The New York Times’ Attack on Arbitration

Series highlighted abuses — but also ignored arbitration’s many advantages

By David B. Lipsky

Critics of arbitration have never been in short supply, but in recent years both their number and the intensity of their attacks seem to have increased significantly. Emblematic of the contemporary skepticism about arbitration was a three-part series published in the New York Times late last fall. In this article I will examine the principal arguments made by the Times reporters and attempt to provide a more balanced picture of the pros and cons of arbitration.

In my view, the Times should be applauded for focusing a major series on an important topic that far too often is ignored by the media. For those of us who favor the use of arbitration to resolve disputes, the Times’ attention to the deficiencies in the contemporary practice of arbitration serves as a warning that we need to be diligent in rooting out the abuses and injustices that critics have identified. At the same time, however, in my judgment the Times series is a seriously biased and one-sided attack on a dispute resolution technique that, when properly designed and administered, has proven itself to be an effective method of resolving disputes that might otherwise be costly, time-consuming, and emotionally difficult.

“Beware the Fine Print”

The New York Times series carried the headline “Beware the Fine Print” and was published on three consecutive days, October 31, November 1, and November 2, 2015. In Part I of the series, entitled “Arbitration Everywhere, Stacking the Deck of Justice,” the Times reporters correctly observed, “Over the last few years, it has become increasingly difficult to apply for a credit card, use a cell phone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car, or placing a relative in a nursing home.”1 Part I of the series was nominally about arbitration, but its real focus was on class-action suits. The Times traced how the use of arbitration became linked to the effort by companies to ban class-action suits. There is more than a hint of a conspiracy in the Times account of this development: “More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers … Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits.”2 This group, according to the Times, succeeded in winning two landmark Supreme Court decisions in 2011 and 2013 that supported company bans on class-action claims and reinforced the use of arbitration. Those two court decisions were AT&T v. Concepcion and American Express Co. v. Italian Colors Restaurant.3

In a letter to the Times after the series appeared, Theodore J. St. Antoine expressed a view that I fully share. He emphasized that arbitration itself is not the real problem. “The real vice is the banning of class actions, without which individuals with small monetary claims cannot afford to seek relief in either courts or arbitration … The ban on class actions is the true villain — not the long-accepted, highly useful practice of private arbitration.”4

The Privatization of the Justice System

In Part II of the series, “In Arbitration, a ‘Privatization of the Justice System,’” the Times reporters note that “Little is known about arbitration because the proceedings are confidential and the federal government does
The proceedings are indeed confidential, and only a small proportion of awards are ever published, but after decades of accounts by scholars and practitioners about how arbitration proceedings are conducted, it is inaccurate to say that we do not know much about the everyday practice of arbitration. If the reporters had done their homework, they would have discovered scores of excellent sources on arbitration practice; a good place for them to start, in my opinion, would be Elkouri and Elkouri’s classic opus, *How Arbitration Works*, but any knowledgeable arbitrator or scholar could recommend dozens of other publications on the topic.6

The *Times* reporters apparently were surprised to discover that arbitration “often bears little resemblance to court.” From the start, arbitration was designed to be more informal than litigation, and those of us who study and practice arbitration have always believed that arbitration’s capacity to handle disputes with fewer strictures than litigation is one of its great advantages. The more relaxed features of arbitration save all the parties — employees and consumers as well as companies — time and money. But contrary to the views of the *Times* reporters, there are definite limits on how relaxed arbitration can be, and the courts have thrown out awards that have not met fundamental standards of fairness. Yet the *Times* reporters do not seem to understand such limits to the process’ flexibility. “Behind closed doors,” the *Times* asserts, “proceedings can devolve into legal free-for-alls.”7 The reality, however, is that if the proceedings literally become a legal free-for-all, the losing party has sufficient grounds to appeal the arbitrator’s award and have it vacated. As the series noted, arbitration can be expensive, especially for an individual plaintiff, but the process does have well established rules, and appeals are possible.

The *Times* series focused on abuses of the arbitration process: for instance, the *Times* claims, “To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law.”8 The *Times* misunderstands the process; although arbitrators’ awards need not be strictly consistent with external law, they cannot be “repugnant to public policy.” An arbitrator’s decision may not necessarily be identical to the decision a judge might have reached in the same case, but contrary to the *Times* claim, an arbitrator cannot simply disregard the law.

