WORKPLACE ALTERNATIVE DISPUTE RESOLUTION: USAGE PROCLIVITY AND OUTCOMES

BY

AIBAK HAFEEZ

DISSERTATION

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Doctoral Committee:

Associate Professor Ryan J. Lamare, Chair
Associate Professor Ariel C. Avgar
Professor Michael H. LeRoy
Associate Professor Mark D. Gough, Pennsylvania State University

ABSTRACT

This dissertation presents two different studies to examine factors that influence workplace Alternative Dispute Resolution (ADR) usage and its outcomes.

The first study analyzes survey data from Fortune 1000 companies to examine how their preferences to use ADR is influenced by their perception of the third-party neutrals' qualifications. It also explores how the hiring source of third-party neutral is associated with employers' inclination to use ADR. Third-party neutrals, including arbitrators or mediators, are one of the most important actors in ADR – they play a vital role in resolving a conflict within an ADR system and influence dispute outcomes. Therefore, it can be inferred that firms might show a higher preference for ADR if the neutral hired is qualified. Third-party neutral sourcing preferences are also likely to vary as different sources can be expected to provide differently qualified neutrals. Finding support for these expectations, this study suggests that third-party neutral quality serves as a meaningful aspect that influences firms' inclinations to use ADR. Neutral quality can therefore be interpreted to have an implication for expanding ADR at the macro level.

The second study focuses on employment discrimination claims to study how case characteristics and outcomes vary across arbitration and litigation in the U.S. securities industry. Arbitration is compared with litigation because arbitration is a quasi-judicial process that just like litigation, is based on binding resolutions. Moreover, arbitration is also used to handle statutory allegations which makes it important to study whether arbitration is as good, better, or worse, compared to litigation. When arbitration got legally institutionalized in the nonunion setting following *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme court clearly stated that arbitration is acceptable *'…so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum'*. This was a very specific condition, known as the 'effective vindication test of arbitration' that indicated that arbitration should be able to effectively vindicate statutory claims for its usage to be warranted.. The paper contributes to determining whether arbitration meets the 'effective vindication' condition by contrasting case characteristics and outcomes of arbitration and litigation. Meeting the requirement of effective vindication is important for arbitration and ADR to expand and gain acceptance amongst scholars, policymakers, and users.

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

In the 1960s and 70s, the Congress passed multiple statutes to regulate and improve employment conditions. Laws, such as Title VII of the 1964 Civil Rights Act, encouraged aggrieved employees to adjudicate their claims in public courts (Lipsky, Avgar, & Lamare, 2016). This induced a surge in employment lawsuits which resulted in frustrating delays and hefty expenses for disputants trying to resolve their cases. In response to this litigation explosion, firms adopted Alternative Dispute Resolution (ADR) techniques as they provided an effective alternative that saved dispute resolution time and costs (Lipsky, Seeber, & Fincher, 2003).

In the beginning, ADR was only used in the unionized setting (Colvin, 2004). For example, the common law of labor arbitration, rooted in the *Steelworkers Trilogy* and subsequent decisions, allowed unions and employers to mutually establish a fair and balanced dispute resolution system. However, when ADR expanded into the nonunion arena, criticisms and controversies began to surface (Lipsky et al., 2016). The tension was specifically fueled when the courts expressed their favorable position on employment arbitration following *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Dispute resolution scholars, policymakers, and users started expressing their concerns regarding the use of pre-dispute mandatory arbitration to handle *statutory* claims. These critics have viewed mandatory arbitration as an assault on people's legal rights, and an employee-unfriendly forum with inadequate due process protections. They specifically allege that if arbitration is used to handle statutory claims, the whole purpose of Congress passing legislations for worker protection is lost (Stone 1996; Colvin, 2011). In contrast, proponents of ADR, consider arbitration as an inevitable reality since it is faster, cheaper, and a more efficient means of resolving disputes (Estreicher, 2001; Maltby 2003).

Academic research that has studied these debates in ADR has been conjectural and descriptive. However, studies in the past two decades have increasingly used quantitative methods to produce tangible knowledge. Studies have examined the factors that influence ADR usage (Brett, Barsness, Goldberg, 1996; Blancero & Dyer, 1996; Lipsky & Seeber, 1999; McDermott, Obar, Jose, & Bowers, 2000; McDermott, Obar, Jose, & Polkinghorn, 2001; Colvin, 2003; Wood & Leon, 2006; Gough, 2014), the factors that influence case outcomes (Bingham & Pitts, 2002; Eisenberg & Hill, 2003; Mareschal, 2005; Colvin, 2011; Colvin & Gough, 2015; Gough, 2016, 2018; Lamare, 2016, 2020; Lamare & Lipsky, 2019, Gough & Colvin, 2020; Lipsky, Avgar, & Lamare, 2020), and how those outcomes compare with outcomes of cases taken into courts (Eisenberg & Hill, 2003; Gough, 2014, 2020). This literature can be viewed as providing a deeper understanding of what factors influence the growth of ADR. Studies on ADR *usage* directly help explain the expansion of ADR. Studies on outcomes highlight how ADR performs compared to other dispute resolution methods which then influences parties' proclivities to use ADR and consequently expand it at the macro-level.

This dissertation presents two different studies to examine factors that influence ADR usage and its outcomes. The first study analyzes how employers' preferences to use ADR is influenced by their perception of the third-party neutrals' qualifications. It also explores how the hiring source of third-party neutral is associated with employers' inclination to use ADR. Third-party neutrals, including arbitrators or mediators, are one of the most important actors in ADR (Gramberg & Teicher, 2006). They play a vital role in resolving a conflict within an ADR system. For example, a qualified mediator can assist disputants to amicably settle a dispute and hence avoid a binding resolution in the final step of arbitration (Goldberg, 2004). An arbitrator plays an even more crucial role as his/her decisions are binding and very difficult to appeal (Lipsky & Seeber, 1998). Since third-party neutrals influence dispute outcomes, it can be inferred that firms might show a higher preference for ADR if the neutral hired is qualified. Third-party neutral sourcing

preferences are also likely to vary as different sources can be expected to provide differently qualified neutrals. All in all, this study suggests that third-party neutral quality serves as a meaningful aspect that influences firms' inclinations to use ADR. Neutral quality can therefore be interpreted to have an implication for expanding ADR at the macro level.

The second study focuses on employment discrimination claims to study how case characteristics and outcomes vary across arbitration and litigation. Arbitration is compared with litigation because arbitration is a quasi-judicial process that just like litigation, is also based on binding resolutions (Brown, 2014). Moreover, arbitration is also used to handle statutory allegations which makes it even more important to study whether arbitration is as good, better, or worse, compared to litigation. When arbitration got legally institutionalized in the nonunion setting following *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme court clearly stated that arbitration is acceptable *'…so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum'*. This was a very specific condition that indicated that arbitration should be able to effectively vindicate statutory claims for its usage to be warranted. This is known as the "effective vindication" test of arbitration. My paper contributes to determining whether arbitration meets the 'effective vindication' condition by contrasting case characteristics and outcomes of arbitration and litigation. Meeting the requirement of effective vindication is important for arbitration and ADR to expand and gain acceptance amongst scholars, policymakers, and users (Chukwumerije, 2014).

A more detailed description of each study is provided below.

1.1.1 Study 1: Third-Party Neutrals Quality and Firms' Preferences to use Workplace ADR

As briefly mentioned, this essay examines how a firm's preference for ADR usage is associated with its' perception of third-party neutral's qualifications and its' source of the neutrals. The Human Resources literature shows that there is a positive relationship between employee

qualification and productivity (Schwab, 1982; Curme & Stefanec, 2007). Human capital theory proposes that workers become qualified and increase their productivity (Becker, 1993) so firms can value and compensate them more (Maranto & Rodgers, 1984). This broadly signals that firms are concerned about the qualification of workers they hire. Applying this logic to employment ADR, it is expected that firms are concerned about the qualification of arbitrators and mediators – that they prefer to use arbitration or mediation when the neutral is perceived as highly qualified. This is a plausible expectation because specialized and qualified neutrals are known to influence the direction of ADR decisions (Bowling & Hoffman, 2000; Gough & Colvin, 2020). Moreover, firms might feel more comfortable to use ADR if arbitrators and mediators are highly qualified and are able to use their skills to produce fair outcomes.

Building on the notion that firms prefer qualified neutrals, this paper also examines how the source of the neutral influences the firm's preference to use ADR. I center my expectations around the idea that different neutral sources offer differently qualified neutrals. For example, *private third-party providers* like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) explicitly market and advertise themselves as providers of highly qualified mediators and arbitrators. However, sources like *word-of-mouth recommendations* serve as informal avenues and do not offer any formal guarantees about the quality of the neutrals. Using this conceptualization, I initially surmise that firms prefer neutrals from sources that are likely to offer qualified arbitrators and mediators. However, since arbitration and mediation are distinct functions with different dynamics (Colvin, 2014), I build a nuanced expectation regarding why a firm's preference for the neutral source might vary based on if they hire an arbitrator versus a mediator.

In sourcing arbitrators, arbitrator quality would be one of the most important considerations for firms (McLean, 2014). This is because arbitrators provide binding resolutions that are hard to appeal (Lipsky & Seeber, 1998) and so firms prefer if such decisions are made by qualified and

experienced arbitrators. As *private third-party agencies* are likely to ensure the provision of qualified neutrals, I posit that firms prefer hiring their arbitrators from private agencies such as the AAA, JAMS, CPR, etc.

As mentioned, I expect firms to prefer hiring qualified mediators from private agencies as well. However, as mediation is a voluntary system that is based on the disputants' consent to mediate, a crucial concern in mediator sourcing might be related to how much control firms have over the process. For example, if mediation is imposed by a judge and the mediator is hired via courts, firms may not want to use mediation. Keeping this in mind, I test whether firms are less likely to use mediation if the mediator is sourced from courts following a court-annexed mediation. This expectation gains strong support from Golann (2001) – he conducted an empirical study on actual mediated cases to show that 'court mediators', hired as a consequence of legal mediation, are less likely to repair relationships between disputants. Golann explained that an imposition of mediation is less likely to work because disputant parties have not willingly decided to mediate.

The dataset used to conduct this study is derived from a survey of U.S. Fortune 1000 corporations. The survey was conducted in 2011 by a university-based research institute. It consists of responses from the general counsels (or their deputies) of 368 firms, spanning a wide range of industries, revenues, sizes, and other firm characteristics (Lipsky, Avgar, & Lamare, 2020).

Findings of this paper highlight a new dynamic in the workplace ADR field – there is an increasing inclination of firms recruiting qualified neutrals from particular sources. If firms' preferences to use ADR is associated with the quality of neutrals they hire, it can be reasoned that neutral qualifications can play an important role in growing ADR as a field. Moreover, if firms are aware of third-party neutral sourcing preferences and their effects at a strategic level, they can proactively decide where they should recruit their neutrals from. When possible, firms can hire mediators and arbitrators from appropriate sources to achieve optimum results.

