the litigation cases was \$5,846.75 to \$215,977.70.

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<sup>23</sup> The employer asked to remain anonymous.

**Table 1: Outside Counsel Fees**

No.	ATTY. FEES	MATTER	No.	ATTY. FEES	MATTER
A-1	\$283,583.45	Arbitration	L-1	\$38,915.75	Litigation
A-2	\$82,000.80	Arbitration	L-2	\$5,846.75	Litigation
A-3	\$13,043.35	Arbitration	L-3	\$36,743.30	Litigation
A-4	\$166,329.00	Arbitration	L-4	\$54,089.58	Litigation
A-5	\$11,462.50	Arbitration	L-5	\$4,732.57	Litigation
A-6	\$39,521.25	Arbitration	L-6	\$37,043.22	Litigation
A-7	\$21,390.20	Arbitration	L-7	\$14,885.56	Litigation
A-8	\$48,326.25	Arbitration	L-8	\$46,120.15	Litigation
A-9	\$44,666.70	Arbitration	L-9	\$215,977.70	Litigation
			L10	\$177,088.70	Litigation
<b>Total</b>	<b>\$710,323.50</b>	<b>Arbitration</b>		<b>\$631,443.28</b>	<b>Litigation</b>

As described in Table 2, when arbitrator and witness fees are added, the totals were \$921,042.22 for arbitration and \$704,908.20 for litigation. The total costs, including settlement, were almost identical: \$938,509.15 for the arbitration cases compared with \$935,086.03 for the litigation cases. Of the nine arbitration cases, five were decided in favor of the employer, two settled, and two were pending at the time data were shared; by comparison, three of the litigation cases were dismissed, two settled, and five were pending.

**Table 2: Total Fees and Costs**

No.	Total Fees	Matter	No.	Total Fees	Mater
A-1	\$403,033.90	Arbitration	L-1	\$42,117.62	Litigation
A-2	\$98,770.66	Arbitration	L-2	\$5,846.83	Litigation
A-3	\$13,476.77	Arbitration	L-3	\$37,488.46	Litigation
A-4	\$203,398.39	Arbitration	L-4	\$56,662.09	Litigation
A-5	\$16,974.39	Arbitration	L-5	\$5,836.50	Litigation
A-6	\$51,916.10	Arbitration	L-6	\$37,567.58	Litigation
A-7	\$24,528.41	Arbitration	L-7	\$15,480.87	Litigation
A-8	\$52,100.76	Arbitration	L-8	\$46,599.15	Litigation
A-9	\$56,842.84	Arbitration	L-9	\$248,654.30	Litigation
			L-10	\$208,654.80	Litigation
<b>Total</b>	<b>\$921,042.22</b>	<b>Arbitration</b>		<b>\$704,908.20</b>	<b>Litigation</b>

Thus, the average of the total costs for the arbitration cases divided by the number that were either decided in favor of the employer or settled is \$134,072.73, and the average of the total costs for the litigation cases divided by the number that were either dismissed or settled is \$187,017.21.<sup>24</sup>

The “life cycle” or disposition time for the two groups, shown in Table 3, was somewhat surprising. The life cycle of the average arbitration case was twenty-one months. The life cycle of the average litigation case was seventeen months.

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<sup>24</sup> It is not clear from the data provided which of the nineteen matters were dismissed, settled, or were pending, and we therefore cannot determine the precise averages for each of the categories.