**The Arbitration of Religious Disputes: “Scripture Is the Rule of Law”**

In Part III of the series, “In Religious Arbitration, Scripture Is the Rule of Law,” the *Times* reports that “For generations, religious tribunals have been used in the United States to settle family disputes and spiritual debates. But through arbitration, religion is being used to sort out secular problems like claims of financial fraud and wrongful death.”9 The *Times* article offers accounts of several cases that illustrate how difficult it can be for an individual to find justice when a religious organization requires a dispute to be submitted to an arbitration that is conducted by faithful adherents of the religion.

In the case of *Garcia v. Scientology*, for example, Luis Garcia, the owner of a successful print shop and yogurt store in Orange County, California, and his wife, Maria, had contributed more than $2 million to Scientology in an apparently futile effort to reach the church’s highest level of “enlightenment.” When they demanded the church refund their money, the church moved to compel arbitration. The Garcias knew that the proceeding would be conducted by committed Scientologists who would serve as the arbitrators, but they had been expelled from the church and no longer thought they were bound by the arbitration agreements Luis Garcia had signed. The Garcias wanted their dispute to be resolved in the courts, but Scientology moved to compel arbitration. “An arbitration run by a panel of Scientologists,” Garcia’s lawyers argued, “could not possibly be impartial.” According to the *Times*, “As a declared suppressive, Mr. Garcia was considered a pariah,” and Scientologists who interacted with him “risked being harassed.”10 Nevertheless, Judge James D. Whittemore of the Federal District Court in Tampa ruled that the Garcias were bound by the terms of the arbitration agreements Luis Garcia had signed, and the judge said that the First Amendment prevented him from considering the issues the Garcias had raised challenging the legitimacy of Scientology as a religion.11

It has long been federal policy to give deference to arbitration as a means of resolving disputes. The use of arbitration by religious organizations adds a further complication, namely, the First Amendment right to religious liberty. If a church, synagogue, or mosque requires its members to use arbitration to
resolve a dispute, does intervention by the courts to limit or prevent the use of arbitration constitute an infringement on religious liberty? If a religious organization requires a congregant to use an arbitration forum to resolve a dispute, as it did in the case of Luis Garcia and his wife, and the case is heard by an arbitrator who is a faithful follower of the religion, can the congregant expect to receive a fair and impartial hearing? At what point do an individual’s civil liberties take precedence over the rights of the religion? These are legitimate questions raised by the Times, and I share the Times’ view that the pendulum in the courts has swung too far in the direction of the right of a religious organization to impose arbitration on a member (and in the case of the Garcias, former members) of the religion.

Is Arbitration a Juggernaut?

Beyond procedural matters, the Times’ assertion that private arbitration constitutes nothing less than the privatization of our system of justice is, in my judgment, mostly off the mark. It must be acknowledged that some scholars have shared the Times’ opinion. For example, David S. Schwartz of the University of Wisconsin Law School has claimed that “the Supreme Court has created a monster. With the Court’s enthusiastic approval, pre-dispute arbitration clauses — agreements to submit future disputes to binding arbitration — have increasingly found their way into standard form contracts of adhesion.” Although Katherine V.W. Stone of UCLA’s School of Law and Alexander J.S. Colvin of Cornell are entirely correct in stating that “over the past 25 years, it has become increasingly commonplace for corporations to insert arbitration clauses into their contracts with customers and employees,” it is a mistake to believe that arbitration has become a “juggernaut” that has replaced our civil justice system.

Tens of thousands of employment and consumer claims are filed in federal and state courts every year. Between 1997 and 2015, 1.7 million discrimination claims were filed with the US Equal Employment Opportunity Commission. Consider the arbitration caseload in the employment arena. In a painstaking search of the American Arbitration Association’s files, Colvin discovered that over a five-year period, from 2003 through 2007, there were 3,945 filings by employees seeking to arbitrate an employment claim. These filings resulted in 1,213 awards, for an average of about 240 a year. A Cornell graduate student, Jesse Klinger, studied the employment arbitration caseload administered by JAMS. He learned that over approximately 10 years, from 2003 to 2013, an average of about 150 employment arbitration claims per year were administered by JAMS, resulting in 26 awards a year.

Ryan Lamare, an Assistant Professor at the University of Illinois at Urbana-Champaign’s School of Labor and Employment Relations, and I collected all the employment arbitration cases administered by the Financial Industry Regulatory Authority (FINRA), the body that administers the dispute resolution program in the securities industry, and discovered that from the inception of the employment arbitration program in 1986 through 2008, a total of about 3,200 awards were issued under FINRA auspices, or on average about 160 awards a year.