1.1.2 Study 2: Difference in Case Characteristics and Outcome between Voluntary Arbitration and Litigation

The second essay examines differences between discrimination cases disposed in arbitration and litigation. ADR scholarship is advancing in terms of contrasting arbitration and litigation as platforms of dispute resolution (Howard, 1995; Estreicher, 2001; Eisenberg & Hill, 2003; Schwartz, 2009; Gough, 2014; 2020). However, empirical knowledge on this topic is insufficient to be able to make meaningful conclusions. Most of the research conducted is based on descriptive statistics that yield somewhat incomplete and debatable results. It is only in the recent past that multivariate empirical analysis has been utilized to enhance our understanding of this topic (Gough, 2020). I contribute to literature by comparing arbitration and litigation outcomes using empirical data from a relatively uncommon arbitration system: post-dispute voluntary arbitration.

The Financial Industry Regulatory Authority (FINRA) introduced post-dispute voluntary arbitration to resolve employment discrimination claims. After this policy was implemented in 1999, disputant parties could either jointly select arbitration to resolve the claim or simply go to courts. (FINRA Rule 13201). Voluntary arbitration provides an ideal means to conduct a systematic side-by-side comparison of how arbitration and litigation differ from each other. Since both forums are available as options, there is an opportunity to look for factors that explain what kinds of cases get selected into each forum.

Keeping this in mind, I first compare differences in case and party characteristics between arbitration and litigation. Specifically, I employ a multivariate regression model to examine how the number of hearing sessions, pre-trial motions to dismiss, disposition time, and employee representation vary across both forums. I expect a variation in these characteristics because arbitration and litigation have different features and are therefore likely to attract different kinds of cases. For example, litigation is known to have successful pre-trial motions to dismiss. This may motivate defendant employers and their attorneys to strategically decide to litigate and use

pre-trial motions to dismiss when they valuate the employees' case to be weak. Similarly, if employees and their counsels believe that they have a strong and straight-forward case and do not need the high-levels of discovery available in litigation, they would probably want to arbitrate to keep the costs low (Schwartz, 2009).

After explaining the differences between the two forums, I conduct a comparison of the employee win rate between arbitration and litigation. The existing literature related to employment arbitration and litigation win rates for discrimination cases shows mixed results (Colvin 2011; Lamare & Lipsky 2014; Colvin & Gough 2015; Lamare 2016; Lamare & Lipsky, 2019; Lamare, 2020; Oppenheimer, 2003; Clermont & Schwab 2004; Nielsen, Nelson, & Lancaster, 2010; Gough, 2020). Some studies present a higher win rate for arbitration whereas others show that litigation has a higher win rate. Comparisons between the employee win rates in these studies, however, do not provide very useful insights because (i) these studies are mostly descriptive, (ii) they mostly examine different types of allegations, and (iii) almost all of them use within-forum data. Gough's (2020) work is the only study of which I am aware that examines both forums and uses a robust analysis by controlling for several case and party characteristics. However, he states that there may be a positive bias in the reported case outcomes since his analysis is based on survey data from attorneys.

I build on Gough's (2020) study and try to address all the limitations identified above. To this end, I use a hierarchical regression framework to systematically control for variations in case and party characteristics across forums. I examine differences in the employee win rate using data from actual award sheets for arbitration, and docket sheets for litigation. The data I use consists of employment arbitration discrimination cases filed in and resolved by FINRA covering the period 1999-2017. The award sheets for these cases provide information on case/party characteristics and outcomes. On the other hand, litigation data is sourced from Bloomberg Law. For all firms in the arbitration dataset, I identified discrimination cases litigated in federal courts by FINRA registered

employees against their FINRA registered employers. I downloaded the docket sheets for these specific cases and extracted all case/party characteristics and outcomes. In compiling this dataset, I incorporated litigation cases that were disposed due to pre-trial motions to dismiss. The primary reason to do this is as follows: for arbitration, the likelihood of using pre-trial motions is low; such demands are typically reserved for the arbitration hearing itself (Sherwyn, Tracey, & Eigen, 1999). However, pre-trial motions to dismiss are used at a high rate within the court system (Cecil & Cort, 2007). As these pre-trial dismissals are basically a loss for the employee, it is strongly recommended that they be included in studies aiming to conduct fair and balanced comparisons (Schwartz, 2009).

Other than providing empirical knowledge on how case characteristics and employee success rate vary for arbitration and litigation, this paper also helps uncover the more nuanced character of arbitration. Majority of the scholarship on employment arbitration is conducted on pre-dispute mandatory arbitration systems: studies have compared *mandatory* arbitration with *non-mandatory* litigation. While it is important to study pre-dispute mandatory arbitration as most private U.S. employees are covered under that policy, it is also meaningful to examine voluntary arbitration. Voluntary arbitration can help produce an objective comparison between arbitration and litigation where *both* forums are available as options for the disputant parties. Such a comparison will address the controversies associated with employment arbitration; it will help answer whether arbitration is an employee-unfriendly system in and of itself, or does making it 'mandatory' stimulate the concerns and criticism thrown its way.

Relatedly, this paper sheds light on the dynamics and feasibility of a post-dispute voluntary arbitration system. Scholars consider it to be a flawed system which does not address the problems associated with employment discrimination law adjudication (Estreicher, 2001; Sherwyn, 2003). However, I believe there is a need to conduct more data-based empirical research before any

conclusive statements can be made. My paper contributes to this purpose by empirically analyzing and comparing outcomes of a post-dispute voluntary arbitration system with litigation.

All in all, this essay serves as the first study that examines differences in properties and outcome of cases resolved in arbitration and litigation by using objective data from discrimination award sheets. It generally contributes to the ADR literature that evaluates arbitration as a viable alternative to litigation. As discussed earlier, this paper offers a more direct comparison of arbitration outcomes to litigation outcomes, and thus invites more inquiry into testing whether arbitration meets the requirement of '*effective vindication*'.

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CHAPTER 2: STUDY 1 - THIRD-PARTY NEUTRALS QUALITY AND FIRMS' PREFERENCES TO USE WORKPLACE ADR

2.1 INTRODUCTION

The value of Alternative Dispute Resolution (ADR) systems is based on the notion that third-party neutrals can enhance the overall conflict resolution experience (Gough & Colvin, 2020). Whether serving as a facilitating mediator or a decision-making arbitrator, third-party neutrals are one of the key actors in ADR systems (Gramberg & Teicher, 2006). This is particularly true for arbitration since arbitrator rulings are usually final and binding on parties (Colvin, 2004). Being central to the dispute resolution process, the selection of these third-party neutrals is an important consideration. Nonunion firms that have adopted ADR to resolve their employment disputes try to be conscientious in hiring qualified arbitrators (Colvin & Gough, 2015) and mediators (Kenny, 2014).

Third-party neutral characteristics, which include their qualifications, influence ADR outcomes (Coben, 2000; Gough & Colvin, 2020). Therefore, firms can be expected to desire qualified neutrals that help produce a good conflict resolution experience. Third-party neutrals can be hired via different sources which can be reasoned to provide variations in neutral qualifications. For example, some sources may be informal and therefore have no formal quality standards (i.e., *word-of-mouth recommendations*) while others may be more formal and ascertain the provision of highly qualified neutrals (i.e., *private third-party providers* like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS)). Provided that the quality of neutrals influences case outcomes, and provided different neutral sources offer variations in neutral qualifications, neutral sources should influence firms' inclinations to use ADR.

I present an initial examination into this notion by first examining how a firm's perception of its' third-party neutral qualification relates to the firm's preferences to use ADR. Using Becker's

(1993) human capital theory, I propose that organizations uniformly prefer more qualified neutrals for both arbitration and mediation. Secondly, I analyze the extent to which different sources of neutrals are associated with firms' preferences to use employment mediation and arbitration. Theorizing that different neutral sources offer differently qualified neutrals, I expect firms to have different neutral sourcing preferences based on what ADR method is being used (mediation or arbitration). I complement my analyses by testing whether the effects of sourcing differences on ADR practice preferences are robust to the inclusion of various firm characteristics within an empirical regression framework. Specifically, drawing from a novel and representative survey data of large (Fortune 1000) U.S. corporations, I empirically examine the extent to which neutral qualification perceptions and different neutral sources influence firms' preferences to use each practice.

I hope to make contributions to the literature into the relationships between third-party neutral qualification and sources on two core non-union employment ADR practices (arbitration and mediation). In arbitration, the sourcing of a qualified arbitrator is one of the most important considerations for firms because arbitrator rulings are usually final and binding on parties (McLean, 2014). In such a scenario, it can be envisioned that firms highly prefer qualified arbitrators who can provide apposite outcomes. Therefore, firms are expected to show clear preferences to hire their arbitrators from sources that offer qualified individuals having the requisite knowledge, experience, and memberships, etc. Out of the neutral sources available to firms, *private third-party providers* are likely to offer the most qualified neutrals. Private ADR providers try to advertise their third-party neutral features as above and beyond the average arbitrator qualifications available. For example, the AAA has a published qualification criteria for admittance to the AAA National Roster of Arbitrators – it includes detailed instructions regarding the minimum professional experience, minimum education, training experience, and

memberships, etc. Keeping in mind this feature of private providers, I test whether firms show higher preferences to use arbitration when arbitrators are sourced through private providers.

Firms are expected to prefer qualified neutrals for mediation as well: a qualified mediator can help disputant parties reach a mutual settlement in mediation, which on average is more desirable than a binding decision awarded by an arbitrator. However, as mediation is a voluntary function in which disputants have control over the whole process (Moore, 2003), it can be rationalized that although firms prefer hiring qualified mediators from private ADR providers as well, a more crucial concern for firms is to hire from sources that gives them control over mediator sourcing. For example, firms may not prefer hiring mediators from courts (in court-annexed mediation). This expectation gains support from Golann (2001) who studied actual mediation cases to show that '*court mediators*' were less likely to repair disputant relationships compared to other mediators (i.e., commercial/private mediators) because the parties were forced to mediate. Therefore, I test whether firms' show lower preferences to use mediation when their mediators are sourced through courts as a result of court-imposed mediation.

To briefly highlight the empirical results, I first find that across both arbitration and mediation, firms prefer to use each practice if they perceive neutrals to be highly qualified. Regarding neutral sourcing, for arbitration specifically, I find support for the expectation that firms prefer to use arbitration if the arbitrator comes from a private third-party agency. The mediation hypothesis is also supported. Firms are less likely to use mediation if the mediator is hired via courts. They value having discretion when sourcing mediators because mediator acceptability is the predominant guiding factor in using mediation.

In sum, empirical results generally establish the fact that firms prefer to hire qualified neutrals for their ADR needs. The findings on neutral sourcing contribute to both the arbitration and mediation literatures specifically and may be interpreted to indicate important firm preferences toward arbitrator quality and standardized credentials when using arbitration, and discretion and

control in selecting mediators when using mediation. I explore competing explanations for these findings in the paper's discussion and conclusion.