**Table 3: Life Cycle Time**

No.	LIFE CYCLE TIME (Months)	MATTER	No.	LIFE CYCLE TIME (Months)	MATTER
A-1	54	Arbitration	L-1	21	Litigation
A-2	23	Arbitration	L-2	10	Litigation
A-3	36	Arbitration	L-3	14	Litigation
A-4	14	Arbitration	L-4	14	Litigation
A-5	4	Arbitration	L-5	3	Litigation
A-6	7	Arbitration	L-6	7	Litigation
A-7	16	Arbitration	L-7	4	Litigation
A-8	9	Arbitration	L-8	25	Litigation
A-9	24	Arbitration	L-9	44	Litigation
			L-10	28	Litigation
<b>Average</b>	<b>21</b>	<b>Arbitration</b>	<b>Average</b>	<b>17</b>	<b>Litigation</b>

The survey and study cited above are obviously not sufficient by themselves to conclude definitively that arbitration is as costly or takes as long as litigation. More information is needed. There seems, however, to be increasing evidence that the assumptions that arbitration is cheaper and faster than litigation may not be correct, or at least that those advantages may not be as significant as previously believed.

**Possible Explanations Why Employment Arbitration Is Taking Longer and Becoming More Expensive**

There are several possible explanations for what may be closing the gap between employment arbitration and litigation in terms of disposition time and cost. One possibility is that employment arbitrations have started to mirror employment litigation's increased discovery and motion practice, thereby increasing the cost both in terms of attorneys' fees and arbitrators' fees. This is in sharp contrast to arbitrations under collective bargaining agreements, where, at

least in the author's experience, there is still little or no discovery or other pre-hearing proceedings.

The increase in discovery and pre-hearing motions might be attributable to an increase in the number of parties represented in arbitration by attorneys who come from a civil litigation background or who otherwise have little or no experience with traditional labor arbitrations. Likewise, many employment arbitrators now come from civil litigation or other backgrounds and, in the author's experience, tend to treat employment arbitrations more like litigation than like traditional labor arbitrations.

Another factor might be that employees are more likely to be *pro se* in employment arbitration than would be the case in either traditional labor arbitration, where a union representative or an attorney likely would advocate for the employee, or in litigation, where the employee is more likely to have counsel. Arbitrations involving *pro se* plaintiffs are likely to take longer and therefore be more expensive due to the plaintiffs' inexperience with the process, and the tendency, at least of some arbitrators, to allow in evidence from a *pro se* plaintiff that would not be allowed in if the party were represented by counsel.

### **Employers May Want to Reevaluate Mandatory Employment Arbitration**

Whatever the reasons may be, any significant increase in the disposition time or cost of arbitration should lead employers to reconsider whether the advantages are substantial enough to outweigh the employer's ability to obtain dispositive motion relief in litigation. The procedural advantage of litigation has become even more prominent given the recent U.S. Supreme Court decisions in *Bell Atlantic v. Twombly*<sup>25</sup> and *Ashcroft v. Iqbal*.<sup>26</sup> Commentators have cited these

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<sup>25</sup> 550 U.S. 554 (2007).

cases for the proposition that it is now much easier for a federal judge to dismiss a complaint in the initial stages of the lawsuit when the complaint fails to include specific factual allegations on each element of each claim.<sup>27</sup> A frequently-quoted article indicated that the *Iqbal* decision was cited over 500 times by federal judges in just the few months after it was issued.<sup>28</sup> Employers may view these decisions as an opportunity to seek dismissal of non-meritorious claims at the earliest stages of litigation and thereby substantially decrease the disposition time and cost of resolving the matter.

Perhaps more importantly, employers should determine whether the cost and speed advantages of arbitration outweigh the inability of an employer to appeal what it considers to be outrageous or simply unfair arbitration decisions and awards. Judges and juries sometimes render decisions with which the losing party does not agree (and sometimes those with which even the winning party does not agree, particularly as to the amount of damages). The losing party, and sometimes the winning party, has the right to have the decision reviewed by an appellate court. Employers understand that if a judge or a “runaway jury” decides a case in a

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<sup>26</sup> 129 S. Ct. 1937 (2009).

<sup>27</sup> See, e.g., Lawrence W. Marquess & Jeff Timermann, *Tightened Federal Pleading Rules Take Effect: Three Months After the U.S. Supreme Court’s Iqbal Decision*, INSIGHTS (Littler Mendelson) (August 2009), available at <http://www.littler.com/PressPublications/pages/Insights.aspx>.

