Focusing on an Often-Neglected Player in the Mandatory Arbitration Game

Author : Martin H. Malin

Date : November 5, 2020

David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 **Minn. L. Rev.** __ (forthcoming), available at SSRN.

In the ongoing discussion over so-called mandatory arbitration "agreements" imposed on consumers and employees, many have focused on questions of fairness and justice, on the potential of such privatization of adjudication to stifle development of the law, on whether mandatory arbitration amounts to suppression of low-dollar-value claims, and on whether arbitrators are overtly or implicitly biased in favor of businesses and employers who as repeat players are the sources for future work for the arbitrators. Largely missing from the discussion are the arbitration services organizations, such as the American Arbitration Association and JAMS. In *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, David Horton goes a long way to filling that void.

Horton begins with a useful report on the history and evolution of arbitration services organization rules. The heart of the article is his analysis of the rules on three grounds, based on a comparison of the arbitration rules to the Federal Rules of Civil Procedure.

First, he observes, that the Federal Rules involve drafting and review by two committees with opportunity for public testimony and written comments before the ultimate product is approved by the Supreme Court. Even then, Congress may veto the rules within seven months of their approval by the Court. In contrast, arbitration services organizations enact their rules by fiat without much, if any, transparency. He notes the major exception of the adoption of the due process protocols for employment and consumer arbitration which were developed by broad committees of industry and consumer and employee representatives as well as representatives of the neutral adjudicator communities. However, he discounts this as a one-time occurrence.

Horton finds that the key regulator of arbitration services organization rules is the market, and cautions that the market makers are the businesses that impose the rules on their employees and customers. He concludes that the evidence of whether the market is an effective regulator is mixed. He points to the notorious National Arbitration Forum, which was forced to cease doing consumer arbitration because its processes were so biased against consumers, and to JAMS's withdrawal of its policy opposing class action waivers as caving in to the market. On the other hand, he acknowledges that AAA is the dominant player and calls its rules "plaintiff-friendly." He attributes this to AAA's marketing its product as having a high degree of likelihood to withstand court challenge and concludes that the market could protect consumers and employees if it values the probability that awards will be upheld.

Second, Horton contrasts the Federal Rules which are generic and apply to all types of cases with arbitration service organizations that have discreet rules for different kinds of cases, such as employment, consumer, construction, insurance and so on. He recognizes advantages in avoiding the one size fits all approach of the Federal Rules but cautions that the approach of the Federal Rules acts as a brake against tilting the rules toward one side or another. What might favor defendants in one type of case might favor plaintiffs in another. In contrast, Horton urges, the proliferation of many different sets of rules favors repeat players who have greater familiarity with the differences among rules. It also

leads to businesses choosing the rules that favor them the most, such as by classifying workers as independent contractors rather than employees and placing them under AAA's Commercial Rules instead of its more claimant-protective Employment Rules.

Third, Horton observes that the Federal Rules strike a balance between accuracy in adjudication and efficiency, whereas the arbitration service organizations prioritize efficiency. He finds fault with two features of many providers' rules that prioritize efficiency. One is a strict waiver doctrine, with the rules providing that a party who fails to state an objection to a violation of the rules and proceeds with the arbitration has waived the violation. He maintains that this has led to judicial confirmation of flawed awards, including cases where the arbitrator engaged in private conversations with one party. The second is the tendency among provider rules to clothe the arbitrator with authority to rule on questions of arbitrability, questions that would otherwise fall to a court. Horton correctly points out that this approach conflicts with a basic principle of due process, that an adjudicator may not have a personal financial stake in the case. An arbitrator has a personal financial stake in finding a matter arbitrable because that will result in more work and more revenue for the arbitrator.

Finally, Horton turns to doctrinal issues raised by his analysis. He critiques courts that have implied from the adoption of a particular arbitration service organization's rules which empower the arbitrator to rule on questions of arbitrability an intent by the parties to delegate to the arbitrator exclusive authority to rule on such matters. He urges that rules empowering arbitrators to rule on their jurisdiction do not mandate that they do so and leave open the option of a judicial ruling. Moreover, he maintains, these rules are designed to save time and money when a matter already is in arbitration and, therefore, should not be read to reflect an intent to cut out judicial resolution of arbitrability disputes that arise at the outset of a case. The problem of the arbitrator's financial interest in finding the matter arbitrable is exacerbated where the arbitration agreement is adhesive and the product of large disparities in bargaining power. He urges courts to reject this approach.

Horton turns next to what he calls weaponizing rules. He observes that businesses have classified workers as independent contractors and specified that commercial rather than employment rules will apply or have recognized workers as employees but nevertheless adopted the commercial rules. Horton highlights two major differences between AAA's commercial and employment rules. Under the commercial rules, parties are equally responsible for the forum costs, including the arbitrator's fee, whereas under the employment rules, the employer is responsible for all forum costs and arbitrator fees except for a $300 filing fee paid by the claimant (an amount less than the filing fee in federal district court). The AAA employment rules empower the arbitrator to award any remedy that a court could award, whereas the commercial rules limit the arbitrator's remedial authority to what is within the scope of the parties' agreement. Horton calls to task courts for not policing such abuse at all, or for responding to it merely by severing the offending provision and directing arbitration anyway. He properly calls for courts to strike the entire arbitration agreement in such cases of over-reaching.

Horton lastly turns to the recent tactic of plaintiff employment lawyers of filing mass claims, sometimes thousands of identical individual claims and demanding arbitration of each of them. He observes that at one level the tactic amounts to a shakedown of the business respondent but at another level it is simply following the very rules that that respondent imposed on its employees. He also observes that when the respondents have refused to pay the millions of dollars in arbitration fees, the arbitration service providers consider it a material breach and cancel the arbitrations. He observes that what happens next is unclear; do the claimants then have to refile their claims in court? Unfortunately, Horton does not offer any prescriptions for dealing with these situations. In my view the answer is clear. A court should order specific performance of the agreement to arbitrate and require the employer to pay the millions of dollars in filing fees. Any other approach undermines the ability of the market to police against employers' abusive uses of arbitration mandates.

In the 1990s, when the Supreme Court first endorsed employment arbitration mandates imposed by employers, it reasoned that the employee was not waiving substantive rights but only agreeing to resolve them in an arbitral forum as long as the forum allowed the employee to effectively vindicate those statutory rights. But in more recent cases such as Concepcion, Italian Colors Restaurant, and Epic Systems, the Court has labeled the effective vindication requirement dicta and instead focused on a supposed federal policy of enforcing arbitration agreements in accordance with their terms. I would have liked to have seen Horton engage with this evolving Court approach to arbitration mandates and its implications for the doctrinal solutions he has advocated. Despite these nits that I have picked, I applaud Horton for focusing attention on the role of arbitration service organizations, a neglected piece of the puzzle of arbitration mandates. I hope his article leads to further discussion of service organizations' roles in the continuing dialogue about mandatory arbitration.

Cite as: Martin H. Malin, *Focusing on an Often-Neglected Player in the Mandatory Arbitration Game*, JOTWELL (November 5, 2020) (reviewing David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 **Minn. L. Rev.** __ (forthcoming), available at SSRN), https://worklaw.jotwell.com/focusing-on-an-often-neglected-player-in-the-mandatory-arbitration-game/.