2.2 LITERATURE REVIEW

2.2.1 The Rise of Employment Arbitration and Mediation at U.S. Firms

From the late-20th century to the present, there has been a fundamental transformation in how U.S. firms address nonunion workplace conflict (Lipsky, Seeber, & Avgar, 2015). Organizations have shifted away from traditional means of conflict resolution (i.e., litigation) and have increasingly adopted the use of mediation, arbitration, and other ADR techniques (Colvin, Klaas, & Mahony, 2006). This transformation began after the Civil Rights Act (and in particular Title VII) was passed by Congress in 1964 (Olson, 1992), which led to an increase in the number of lawsuits employees could file against employers on the basis of statutory violations. In order to respond to this increased vulnerability to legal complaints, firms began committing themselves to using ADR techniques at least partly in order to save time, money, and potentially to more amicably resolve workplace disputes (Lipsky, Seeber, & Fincher, 2003).

Of the myriad private dispute resolution techniques available to firms, by far the most commonly used within non-union workplaces are arbitration and mediation. Arbitration is a quasi-judicial process in which a neutral makes a binding verdict based on the merits of each party's claims (Brown, 2014). On the other hand, mediation is an interest-based process whereby a third party attempts to resolve a conflict by assisting the disputants to reach a mutually agreeable settlement, but does not have the authority to impose a decision (Moore, 2003).

Arbitration and mediation operate as distinctive and often independent aspects of workplace conflict resolution, in that they evolved from different historical places and serve discrete purposes. As expected, the process and outcomes of arbitration behave similarly to the courts, given that both parties rely on an adjudicator to make a final and binding decision (Brown,

2014). And therefore, just like judges' qualifications influence case outcomes (Ashenfelter, Eisenberg, & Schwab, 1995), arbitrator qualification can be expected to be associated with the arbitration process as well. In contrast to arbitration, since mediation is usually voluntary, both parties in a dispute have control over the process and only rely on the mediator to play a facilitating role (Moore, 2003). Therefore, it is not just the qualification of the mediator that is important, but the acceptability of the mediator by parties is also central to the process.

These ideas on neutral quality, neutral acceptability, and these inherent distinctions between mediation and arbitration lead to the key research questions of this paper: (i) whether firms' preferences to use ADR are associated with their perceptions of how qualified their third-party neutrals are, and (ii) whether firms value particular sources of third-party neutrals over others based on which practice (mediation or arbitration) is being used.

2.2.2 Quality of Neutrals

To build theory regarding firm preferences toward qualified neutrals, I turn to studies outside the domain of ADR because there is a lack of literature on neutral qualification and its relationship with employment ADR practices specifically. Generally, the Human Resource (HR) literature argues that there is a positive relationship between employee qualification and productivity (Schwab, 1982; Curme & Stefanec, 2007). Human capital theory supports this idea by proposing that workers build skills, accumulate education, and gain experience, which in turn positively affects output (Becker, 1993). Such experienced workers are arguably compensated more due to their better productivity (Maranto & Rodgers, 1984). Assuming that education and experience signal qualification, and if these types of employees are more productive and are also paid more, we can find some support for the broad idea that firms are concerned about the qualification of workers they hire. This is especially likely because hiring lower qualified employees have high

long-term costs (Egger & Egger, 2006; O'Connell & Kung, 2007; Heskett, Jones, Loveman, Sasser, & Schlesinger, 2008).

Studies on third-party neutrals also resonate with this idea. There is a body of research which shows that labor arbitration outcomes are influenced by arbitrator characteristics such as education and experience. For example, Bemmels (1991a) and Nelson and Curry (1981) found that more experienced arbitrators do not render compromised awards. Oswald and Caudill (1991) further showed that compared to less experienced and less educated arbitrators, more experienced and more educated arbitrators are stricter on aggrieved employees regarding their sexual harassment cases. Bemmels (1991b) seconded this finding by showing that compared to arbitrators with masters or law degrees, those with Ph.D.'s are less likely to reinstate employee-plaintiffs. Gough & Colvin (2020) studied employment arbitration and showed that arbitrator characteristics (such as having a defense counsel background) affect employee outcomes negatively. There are no specific studies of which I am aware of that examine how labor or employment mediators' qualifications affect outcomes; however, scholars that have looked at mediators as a general profession assert that disputants prefer their mediators to have satisfactory education, experience, intelligence, and certifications (Harges, 1997; Shaw, 1988; Shaw, 1998; Hill, 1998; Honeyman, 1993, Coben, 2000; Bowling & Hoffman, 2000; Bingham, 2004).

All these studies combined, it can be deduced that firms prefer highly educated, experienced, and therefore, conceivably higher qualified neutrals. Therefore, I hypothesize that firms are more likely to use both arbitration and mediation when they perceive neutrals to be highly qualified.

2.2.3 Sourcing of Neutrals

The second research question asks whether neutral sourcing varieties are associated with firm preferences to use arbitration and mediation separately. The general *process* by which arbitrators

and mediators are sourced to resolve workplace conflicts is well understood (see Elkouri and Elkouri, 1956 for an overview of arbitration; see Moore, 2003 for an overview of mediation). However, there is very little knowledge about whether organizations indicate *preferences* for certain sources of arbitrators and mediators that might underscore their ADR usage preferences.

There are four main recruitment sources for arbitrators and mediators that I examine in this study: courts; state or federal agencies; private ADR providers; and word of mouth. The first category, courts, signifies a source that provides adequately qualified neutrals but imposes the ADR function onto disputants. The second category includes government or state agencies that also provide satisfactory third-party neutrals for dispute resolution (i.e., Association of Labor Relations Associations (ALRA), Federal Mediation and Conciliation Service (FMCS), etc.). The third category comprises all private ADR providers that are used to privately source neutrals for dispute resolution (i.e., American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS), etc.). These organizations, as explained earlier, make special efforts to market their neutrals as being highly qualified and experienced. The fourth category covers all neutrals that are selected through word-of-mouth recommendations or relational networks. These four categories can also be looked at as having a hierarchy of formality where courts are entirely formal, and word-of-mouth is an informal source.

Given the paucity of prior literature on arbitrator and mediator sourcing, to build theory that can help identify hypotheses regarding how neutral sourcing is associated with ADR preferences, I again turn to broader HR scholarship into employee recruitment and selection. Research has shown that under at-will employment, the sourcing of employees (where the firm looks, or the method it adopts to recruit and select employees) significantly influences turnover, performance, and various perceptions of success (Zottoli & Wanous, 2000). Analogously, I believe that variations in neutral sourcing types should be associated with firms' preferences to use arbitration and mediation.

Moreover, many studies show that firms view selection and sourcing of employees and other individuals as important to organizational outcomes (Rynes, Reeves, & Darnold, 2014). More specifically, literature shows that firms tend to view informal sourcing as preferable to formal sourcing. For instance, Schnake (2016) conducted an exploratory study that looked at how different recruitment sources affected employees' intent of turnover, finding that more informal, direct, and intimate sources produced employees with lower levels of intent to leave their job. Conversely, less direct and more formal sources led to higher intent to leave. There is an array of similar studies showing that informal recruiting sources tend to provide stronger applicants, more successful hires, and result in better outcomes compared to formal sources (Saks 1994; Aamodt & Carr 1998; Zottoli & Wanous 2000; Rynes & Cable, 2003; Moser 2005; Weller, Holtom, Matiaske, & Mellewigt, 2009).

The literature mentioned above can be inferred to indicate that informal sources work better for hiring neutrals. For arbitration specifically, it can be expected that arbitrators recruited through the least formal source (word-of-mouth recommendations) might provide better outcomes for organizations and would therefore be preferred by firms. However, a more nuanced consideration of arbitration as a quasi-judicial dispute resolution suggests a competing hypothesis. As noted, a third-party neutral hired in arbitration is not like a mediator, whose relationship can be ended at any time by either party. Hence, firms must be extremely careful and understand that the cost of making a sourcing mistake with an arbitrator is much higher than it is with a mediator.

Therefore, I argue that firms prefer to hire their arbitrators from private third-party ADR agencies who advertise themselves as providers of qualified arbitrators guaranteeing consistently satisfying experiences. These agencies candidly market their quality services so as to attract disputants to source neutrals from them. For example, as explained earlier in the paper, the AAA has a precise qualification criterion. Similarly, JAMS has a complete *Talent Development Philosophy* which explains how training and professional development of their neutrals are

important elements of their mission – JAMS declares that it *attracts, retains, and develops the highest quality* neutrals. Similarly, the Financial Industry Regulatory Authority (FINRA) also has specific arbitrator qualifications listed in their *FINRA Manual* that mentions the required qualifications to be listed on their roster – qualifications include minimum education, experience, memberships, familiarity with law, etc.

When an arbitrator is bound to meet such specific qualification standards by these private ADR providers, I propose that firms will tend to have more confidence in the overall arbitration proceedings – that the reliability and credibility of the arbitration process gets enhanced. Such quality elements of arbitration may not routine under informal hiring arrangements, like word-of-mouth recommendations that lack institutional oversights. Therefore, on balance, I expect that in giving value to the quality of arbitrators when sourcing arbitrators, firms prefer to use arbitration when their arbitrators are sourced through private third-party providers.

Just like arbitrators, as the first hypothesis states, I expect firms to hire qualified mediators as well. Hence, my inchoate expectation was that firms desire to recruit their mediators from private ADR providers. However, in consideration of how mediation differs from arbitration structurally, I believe a more central concern for firms would is to have control over mediator sourcing. As mediation is a relatively informal and voluntary function where mediators do not have the authority to impose a decision, disputants (including firms) like to have control over the mediation process. For example, if mediators are sourced as a result of court-annexed mediation, firms and disputant parties lose a lot of the discretion that they would have had in sourcing a mediator otherwise. The discussion on neutral sources being formal and informal also points towards this expectation: informal sources are deemed important when parties voluntarily recruit employees under an at-will arrangements. Under these circumstances, informal sourcing results in fewer unmet expectations about the employee (Moser 2005; Zottoli & Wanous 2000), lower levels of information asymmetry (Granovetter, 1995) and greater control over the process (Curran &

Stanworth, 1979). Moreover, informal and direct sourcing options are often less complicated and give substantial discretion in choosing the applicant pool (Werbel & Landau, 1996), while more formal sourcing options give recruiters less control over who applies and is eligible to be selected for the job (Kirnan, Farley, & Geisinger, 1989). Keeping all this in mind, firms can be expected to prefer a more informal and direct recruitment source that gives parties full discretion to choose the mediator they want when they decide to use mediation.