<sup>28</sup> *Id.* (citing Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10).

manner that exceeds what the law permits, they will have a good chance of having the judgment reduced or reversed on appeal. That is almost never the case in arbitration.

Under the Federal Arbitration Act (FAA),<sup>29</sup> the scope of judicial review of an arbitration award is extremely narrow.<sup>30</sup> The employment arbitration agreements of many employers fall within the scope of the FAA. Under the FAA, an arbitrator's mistake—even a mistake of law—is not a sufficient ground to invoke judicial review. As the Supreme Court recently held in *Hall Street Associates, LLC v. Mattel, Inc.*,<sup>31</sup> a mistake of law is not enough.<sup>32</sup> Further, the Court in *Hall Street* held that the parties may not by contract expand the scope of judicial review of an arbitration award beyond the grounds identified in the FAA.<sup>33</sup>

The inability to appeal an arbitrator's decision can be critical, particularly if the amount of the award is large. A California arbitrator recently issued an award against iFreedom Communications International Holdings Limited and its founder, Timothy Ringgenberg, for more than \$4 billion, including almost \$3 billion in punitive damages. The award was confirmed by the Superior Court of California of Los Angeles County, and judgment was entered against the defendants in favor of the terminated executive who had accused them of breaching his

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<sup>29</sup> 9 U.S.C. §§ 9–11 (2006).

<sup>30</sup> *Id.*

<sup>31</sup> 128 S. Ct. 1396 (2008).

<sup>32</sup> *Id.* at 1405.

<sup>33</sup> *Id.* at 1400.

employment contract, converting shares of stock owed him under the contract, and other employment claims.<sup>34</sup>

Given these developments, employers may decide that litigation is the better means of resolving employment disputes. Each employer must weigh the pros and cons of any time and cost advantage of mandatory arbitration over litigation. Such an analysis should consider both the new legal standards that may make motions to dismiss and other dispositive motions more likely to be granted, and the inability to appeal an adverse arbitration award.

### **Raytheon's Experience**

Raytheon changed its policy in 2006 and transitioned from mandatory to voluntary arbitration of employment disputes. Raytheon still offers employees the opportunity to resolve employment disputes internally through a management review process and external mediation.

Raytheon has been very successful in resolving employment disputes over the six years since we began our ADR program. More than ninety percent of our ADR complaints end at the management response level (step two of our four-step process). Many of these matters would not be eligible for mediation or arbitration, the third and fourth steps of our process, because the claims do not involve violations of law (e.g., a dispute over an employee's performance appraisal rating without any allegation of discrimination). We have also been successful in resolving the remaining ten percent of the ADR complaints at mediation (step three of our process). Almost two-thirds (sixty-four percent) of the cases submitted to mediation result in a settlement. Of the 508 ADR complaints filed over the life of our program, only five cases have gone to arbitration.

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<sup>34</sup> Chester v. iFreedom Commc'ns Inc., No. BC353567, 2009 WL 1641662 (Cal. Super. Ct. May 28, 2009).

In those cases where an employee has a legal claim and is not satisfied with the result of the management review or external mediation, the employee and Raytheon still have the opportunity to agree voluntarily to binding arbitration. However, the parties retain the right to have the courts resolve the dispute.

### **Conclusion**

While employers with ADR policies and procedures may find it beneficial to maintain them, they may want to revisit whether mandatory employment arbitration is the best final step in their ADR process. The speed and cost advantages of arbitration over litigation may not be as great as previously thought. With the Supreme Court's recent decisions in *Twombly* and *Iqbal*, lower federal courts may grant employers' motions to dismiss at a much higher rate than in the past. This would decrease the disposition time and reduce the cost of litigation as a means of resolving employment disputes. Finally, employers that continue to utilize mandatory employment arbitration must be willing to live with an undesirable arbitration award and, in most cases, forgo any appeal, as opposed to the full appellate review available if they receive an adverse litigation judgment.