It appears that in a typical year, the AAA, JAMS, and FINRA, the three most prominent arbitration providers, administer approximately 500 employment arbitration cases that result in an award. No one knows precisely how many employment arbitration cases are administered by other providers or are self-administered by the parties themselves. Even if the employment arbitration caseload is doubled (a generous assumption), it is highly unlikely that more than 1,000 employment arbitration awards are issued annually. Can anyone rightfully claim that this caseload is a “juggernaut” that has replaced the civil justice system? In my opinion, we have only scratched the surface in using arbitration and other forms of alternative dispute resolution to resolve the thousands of employment and consumer claims that are filed annually in federal and state courts.

Due Process in Arbitration

Of course, the arbitration procedures used to resolve these claims must be fair and impartial, and the Times series emphasizes how often they are not. The Times series, however, downplays the numerous arbitration cases in which essential due-process protections are used in the administration of the cases. It makes no mention, for example, of either the Due Process Protocol for the mediation and arbitration of employment disputes or the Due Process Protocol for consumer disputes. Under the Employment Due Process Protocol, the AAA, the Federal Mediation and Conciliation Service, and the other signatories...
are committed to using fundamental due-process protections in the arbitration and mediation process, including the right of the parties to be represented “by a spokesperson of their own choosing,” to have access to all information and documents relevant to the case, to participate jointly in the selection of a neutral who is well qualified and trained, to eliminate conflicts of interest, and to obtain rulings and remedies consistent with those available in a court of law. Before the AAA administers an employment arbitration case, it seeks to ensure that the parties agree to abide by the Employment Due Process Protocol. Parallel protections are guaranteed under the Consumer Due Process Protocol.

Critics might express skepticism about whether pledges by the AAA and other providers to ensure due process in arbitration are carried out in practice, and to be sure, there are clearly limits on the AAA’s capacity to monitor compliance with its rules and requirements in each and every case. Also, the Times is correct to be concerned about arbitration cases that are not administered by the AAA or other reputable providers or are self-administered by companies. But the Times fails to recognize the degree to which providers, arbitrators, and attorneys have been concerned about abuses in arbitration and have made a strenuous effort to eliminate them.

**Mend It, Don’t End It**

The Times apparently believes that the only remedy to correct the abuses in the use of mandatory arbitration in consumer and employment disputes is to ban its use and return these disputes to the courts. Curiously, the Times series never mentions the fact that the Arbitration Fairness Act (AFA), which has been introduced in Congress in every session since 2007 but has never passed, would ban the use of mandatory arbitration in consumer, employment, civil rights, and franchise disputes.\(^{19}\) In 2009, during President Barack Obama’s first year in office, the Democrats were in control of both houses of Congress, and supporters of the Arbitration Fairness Act believed it had a good chance of passage.

Several of my colleagues and I, anticipating that the Arbitration Fairness Act might pass, mounted an effort to find a middle ground between supporting the use of mandatory arbitration and banning it by federal statute. In 2009, the Association for Conflict Resolution formed a seven-member Task Force to assess the AFA. Joseph B. Stulberg of Ohio State University, who is also co-chair of the Editorial Board of this magazine, was the chair of the Task Force, Sharon Press of Mitchell | Hamline University was the vice-chair, and I was pleased to serve as a member. After six months of study and deliberation, the Task Force produced a 95-page report that thoroughly assessed the pros and cons of the AFA. The members of the Task Force were unanimous in reaching the following conclusions: “The AFA identifies significant problems in the design and administration of some pre-dispute arbitration agreements and practices that require immediate attention and warrant change. Pre-dispute mandatory arbitration has the potential for developing a fast, efficient, fair, low-cost dispute resolution process to which all citizens could gain access and whose procedures and practices are fair and transparent.”\(^{20}\) The Task Force recommended that “Congress should amend the Federal Arbitration
Act to insure access to, transparency in and fairness in the administration and conduct of the mandatory arbitration process. The Task Force members believed the FAA should contain fundamental due process protections, similar to those contained in the Due Process Protocols.

While I was engaged in these efforts, I recalled that in defending affirmative action in 1995, President Bill Clinton recommended that the best approach was to “Mend It, Don’t End It.” Clinton’s prescription for dealing with affirmative action seemed to me then, and still seems to me now, the right approach for handling mandatory arbitration. Currently there is not much chance the approach my colleagues and I prefer will receive serious attention in the Congress, nor is there much chance that Congress will pass the AFA. But it is my fond hope that the New York Times will reconsider its opposition to arbitration, give more weight to the views of scholars and experienced practitioners, and adopt a more balanced and informed view of the topic.

Endnotes

2 Id.
7 Silver-Greenberg and Corkery, supra note 5.
8 Id.

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