In tying this expectation directly to employment relations literature, I find general support for this proposal from Bingham (2002), who states that control of a dispute resolution system can affect the nature of the system and its outcomes. Lipsky, Avgar, & Lamare (2016) support this idea by alleging anecdotally that both parties involved in a dispute may be more likely to trust a mediator that is chosen rather than assigned. The strongest support for this expectation comes from Golann (2001) who conducted a survey of mediators and studied their actual mediation cases. Results showed that compared to commercial mediators, mediators hired through a court-connected program (*court mediators*) were less likely to repair the relationship between disputant parties. He explained that this was primarily due to the mediation being imposed – when disputant parties are not in the mindset to negotiate and are forced to mediate, mediation is less likely to succeed. Firms would understandably like to avoid such mediation experiences. Keeping all these things in mind, I hypothesize that mediators sourced from courts as a result of court-annexed mediation corresponds with overall lower levels of mediation usage.

2.3 DATA AND METHODS

The data comes from a comprehensive survey into wide-ranging aspects of ADR usage by Fortune 1000 companies in the employment, consumer, and corporate contexts. The survey was conducted between 2010 and 2011 by a consortium of major U.S. universities. The survey administrators interviewed the General Council (GC) or one of the GC's top deputies in each of the respondent

Fortune 1000 corporations. When the survey was conducted, GCs were chosen rather than, for instance, chief HR officers or CEOs after consultation and interviews with human resource managers, legal groups, and other ADR experts indicated that the GC would be the most knowledgeable entity regarding firms' ADR practices (Lipsky, Avgar, & Lamare, 2020). At the time of the survey, the GC was seen to have specific knowledge of firms' approaches to ADR in the North American context because organizational ADR systems were more frequently managed by this branch of the firm, and ADR had been frequently operationalized as an alternative to litigation, rather than as a common HR practice (Lipsky, 2014).[1]

All firms within the Fortune 1000 were contacted, and a total of 368 attorneys completed the questionnaires using a phone-based survey method (the final effective sample, after accounting for listwise deletion of all missing data in the regression models, is 173 firms). Given the difference between the universe of firms and the response rate, I examined the extent to which the survey respondents were biased toward some types of firms versus others. When comparing the overall composition of the Fortune 1000 against those who responded to the survey, I found that the sample covered firms from a wide spectrum of industries, sizes, characteristics, and other compositional elements. I therefore believe that the 368 firms represent a robust cross-section of all the Fortune 1000 firms (Stipanowich & Lamare 2014).

Six questions from the survey form the key dependent and independent variables. Before answering the six key questions, respondents were prompted to consider employment disputes only and to refer solely to their U.S. operations over the past three years. Respondents were also specifically prompted to consider only their *non-union* workforce when answering the questions, (though I control for the firm's union status as well). The first two questions of interest asked how

[1] An ideal approach might have been to interview both GCs and other top leaders, like HR managers, at these companies. However, scarce resources prevented the survey team from being able to both conduct multiple surveys at the same site and also ensure high quality responses. In this case, the team prioritized response quality over having multiple inputs, but future research should examine these issues using multiple sources and note this as a limitation of this study.

frequently the firm had used arbitration or mediation (in separate questions) to resolve employment disputes, and respondents could answer on a 1-5 scale (1=never; 5=always). The third and fourth questions asked how likely the firm was to use arbitration or mediation (again in separate questions) in the future, (1=very unlikely; 5=very likely). I used factor analysis to combine the four questions regarding current and future arbitration and mediation usage into latent constructs, as I suspected that two underlying and correlated variables would emerge: the firm's current and future use of arbitration, and (2) the firm's current and future use of mediation. The two continuous factors scores derived from combining these measures serve as the dependent variables in the empirical analysis (see Table 1 for the factor analysis results). I ran an iterated principal factor analysis, which resulted in two factors that had eigenvalues greater than 1, which is a useful cutoff in determining distinctive factors (Kaiser, 1960). The items 'Frequency of current use of arbitration' and 'Likelihood of future use of arbitration' both had a factor loading of .89, which I used as the arbitration factor. The mediation factor was driven by the items 'Frequency of current use of Mediation' and 'Likelihood of future use of Mediation,' which had a factor loading of .78.

To create the key independent variable regarding neutral qualification, respondents were asked if they had found their third-party neutrals in employment disputes to be not qualified at all, somewhat unqualified, somewhat qualified, or very qualified. I reduced the four-point scale to three categories by combining 'not qualified at all' and 'somewhat unqualified' as the 'not qualified at all' option was rarely selected. Finally, to create the key variable regarding sourcing, respondents were asked, "Of the following, from where has your company most often got its nominees for third-party neutrals in employment disputes?" Respondents were asked to pick the best option and could select from: the court; a state or federal agency; a private ADR provider (such as AAA, JAMS, or CPR); within the corporation; previous experience (word of mouth); or other. I reduced this list to four main sources of neutrals: courts; state or federal agencies; private

ADR providers; or word of mouth (the remaining options were not selected often enough to perform statistical analysis).

Table 2 provides a breakdown of neutral sourcing. Descriptively, firms were considerably more likely to source their neutrals from either private ADR providers or from informal word-of-mouth arrangements than from the courts or state agencies. This provides early support for the notion that neutral sourcing does indeed vary across organizations. However, in order to examine the extent to which both quality and sourcing variations affect ADR usage at companies, an empirical regression framework must be used.

The survey provided a number of other items that I incorporate as controls in the empirical analysis, which are likely to be related to employment arbitration and mediation usage. These controls are canonically appropriate for the analysis. They include broad firm characteristics, environmental characteristics, and ADR policies. Firm characteristics include firm size, measured by the number of employees, as larger firms with greater human resources might be more likely to use mediation and arbitration.[2] This size variable is broken down into the following categories: less than 5,000 employees; 5,000-10,000 employees; 10,000 to 20,000 employees; 20,000 to 40,000 employees, or greater than 40,000 employees. Other firm characteristics include location (state-based), industry (finance/investment; manufacturing; retail and trade; services; or other), and whether the industry underwent deregulation. In addition to union status, I also control for overall employee quality (measured by revenue per employee) and firm commitment to ADR (measured by the presence of mandatory ADR provisions and the percent of employees covered by ADR). Previous empirical analyses of the Fortune 1000 data use these same measures as control

[2] I performed robustness checks to ensure that the results were unaffected by using different specifications for firm size and resources (assets, revenues, and combined variants of these). The results were materially equivalent to what I find using the categorical measure of size.

variables (Avgar, Lamare, & Gupta, 2013; Lipsky et al., 2020). Table 3 lists all the variables used in the analysis along with their coding schemes and summary statistics.

2.4 EMPIRICAL FINDINGS

I perform multivariate Ordinary Least Squares (OLS) regressions to test how third-party neutral qualification and sourcing relate to firm usage of arbitration and mediation. As explained in the previous section, the dependent variables are the two arbitration and mediation factors that emerged from the factor analysis. Specifically, I run hierarchical regression analysis (similar to stepwise regression or a nested models approach) by incrementally adding independent variables into the analysis in steps (Lewis, 2007). These hierarchical models are used to examine how sensitive the results are to adding various controls, and also how robust the models are to missing data as additional variables are added.[3] The first model incorporates only the key independent variables (neutral source and neutral quality) plus state fixed effects. Unlike stepwise regression, where a statistical software chooses the order in which to enter the variables, the hierarchical models sequentially add in variables based on past research (Lipsky et al., 2020). The second-order model includes internal firm characteristics, which is further nested in the third-order model that includes firm ADR policies. The final model comprises of all of the above-mentioned variables as well as the environmental characteristics. In order to test the robustness of each model, I include Akaike Information Criterion (AIC) values in Table 4. The AIC helps determine the relative quality of statistical models for a given dataset; the model with the lowest AIC value is the highest

[3] To ascertain whether the models were robust enough to correctly estimate coefficients for the independent variables, I ran several regression diagnostics. First, I tested for outlier effects by plotting graphs in STATA, and by examining residuals and leverages. I found that the results were robust to all concerns regarding outliers. I checked for normality of residuals by using inter-quartile range (iqr) and swilk tests and found that the residuals were normally distributed. I also use multicollinearity diagnostics (VIF and tolerance tests) to evaluate whether the measurements and coefficients suffered from multicollinearity concerns. All tests verified that there were no issues within the models and are available upon request.

in empirical quality (Anderson, Burnham, & White, 2010). The full models have the lowest AIC values and I therefore focus on those as the central regression outcomes.

Table 4 shows that third-party neutral qualification is significantly associated with arbitration and mediation usage at each hierarchical regression increment. The results support the hypothesis that neutral qualification is related to a firm's usage of arbitration. Relative to unqualified neutrals, when firms perceive their neutrals as very qualified, they are significantly ($p<.10$) more likely to use arbitration currently and in the future. Mediator qualification also influenced firms' usage of mediation. The table shows that when firms respond that they believe that their mediators are very qualified, they have a stronger likelihood of using mediation ($p<.05$ in the initial two models; $p<.10$ in the full model). Both these findings provide support for the hypothesis that perceived neutral qualification is positively related to a firm's likelihood of mediation usage as well as arbitration usage.

The table also shows hierarchical OLS outcomes for neutral sourcing and its effect on a firm's current and future use of arbitration and mediation. For arbitration, results show that relative to sourcing an arbitrator from a private ADR agency (which I believe is the appropriate reference category for arbitration given the hypothesis), selecting an arbitrator from the court ($p < .05$), a state agency ($p < .10$), or word-of-mouth recommendations ($p < .10$), yields a significantly lower likelihood of firms preferring to use arbitration. Although the significance levels vary depending on which hierarchical model is used, these results offer general support for the notion that private ADR as a neutral source is associated with greater firm usage of arbitration.

Regarding mediator sourcing, I use courts as the reference category since court-annexed mediation is an imposed form of mediation and therefore is most salient to the hypothesis. Regression outcomes on mediation suggest that when mediators are sourced trough non-court imposed options (i.e., state agencies, private ADR companies like AAA, and word-of-mouth), firms are significantly more likely to indicate a stronger preference for mediation usage ($p<.05$ for

state agencies; $p<.01$ for private agencies and word of mouth). This finding lends support to the hypothesis that when firms are provided with mediators that are selected as a result of court-annexed mediation, they indicate a lower preference for using mediation either currently or in the future.

2.5 DISCUSSION

The empirical results found in the analysis deserve further discussion. I find support for the notion that a firm's preference to use arbitration and mediation is associated with how qualified firms think their neutrals are. This result complements the literature from HR which demonstrates that organizations value highly qualified employees and see qualification differences as important to organizational outcomes. This study contributes to the dispute resolution literature by empirically demonstrating a relationship between a firm's perception of third-party neutral qualifications and firm's preferences to use both core ADR practices.

The results of this paper should however be interpreted keeping in mind that the data analyzed is cross-sectional in nature and hence there could be reverse causality. One way of interpreting the results is that neutral qualification influences use of ADR. That there is a payoff to ADR as a field as its actors undergo increasing professionalization. In recent years, there has been growing awareness that mediation and arbitration have increasingly engaged in efforts at professionalization and specialization (Seeber & Lipsky, 2006). Therefore, as neutrals become perceived as being more professional, more specialized, and by extension more qualified, firms may trust them more frequently to resolve conflicts and show a preference to use ADR.

However, endogeneity issues must be considered— for example, reverse causality, omitted variables, or selection biases. It may be the case that firms who are frequent ADR users are those that have the resources to recruit the most highly qualified neutrals (Colvin & Gough, 2015). Similarly, it may be that highly qualified neutrals select themselves onto rosters of high-usage

firms for a number of reasons that would be unrelated to the notion that neutral professionalization is driving firms' greater ADR preferences. While I make efforts to mitigate some of these concerns by accounting for proxies for firm resources (size, employee quality, industrial sector, location) I acknowledge that my findings speak to associative and not causal relationships between neutral qualification and firm ADR preference. A longitudinal survey might help to overcome this issue and I encourage future research to explore causality in a more robust manner than is available under this research design.

Nonetheless, these results on neutral qualification are helpful in complementing the other hypotheses on the relationship between neutral sourcing and firms' preferences of using different ADR functions. Specifically, I find that relative to all other sourcing options, if an arbitrator is sourced from private ADR providers, firms are more likely to use arbitration. This lends some credence to the argument that organizations see groups like AAA and others as offering and possibly guaranteeing highly qualified and experienced arbitrators, something that may not be ensured through less formal sources like word-of-mouth recommendations, or even government agencies. It is well known that private ADR providers compete for clients and specifically advertise their value as providing arbitrators with high levels of education, training, experience, and other relevant accomplishments including honors and awards (see Qualification Criteria for Admittance to the AAA® National Roster of Arbitrators, JAMS Talent Development Philosophy, FINRA Manual, etc.). Therefore, given the high stakes of the conflicts that reach an arbitration stage and the lack of recourse if an arbitrator makes decisions that are inferior in quality, hiring qualified arbitrators may make firms more comfortable with using ADR practices.

However, it is important to also consider an alternative, and perhaps more problematic (for arbitration as a field, at least), explanation for why firms might prefer arbitrators sourced from private ADR providers. It may perhaps be the case that using these private agencies allows organizations (in particular) to tacitly believe they will be more likely to win in arbitration. Firms

are sometimes suspected to consistently return to the same neutral source repeatedly to carve out an advantage in arbitration.

This particular issue, that arises in private third-party arbitration, is known as the repeat-player effect (Bingham, 1998). Broadly, the concern is that large, well-resourced firms that repeat frequently in arbitration may receive better outcomes than the one-time employee participants they face in a given conflict. This may be a product of conscious bias on the part of the arbitrator who might act in favor of firms to receive future business from them (Stone, 1996; Bingham, 1998; Colvin, 2011; Stone & Colvin, 2015). Another explanation may be that repeat-firms in arbitration simply have greater resource levels and consistently outperform one-time employees because of these resources (Lamare, 2016). Either way, the problem is especially concerning for private ADR providers, who often maintain common rosters of neutrals that may be sourced multiple times by the same employer. Even though private neutral providers take considerable care to limit this possibility, it is certainly conceivable that the results of this study are demonstrating that firms hire arbitrators from private ADR agencies not primarily because these agencies offer highly qualified arbitrators, but because firms see private ADR providers as giving them the best opportunity to win their arbitration cases against employees.

Regarding mediator sourcing and firms' preferences to use mediation, I again find results that are consistent with the hypothesis. Firms express a weaker likelihood of using mediation when their mediators are sourced from courts as a result of court-imposed mediation. This finding suggests that although firms value mediator qualifications, a more important concern may probably be about having control and discretion over the process.

It is necessary to mention competing explanations for these results as well. For instance, it could also be argued that this finding is a function of the fact that an imposition of mediation mitigates the main benefit of this practice, which is that it inherently is designed to give disputants process control in their dispute resolution – firms perhaps do not prefer to use mediation simply

when the mediation is imposed by courts. Another explanation for this finding can be deduced from the data which shows that the number of firms that selected neutrals as a result of court-imposed mediation/arbitration was relatively small when compared against organizations that used word-of-mouth recommendations or private ADR providers. Hence, it may be that these firms have some shared characteristic that would make them both less likely to prefer mediation and more likely to have ADR practices imposed upon them that the data do not capture, which implies the possibility of omitted variable concerns. To directly address this potential bias in my analysis, I control for firm ADR policies (such as the company's commitment to ADR and its usage of mandatory or voluntary procedures) to mitigate against the odds that the results are simply picking up the organizations that do not typically use ADR on the whole. However, I again speak only to the associative nature of the relationship between mediators sourced as a result of court-annexed mediation and lower mediation preference, rather than anything causal.

Future research using either qualitative or longitudinal data should be conducted to understand the relationship and causality more fully between third-party neutral qualification/sourcing and firms' preferences to use ADR.

2.6 CONCLUSION

In this paper, I aimed to shed light on one of the important issues for the field of employment dispute resolution. Using data emanating from a novel survey of Fortune 1000 firms, I empirically examined the extent to which neutral qualification and sourcing were associated with organizational preference for two key ADR practices, arbitration and mediation. The findings on neutral qualification and firms' preferences to use ADR suggest that firms care about the quality of neutrals they hire. Whether it is highly qualified neutrals influencing firms to use more ADR or that firms who participate more frequently in ADR look for more qualified neutrals, the quality of neutrals is associated with ADR usage. Another implication for this finding is that ADR as a field

can benefit from encouraging neutrals to be perceived as highly qualified – firms would be more likely to used ADR which would contribute to the growth of ADR at the macro level. Arbitrators and mediators would also benefit by being seen as belonging to a profession, rather than being viewed as a loose or ad-hoc confederation of independent entities.

The findings on the relationship between neutral sourcing and ADR usage preferences might be interpreted to reinforce that when it comes to arbitration, firms value hiring qualified arbitrators. Not discounting competing interpretations, one way of reading the result is that firms express a preference for qualified neutrals provided by third-party agencies by more frequently using arbitration when their arbitrators are sourced from these providers. In essence, I conclude that given the stakes at hand in an arbitration setting, when given a choice of neutral sources, firms prefer hiring qualified arbitrators from private providers so that a high-quality outcome is achieved.

When it comes to mediation, which is a voluntarist process akin to an at-will employment relationship, I interpret the results to show that although firms desire qualified mediators, they exhibit a stronger preference for having control over the selection process and so they prefer to hire mediators from non-court imposed sources.

In sum, I hope the findings in this study appear to add value to the intersectional streams of research that explore ADR processes and usage by examining differences in the qualification and sourcing preferences for neutrals in mediation and arbitration.

Tables

Table 1: Factor Analysis of Mediation and Arbitration Usage

Variables	***Arbitration Factor***	***Mediation Factor***
Frequency of current use of Mediation	0.108	0.779
Likelihood of future use of Mediation	0.122	0.798
Frequency of current use of Arbitration	0.890	0.089
Likelihood of future use of Arbitration	0.898	0.113
Eigenvalue	1.851	1.042

Table 2: Descriptive Statistics of Neutral Sourcing Variations

Source of Neutral	***Frequency***	***Percent***
Courts	17	6.7
State or Federal Agencies	26	10.3
Private ADR Providers (i.e., AAA)	105	41.5
Word of Mouth	105	41.5

Table 3: Summary Statistics and Coding Scheme

Variable	***Coding Scheme***	***Obs***	***Mean***	***St. Dev.***	***Min***	***Max***
<u>Dependent Variables</u>						
Mediation Usage	Continuous factor scale	173	0.076599	0.86498	-2.8727	1.58085
Arbitration Usage	Continuous factor scale	173	0.082815	0.99262	-1.1645	2.21828
<u>Independent Variables</u>						
Neutral Quality	1 = Not Qualified 2 = Somewhat Qualified 3 = Very Qualified	173	2.236994	0.60657	1	3
Neutral Source	1 = Court 2 = State 3 = Private ADR 4 = Word of Mouth	173	3.583815	1.28052	1	4
Mandatory	0 = Mandatory 1 = Voluntary	173	0.341041	0.47544	0	1
No. of employees	1 = <5k 2 = 5k-10k 3 = 10k – 20k 4 = 20k – 40k 5 = >40k	173	2.982659	1.42842	1	5

Table 3 (cont.)

Variable	*Coding Scheme*	*Obs*	*Mean*	*St. Dev.*	*Min*	*Max*
Industry	1 = Finance/Investment 2 = Manufacturing 3 = Retail and Trade 4 = Services 5 = All others	173	2.895954	1.32535	1	5
Coverage	1 = 1-25% 2 = 26-50% 3 = 51-75% 4 = 75-100%	173	2.156069	1.26396	1	4
Revenue per employee	Continuous variable	173	-0.95868	0.85166	-3.3653	1.19871
Deregulation	0 = No 1 = Yes	173	0.208093	0.40712	0	1
Unionization	0 = Non-union 1 = Union	173	0.50289	0.50144	0	1
State	Categorical (36 states)	173	18.83815	9.81144	1	36

Table 4: Hierarchical OLS Results for Mediation and Arbitration Usage

Variables	***Arbitration preference*** ***Coefficient (S.E.)***				***Mediation preference*** ***Coefficient (S.E.)***			
	(1)	**(2)**	**(3)**	**(4 - Full)**	**(1)**	**(2)**	**(3)**	**(4 - Full)**
Neutral Qualification								
Not qualified	(ref)	(ref)	(ref)	(ref)	(ref)	(ref)	(ref)	(ref)
Somewhat qualified	0.363 (0.258)	0.394 (0.267)	0.291 (0.193)	0.247 (0.196)	0.347 (0.231)	0.352 (0.242)	0.308 (0.246)	0.289 (0.251)
Very qualified	0.513* (0.275)	0.564* (0.280)	0.396* (0.204)	0.357* (0.207)	0.576** (0.246)	0.568** (0.254)	0.475* (0.260)	0.466* (0.265)
Neutral Source								
Court	-0.916*** (0.315)	-0.810* (0.322)	-0.578** (0.232)	-0.486** (0.242)	(ref)	(ref)	(ref)	(ref)
State	-0.760*** (0.256)	-0.717* (0.276)	-0.365* (0.201)	-0.370* (0.205)	0.773** (0.335)	0.840** (0.352)	0.757** (0.355)	0.885** (0.368)
Private ADR	(ref)	(ref)	(ref)	(ref)	0.822*** (0.282)	0.829*** (0.292)	0.768** (0.296)	0.846*** (0.309)
Word of Mouth	-0.862*** (0.172)	-0.853*** (0.179)	-0.341** (0.136)	-0.283* (0.145)	1.039*** (0.282)	1.066*** (0.293)	0.992*** (0.299)	1.050*** (0.265)

Table 4 (cont.)

Variables	*Arbitration preference* *Coefficient (S.E.)*				*Mediation preference* *Coefficient (S.E.)*			
	(1)	**(2)**	**(3)**	**(4 - Full)**	**(1)**	**(2)**	**(3)**	**(4 - Full)**
Internal Firm Characteristics								
Firm size								
1 = <5k	-	0.115	0.089	0.066	-	-0.081	-0.097	-0.164
2 = 5k-10k	-	(ref)	(ref)	(ref)	-	(ref)	(ref)	(ref)
3 = 10k – 20k	-	-0.207	-0.109	-0.166	-	0.123	0.074	0.184
4 = 20k – 40k	-	0.113	-0.109	-0.214	-	0.052	-0.025	0.006
5 = >40k	-	0.217	-0.096	-0.207	-	0.184	0.044	0.133
Revenue per employee	-	-0.033 (0.118)	-0.069 (0.084)	-0.147 (0.099)	-	-0.004 (0.106)	-0.025 (0.107)	0.090 (0.126)
ADR Policies								
Coverage								
1 = 1-25%	-	-	(ref)	(ref)	-	-	(ref)	(ref)
2 = 26-50%	-	-	0.145	0.203	-	-	-0.210	-0.154
3 = 51-75%	-	-	0.633	0.530	-	-	-0.035	0.163
4 = 75-100%	-	-	1.035	1.034	-	-	0.285	0.384
Mandatory	-	-	0.657*** (0.150)	0.682*** (0.154)	-	-	-0.224 (0.191)	-0.283 (0.197)
Environmental Characteristics								
Industry	-	-	-	Yes	-	-	-	Yes
Deregulation	-	-	-	0.017 (0.183)	-	-	-	-0.279 (0.234)
Unionization	-	-	-	0.011 (0.122)	-	-	-	-0.190 (0.155)
Constant	-0.464	-0.654	-0.950	-0.986	-1.267	-1.247	-1.088	-1.089
N	210	210	177	173	210	210	177	173
AIC	581.573	585.102	379.206	373.997	543.600	551.023	460.145	458.827

Note: All models have location (state-based) fixed effects.
Statistically significant at the *** .01; ** .05; or * .10 level.

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CHAPTER 3: STUDY 2 – DIFFERENCE IN CASE CHARACTERISTICS AND OUTCOME BETWEEN VOLUNTARY ARBITRATION AND LITIGATION

3.1 INTRODUCTION

The use of employment arbitration to resolve discrimination complaints is met with considerable controversy and debate. The fundamental question at issue is that does an arbitration system produce outcomes for employees that are substantively equivalent to those achieved in a court system – does arbitration meet the condition of 'effective vindication' prescribed by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Much has been written on this topic (Estreicher, 2001; Eisenberg & Hill, 2003; Schwartz, 2009; Colvin & Gough, 2014, Gough, 2020). Nonetheless, there is little evidence that directly compares how similarly situated employees, who have a choice in selecting a forum, fare across these alternative venues. Except for Gough (2020), the remaining literature that compares the two forums is descriptive and lacks the quantitative analyses this topic merits.

My paper uses new empirical data to examine whether employment discrimination cases resolved through arbitration differ in their underlying characteristics and outcomes. Precisely, I analyze the difference in the case/party characteristics and employee-plaintiff win-rate between arbitration and litigation in the securities industry. I specifically study the securities industry as it is one of the few sectors that uses post-dispute voluntary arbitration. Not many industries or firms implement voluntary arbitration – most private-sector employers use it on a pre-dispute mandatory (Colvin 2014). This is one of the reasons why the academic literature is full of studies on mandatory arbitration (Stone,1996; Bingham 1998; Estreicher, 2001; Colvin, 2004; Colvin 2011; Colvin, 2014; Colvin & Gough 2015, Gough, 2020) but is short on research with an emphasis on voluntary arbitration. My paper tries to fill this gap because it is worthwhile to examine how different forms of arbitration perform.

Post-dispute voluntary arbitration was implemented in the securities industry by the Financial Industry Regulatory Authority (FINRA) in 1999. Through this system, disputant parties are given the option to either jointly select arbitration, or simply go ahead with litigation to resolve their discrimination cases. Voluntary arbitration, I believe, can enable a nuanced understanding of arbitration as a system of workplace dispute resolution. Prior studies on arbitration and litigation contrast pre-dispute mandatory arbitration with litigation. This comparison is important since employees are increasingly being required to sign a mandatory arbitration clause as a condition of employment. However, an objective evaluation of arbitration necessitates that both arbitration and litigation be available as a choice, i.e., voluntary arbitration. Such an analysis would shed light on the real character of arbitration. It can help contribute to the question of whether arbitration is an inferior dispute resolution system in and of itself or does making it *mandatory* and an *adhesion of contract* cause the problems.

The data I use to conduct my analyses includes discrimination cases filed by FINRA registered employees against their FINRA registered employers. As employees have the option to choose between arbitration and litigation, I collect information on cases filed in both forums. The arbitration data comprises of the universe of discrimination cases filed and subsequently resolved by FINRA's arbitration system during 1999-2017. I gathered all award sheets for these cases to extract case and party characteristics that I compare with litigation. I sourced the litigation data from Bloomberg Law, an online database for docket sheets on lawsuits filed in U.S. courts. For each firm in the FINRA arbitration dataset, I assembled discrimination cases resolved against them in federal courts for the same period (i.e., 1999-2017). The complete dataset consists of individual arbitration and litigation case outcome (employee win-rate), case characteristics, and party characteristics.

Using this data, I employ a multivariate regression framework to examine differences across both forums. I first analyze differences in case and party characteristics across both forums.

One of the issues in comparison studies is that it is difficult to account for the selection effect that drives cases into arbitration versus litigation (Priest & Klein, 1984). I study how cases that go into each forum differ across forums. I specifically expect variations in the number of hearing sessions, frequency of motions to dismiss filed by defendant firms, disposition time, and employee representation.

Using these variables and other disputant party characteristics as controls, I test my key research question regarding which forum produces a higher employee win rate. To date, studies that have examined employee win rates for discrimination cases show mixed results. Some studies have shown a relatively higher employee win rate in arbitration while others have shown the contrary (Eisenberg & Hill, 2003; Nielsen, Nelson, & Lancaster, 2010; Lamare & Lipsky, 2019; Gough, 2020). Therefore, research on this topic needs to develop further: a systematic comparison of both forums using multivariate analysis is necessary.

Gough's (2020) work is unique in examining both forums and controlling for case and party characteristics as these variables relate to case outcomes. However, Gough notes that his analysis is based on survey data from attorneys. Consequently, there may be a positive bias in the reported case outcomes. My paper addresses this limitation and builds on Gough's (2020) study by examining actual wins and losses from award/docket sheets in arbitration and litigation. I interpret and discuss my results keeping in mind that arbitration and litigation have different dynamics and that the data represents voluntary arbitration, and not mandatory arbitration. Other than empirically contributing to the literature that compares arbitration and litigation outcomes for employee-plaintiffs, this paper also enhances our understanding of post-dispute voluntary arbitration, a comparatively uncommon yet valuable dispute resolution system.

3.2 LITERATURE REVIEW AND THEORY

Arbitration in general is a dispute resolution function in which a third-party neutral makes a binding verdict on a dispute between two parties (Brown, 2014). It is used to resolve all kinds of conflicts including consumer, commercial and employment disputes. In the employment arena, arbitration got introduced as an alternative to litigation (Lipsky, 2014). The increasing costs, delays, and overall dissatisfaction with the U.S. judicial system in 1960s and 1970s stimulated its' adoption (Lipsky, Avgar, & Lamare, 2016). The courts also endorsed arbitration so much so that they allowed organizations to mandate arbitration to resolve disputes as a condition of employment (Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)). This decision fueled the controversies and debates related to employment arbitration. Critics primarily attack arbitration for being used to resolve statutory claims. Among other concerns, they argue that arbitration is a biased system and therefore serious cases based on statutory laws should not be heard in such a private institution (Stone, 1996).

As a means of addressing this issue, scholars and advocates of arbitration came up with post-dispute voluntary arbitration. Post-dispute voluntary arbitration provides both arbitration and litigation as available options. After a conflict has arisen disputant parties weigh the benefits of both forums and then either go for private arbitration (if both parties agree) or go ahead with public litigation (Sherwyn, 2003). Supporters of this system present it as a solution because it allegedly has all the benefits of mandatory arbitration and excludes the *mandatory* drawback from it.

Removal of a mandatory clause in a post-dispute voluntary arbitration system introduces a completely different environment for employees and employers. For example, parties are able decide which forum to choose based on what suits their case (James, 2016). Moreover, employee-plaintiffs are able to hire and attract qualified attorneys who are lesser inclined to take cases with mandatory arbitration clauses (Gough, 2016). I use such distinctive characteristics of voluntary arbitration as well as relevant literature to guide my hypotheses.

3.2.1 Case and Party Characteristics in Arbitration and Litigation

Conducting a reliable and meaningful empirical comparison between arbitration and litigation dispositions is very challenging. Studies that have tried to make these comparisons are fraught with problems resulting in debatable findings (Schwartz, 2009). One of the most cited problems is regarding selection effect (Priest & Klein, 1984). Cases that go to courts and that go to arbitration are likely to have different characteristics and features (Eisenberg & Hill, 2003). Moreover, arbitration and litigation have distinct features as platforms of dispute resolution which attract different kinds of cases (Gough, 2014). Therefore, selection effect can be viewed as a combination of case and forum characteristics that engage with each other.

Complexity of a case is a factor that influences an employee's choice between arbitration or litigation in a voluntary arbitration system (Sherwyn, 2003). Arbitration is considered to be a relatively informal dispute resolution system with limited discovery (Cole, 2005). Therefore, if a case is complex and the employee-plaintiffs (and their counsels) feel the need to use rigorous procedures of discovery with multiple hearing sessions, they would be more likely to file a lawsuit. Hence, I expect that the number of hearing sessions would be higher in litigation.

A defendant's attempts to dismiss the case before a hearing on the merits is another difference between litigation and arbitration. Compared to arbitration, litigation is known to have a high rate of *pre-trial* motions to dismiss (Sherwyn, Tracey, & Eigen, 1999; Colvin & Pike, 2014). It is also reported that over 70 percent of these pre-trial dispositive motions in litigated employment discrimination cases are granted (Cecil & Cort, 2007). In arbitration, however, such motions are rare and mostly filed in front of the arbitrator at the hearing (Sherwyn et al., 1999). Therefore, it can be rationalized that defendant employers who think they have a meritorious case are more likely to file a lawsuit because they can use pre-trial motions to completely dismiss the case. This alludes to the notion that case meritoriousness is another factor that varies across both forums. Firms decide against arbitration and pull employees into litigation if they think the employee's

case is weak. Keeping this reasoning in mind, I expect that that litigation will have a higher rate of motions to dismiss. However, it must also be considered that a difference in motions to dismiss may not solely represent case meritoriousness – it may also be a function of the mere fact that such motions are a common feature of the litigation system.

Employee representation is also known to play a role in whether the case is filed in arbitration or litigation (Estreicher, 2001; Sternlight 2015; Gough 2016; Estlund 2018). The literature on employee-plaintiff representation has shown that an attorney's decision to accept a case is influenced by the forum in which the case is adjudicated (Gough, 2018). Attorneys who represent employees are generally hired under contingency-fee arrangements. They are paid a percentage of the award or settlement that is received by employee-plaintiffs (Sherwyn, 2003). Therefore, being rational actors motivated by economic incentives, lawyers decide to accept cases based on their valuation of the potential monetary award or settlement of the case at hand. For example, Sherwyn's (2003) survey of labor and employment lawyers in Chicago, Illinois from 1994 through 1998, showed that attorneys choose between arbitration and litigation based on what is most favorable for the case as well as their own potential earnings by accepting that case.

Therefore, as arbitration is reputed to be a forum that awards lower compensatory damages (Gough, 2020), employment attorneys are less likely to take cases going to arbitration because it lacks the economic incentives that litigation has to offer (Estreicher, 2001; Sherwyn, 2003; Colvin 2014; Sternlight 2015; Gough 2016, 2018). I build on these studies to test employee representation effects using empirical data and analysis. I use a different setting where arbitration is not mandated but is available as an option. Based on the theoretical foundations laid by studies mentioned above, I expect that having representation would increase the chances of employee-plaintiffs filing their claims in public courts instead of arbitration.

Lastly, I also expect the disposition time to vary across both forums. One of the attractions of arbitration is the idea that it provides faster resolutions than litigation. Empirical evidence

supports this notion as well. Eisenberg & Hill (2003) report an average duration of 262 days to reach disposition in employer-promulgated arbitrations conducted by the AAA. Colvin (2011) found that the mean time to disposition was 284 days for cases that settled and 362 days for cases that were disposed by an arbitrator's award, an average of 323 days. The average federal court disposition times is 819 days and 814 days for federal and state courts respectively, an average of 817 days (Gough, 2018)[4]. Eisenberg & Hill (2003) reported federal court disposition times to be 709 days and 818 days for state courts (average of 764 days). Clermont & Schwab (2004) reported the mean disposition time for federal courts to be 454 days. Based on these studies, it can be concluded that arbitration has lower disposition times compared to litigation.

However, all these studies account for only cases that reached a trial (or a hearing stage in arbitration). They do not include data on pre-trial dismissals in litigation. As I have highlighted above, and as I will explain in more depth later in the paper, inclusion of pre-trial dismissals is imperative in order to conduct a balanced and fair comparison between arbitration and litigation (Sherwyn, 2003). To this note, Schwartz (2009) contends that if a comparison is done between disposition times including pre-trial dismissals, the average disposition time may actually be shorter in litigation. He goes on to assert that it is necessary to average dismissals into case duration calculations. Since I include these dismissals, I am able to test Schwartz' proposition. I hypothesize something that goes against one of the definitive properties of arbitration – that compared to litigation, arbitration has higher disposition times.

[4] Gough (2018) states these number referencing Prof. Alexander Colvin having the data one file. He mentioned that the federal courts time statistics were calculated using 2012 Federal Court Cases from the Interuniversity Consortium for Political and Social Research (ICPSR), and state courts time statistics were calculated using the Civil Justice Survey of State Court, 2005

3.2.2 Employee Win Rate in Arbitration vs. Litigation

The key research question of this paper is whether the win rate for employees who file an arbitration case differs from the win rate for employees who file a lawsuit. I again use a multivariate analysis to test which forum (arbitration or litigation) produces a higher win rate for employee plaintiffs filing discrimination claims. Empirical evidence related to employment arbitration and litigation win rates show mixed results (Colvin 2011; Lamare & Lipsky 2014; Colvin & Gough 2015; Lamare 2016; Lamare & Lipsky, 2019; Lamare, 2020; Oppenheimer, 2003; Clermont & Schwab 2004; Nielsen, Nelson, & Lancaster, 2010; Gough, 2020). These mixed results are primarily due to the fact that these studies do not examine the same types of allegations. Win rate comparisons become dubious when different types of allegations are compared with each other. For instance, discrimination cases have distinct features and differ from other types of cases (Lamare & Lipsky, 2019). Therefore, discrimination cases resolved in litigation should only be compared with discrimination cases resolved in arbitration. Below, I present results from studies that focus on discrimination cases.

One of the first investigations into discrimination cases resolved in arbitration was done by Howard (1995). He showed that the employee win rate for cases arbitrated in the securities industry between 1992-94 was 48%. Lamare and Lipsky (2019) used actual case awards to show that the employee win rate for discrimination cases resolved between 1991-2006 in the securities industry's arbitration system was 51.3%. For litigation, Nielsen, Nelson, and Lancaster (2010) showed a 33% win rate for employment discrimination cases that reached a trial. Clermont and Schwab (2004) report an employee win rate of 36%. Taken together, it can be concluded from these studies that arbitration has a higher employee win rate. However, it must be noted that one of the major lacking in these studies is that they provide within-forum insights, making results less informative and ambiguous (Gough, 2020). A systematic side-by-side comparison that considers outcomes of both forums is necessary.

Studies that have compared both forums are limited in their data and methodology. Eisenberg and Hill (2003) used 1999-2000 data from the Administrative Office of the U.S. Courts (AOUSC) and compared it with the American Arbitration Association (AAA) to show that that the employee win rate for federal court discrimination cases is 36.4%. He categorized arbitration awards into high and low paid employees and found that arbitration had a win rate of 40.0% for higher pay employees and a win rate of 24.3% for lower pay employees. He found no significant difference between the win rate of higher-pay employees in arbitration and litigation. These results, however, are criticized by scholars as they rely on simple descriptive statistics using data from a very short time span (i.e., 1999-2000) (Schwartz, 2009; Lamare & Lipsky, 2019). Another comparison study was conducted by Gough (2014) who used survey data from 700 plaintiff-attorneys to present a comparison of case characteristics and outcomes in arbitration and litigation. He found that the employee win rate in arbitration was 45% whereas litigation had a higher win rate of 63%. This study was also based on descriptive statistics.

Gough (2020) conducted the only study of which I am aware that examined data from both forums and also used multivariate statistical analyses. He collected survey data from 1,256 employment plaintiff attorneys and reported an employee win rate of 46% for discrimination cases resolved in arbitration and 62% in litigation. He found support for these numbers in his empirical analyses as well. Specifically, he showed that compared to state and federal jury trials, employees bringing in discrimination cases experienced a significantly lower win rate in arbitration. The overall award amounts, and the percentage of claimed amount awarded, were also found to be significantly lower in arbitration. Gough (2020) controlled for many case and party characteristics which helped produce a robust analysis. However, as the author mentioned himself, the fact that the data came from surveying attorneys invited a positive bias in the reported case outcomes.

All in all, the literature on discrimination allegations also show variation in the employee win rate across arbitration and litigation. This suggests that research is still developing to reach a

more reliable conclusion regarding the arbitration vs. litigation outcomes debate. The most recent comparative studies (Gough 2014; 2020), that examine both forums, can be summarized to suggest that discrimination cases resolved in arbitration have lower win rates and unfavorable outcomes for employee plaintiffs. However, it must be mentioned here that these studies are based on comparisons between arbitration cases that reached the final stage of a hearing and litigation cases that reached a trial. As hinted to earlier, this comparison may seem appropriate as both these junctures serve as the final stage in each forum. However, as Sherwyn (2003) explains, such a comparison is inherently flawed and therefore should not be used to make any valid conclusions.

This argument has primarily got to do with the difference in the use of pre-trial *motions to dismiss* (or *summary judgements*) between arbitration and litigation. Such dispositive motions are mostly used by defense attorneys to get cases dismissed before a hearing/trial. As explained earlier, in arbitration, it is very rare for a case to be dismissed based on such pre-hearing dispositive motions – requests for these kinds of dismissals are typically reserved for the arbitration hearing itself (Sherwyn, Tracey, & Eigen, 1999). However, in litigation, motions to dismiss and summary judgements are basic procedural tactics used by defendants to avoid a hearing on the merits (Sherwyn, 2003). Seventy percent of pre-trial motions to dismiss are granted in employment discrimination cases (Cecil & Cort, 2007). Such pre-trial dismissals equate to employee losses; however, because these cases are never tried before a court, some studies omit this important information in the win-rate calculations for cases decided on the merits. The omission of cases dismissed in a pre-trial motion distorts findings that simply report win-rates at trial.

Studies have mostly ignored these pre-trial dismissals due to lack of data on these cases. However, unavailability of data does not justify excluding them as they are an integral outcome of the litigation forum (Schwartz, 2009). Therefore, to ensure a fair comparison, it is strongly recommended that dispositive pre-trial motions be included in arbitration vs. litigation win/loss calculations (Ware, 1996; Sherwyn, 2003; Sherwyn, Estreicher, & Heise, 2005; Schwartz, 2009).

Following this advice, I include cases that were dismissed as a result of motions filed by defendant firms prior to a trial. This addition of dismissals in the mix of outcomes lead me to expect results contrary to what Gough (2014, 2020) studies show. Past studies that have produced higher employee win rates in litigation may have been due to the fact that they excluded pre-trial dismissals. Excluding these dismissals would leave litigation with relatively more meritorious cases that reach a trial, which would then create an upward bias in the litigation win rate. By including dismissals, I expect that the employee win rate in litigation would be lower compared to arbitration.

My expectation for a lower litigation win rate banks on two other reasons as well. The first relates to the fact that the data I analyze consists of voluntary arbitration cases: in a voluntary arbitration system, parties are able to strategically decide where they will resolve the dispute (James, 2016). The decision to choose the forum is based on the parties and their attorneys' opinion about the merits of the allegation and what forum benefits them (Kritzer, 1997). For example, as arbitration is a more cost-effective platform, it makes more sense for employee-plaintiffs to resolve their low-stakes cases using arbitration. Firms also avoid taking such claims to courts as they do not want to bear high litigation costs for cases that do not have high stakes (Schwartz, 2009). Moreover, for such arbitrated cases, since the cost of arbitration is low, both parties are less likely to settle; employers are known to refuse low-cost settlements in arbitration (Sherwyn, 2003). On the other hand, high stakes cases are more likely to end up being filed for litigation (Schwartz, 2009). Such cases may involve more egregious allegations (Marshall, 2005), a factor that increases the likelihood of settlements as well.

This line of reasoning implicates a second reason for expecting a low litigation win rate for employees. Litigation is known to have a high settlement rate (Clermont & Eisenberg, 2002). Therefore, a good majority of the high-stakes cases that are filed in litigation are probably settled. In fact, more than 70% of employment discrimination claims filed in litigation are known to take

the form of settlements (Clermont & Eisenberg, 2002) because defendants and their attorneys try to settle litigated cases to avoid hefty damages awarded by judges (Galanter, 1974). Therefore, a difference in win-rates in arbitration and litigation may be explained by the greater tendency for litigated cases to settle. For example, arbitration might have a lower settlement rate which lets more meritorious cases feed into the final stage of a hearing producing a certain employee win rate. On the other hand, in litigation, given the high cost and risk involved, many high-merit cases probably get settled before they reach a trial – this would leave litigation with a lower employee win rate.

Keeping these arguments in mind, I hypothesize that arbitration has a higher employee win rate compared to litigation.

3.3 DATA AND METHODS

Unlike past studies on arbitration vs. litigation outcome comparisons that are based on secondary datasets (Eisenberg & Hill, 2003) or surveys (Sherwyn, 2003; Gough, 2014; Gough, 2020), I analyze information from actual case award sheets. This allows me to incorporate and control for objective case/party characteristics in the analyses. The arbitration data I use comprises of the universe of employment discrimination arbitration disputes filed and resolved by FINRA registered employees against their FINRA registered employers between 1999-17[5]. Data on cases filed between January 1999 – December 2007 were received as a compiled dataset from FINRA itself[6]. Cases filed between January 2008 to December 2017 were sourced from FINRA's website where all arbitration cases that have been resolved are published and made publicly available. I

[5] I analyze employment discrimination claims because they are the only type of claims that are resolved using voluntary arbitration and hence are filed in arbitration as well as litigation (Lamare & Lipsky, 2019). Also, the most common type of employment case filed in both public courts and arbitration are discrimination cases (Clermont & Schwab 2004; Colvin 2012).

[6] I use 1999 as the starting point for my dataset because that was when FINRA implemented post-dispute voluntary arbitration for discrimination cases in the securities industry.

downloaded all these award sheets and extracted information on case characteristics, party characteristics, and outcomes. A total of 310 discrimination cases comprised the arbitration dataset[7].

The litigation data was sourced from Bloomberg Law which is an online database for docket sheets on lawsuits filed in U.S. courts. Bloomberg Law has information on the universe of cases filed and resolved in federal courts. They scrape this data from the Public Access to Court Electronic Records (PACER), which is a government service that provides electronic public access to federal court records. The sampling method for litigation cases was such that I collected data on court filings for all the securities firms in the FINRA dataset. For all those firms (covering the period 1999-17), I collected the universe of discrimination cases filed and disposed against them in federal courts. Out of those filings, I filtered cases that were filed by employees registered with FINRA; I did this using the *FINRA Broker Check* service which allowed me to check if the plaintiffs' names appeared as a broker employed by the defendant firm. I was able to collect a total of 556 federal court cases.

To generate variables for the litigation data, I downloaded the docket sheets and pulled information on case and party characteristics using Python Software. For the outcome variable, I matched the dataset with the Federal Judicial Center's (FJC) Integrated Database using three identifying variables: individual case docket numbers, plaintiff name, and date of case filing. The FJC dataset contains information on all federal court case *dispositions* reported by the Administrative Office of the U.S. Courts. I used this data to divide cases into three categories: (i) judgements in favor of employee-plaintiffs at trial; (ii) judgements in favor of defendant employers

[7] All arbitration cases reached the stage of a hearing. There were 28 cases that indicated some degree of settlement. However, anecdotal evidence sourced from the Vice President, Dispute Resolution Services, FINRA suggests that as these cases reached the hearing stage and an award was written by the arbitrator(s), they should be considered as resolved/decided by arbitrator(s). Moreover, almost all these cases are *partially* settled. All results remain significant even after removing these cases.

at trial and pre-trial dismissals; and (iii) settlements[8]. As the arbitration data does not include settled cases, I exclude the category of settlements from litigation as well[9]. The remaining 130 cases were simply categorized as employee wins and losses.

I used a regression framework to test all my hypotheses. To test the first set of hypotheses regarding characteristic differences between arbitration and litigation, I regress *Forum* on all case and party characteristics. *Forum* is a dichotomous variable signifying whether a discrimination case was resolved in arbitration (*Forum* = 1) or litigation (*Forum* = 0)[10]. The case and party characteristics are the independent variables. *Number of hearing sessions* is a continuous variable which as explained earlier in the paper, serves as a proxy for case complexity (Lamare & Lipsky 2019). *Motion to dismiss* is a binary measure of whether the defendant-firm filed a motion to dismiss the case. This variable serves as a proxy for the meritoriousness of the claims (Epstein, 2007); it also takes into account the variation in the usage of motions to dismiss across arbitration and litigation (Sherwyn, Tracey, & Eigen, 1999; Sherwyn, 2003). D*isposition time* is a continuous variable representing the number of days between filing date and disposition date. I used additional information from the award/docket sheets to develop variables related to party characteristics. I also account for party characteristics that I explain below.

To test the second hypothesis regarding employee win rate, I use *Win-rate* as the dependent variable, which is a binary measure signifying wins and losses for all discrimination cases. A finding of merit by the arbitrator/judge where s/he granted an award in favor of the employee-plaintiffs is considered an employee win (*Win-rate* = 1). An employee loss is a situation where either the case was dismissed prior to a trial, or the arbitrator/judge found no merit in the case and

[8] I used disposition method code 3 (dismissals due to lack of jurisdiction) and code 18 (judgement on statistical closing) to define dismissals. Following Sherwyn's (2003) call for including cases dismissed due to pre-trial dispositive motions, I include disposition method code 6 (judgement on motion before trial) as well. For settlements, I used disposition method code 2 (dismissals based on want of prosecution), code 5 (judgement on consent), code 12 (voluntary dismissals), and code 13 (settlements).
[9] I eliminate 411 litigation cases that got settled prior to a trial. I also remove 15 cases that were pending disposition.
[10] This type of dichotomous variable representing the forum has been used by Gough (2020).

adjudicated in favor of defendant employers (*Outcome* = 0)[11]. I treat *Forum* as the primary independent variable here. I use all the case characteristic mentioned above as controls because they influence case outcomes (Lamare & Lipsky, 2019).

Attorney representation is also known to influence arbitration outcomes (Colvin & Gough, 2015; Lamare, 2020) and litigation outcomes (Clermont & Schwab, 2004, 2009; Nelson, Nielsen & Lancaster, 2010). Therefore, I use them as controls as well. *Employee representation* and *employer representation* are binary variables (where 0 = no representation). Moreover, gender also influences arbitration awards (Lipsky, Lamare, & Gupta, 2013) and litigation outcomes (Dunham & Leupoid, 2019). To control for any gender bias, I include binary measures of *arbitrator/judge gender* and *employee-plaintiff gender* (where 0 = female). *Employee-plaintiff race* is another factor that may influence case outcomes (Gough, 2020). This is a categorical variable coded as either Caucasian, African American, Hispanic, or Asian. All the variables mentioned above have been used as controls by recent empirical studies on employment dispute resolution studies (Colvin & Gough, 2015; Lamare, 2016; Lamare & Lipsky, 2019, Lamare, 2020, Gough, 2020).

To further improve the regression models, I include (i) time (year-based) fixed effects to account for any changes in rules, procedures, or economic conditions across the years, (ii) location (state-based) fixed effects to control for any variation in policies or environmental characteristics between different states, and (iii) firm-level fixed effects to remove any unobserved heterogeneity between the different defendant firms. Moreover, to account for any unexplained variation in the dependent variables, I use robust standard errors clustered by defendant firms. (Rogers, 1993; Petersen, 2009)

[11] This type of dichotomous outcome has been used in most empirical research conducted on workplace ADR (Colvin & Gough, 2015; Lamare, 2016; Lamare & Lipsky, 2019, Lamare, 2020).

3.4 EMPIRICAL FINDINGS

Table 5 lists all the variables along with their summary statistics, by forum. In early support for the first hypothesis, results suggest that the number of hearing sessions, motions to dismiss, disposition time, and employee representation have statistically significant ($p < .05$) differences across arbitration and litigation. I test the legitimacy of these results using a regression framework.

Table 6 presents results from a Linear Probability Model (LPM) showing that arbitration is associated with significantly lower number of hearing sessions ($p < .01$) and lower rate of motions to dismiss ($p < .01$). Moreover, if an employee is represented by a lawyer, the probability of filing an arbitration claim over a litigation claim significantly decreases ($p < .01$). The coefficient on disposition time is also significant ($p < .01$) but the coefficient is zero. I test this disposition time difference using a separate Ordinary Least Square (OLS) regression analysis. Table 7 shows the OLS results confirming that holding all other variables constant, a shift from litigation to arbitration is associated with a significantly higher disposition time ($\beta = 232.018$; $p < .01$). In other words, on average, compared to litigation, it takes arbitration approximately 232 days longer to resolve a discrimination case. These results are generally consistent with my hypothesis that case outcomes, party characteristics, and win-rates differ in arbitrated and litigated cases. As I discuss later in the paper, these findings lend support in interpreting results of the second hypothesis regarding the win rate.

The second, and key, hypothesis is that arbitration, compared to litigation, will have a higher employee win rate. Once again, Table 5 provides initial support for this expectation. However, I use a multivariate regression framework to test whether the results are valid after accounting for case/party characteristics. *Win-rate* is treated as the dependent variable and *Forum* is the key independent variable. I use a hierarchical Linear Probability Model (LPM) to examine how the win rate is affected by incrementally adding case and party characteristics into the

regression (Lewis, 2007). This allows me to examine how sensitive and robust the models become when additional variables are added.

Table 8 provides the results for these models. The first model (Model 1) includes party characteristics plus the time, location, and firm fixed effects. In the next step (Model 2), I add case characteristics. In the final step (Model 3), I add the key independent variable of interest, *Forum*. To compare all models, and to determine whether Model 3 explains the *Win-rate* better than the other models, I estimate the prediction error and hence relative quality of each model using the Akaike information criterion (AIC) – the model with the lowest AIC value serves as the highest in statistical quality (Kubokawa & Srivastava, 2012). Table 6 shows these AIC estimates for each model. Model 3 (full model), which includes *Forum*, has the lowest AIC which means that it has the best statistical quality.

Results of Model 3 show that the probability of employees winning their discrimination cases is significantly higher in arbitration compared to litigation ($\beta = 0.325$; $p < .01$). Specifically, compared to filing a litigation claim, an employee filing his/her discrimination claim in arbitration would have a 32.5% higher chance of winning the case. Put differently, keeping all case/party characteristics constant, if there are two otherwise similar cases, the one that is arbitrated would have a 32.5% greater chance of winning. This result clearly supports the hypothesis that compared to litigation, arbitration is associated with a higher likelihood of employee-plaintiffs winning their discrimination cases.

Table 8 also shows significant results for some of the other independent variables. The probability of employees winning their discrimination cases is significantly higher for cases that have higher number of hearing sessions ($\beta = 0.002$; $p < .05$); however, the coefficient is very small. Second, the likelihood of winning a discrimination cases is significantly higher for employee-plaintiffs who are represented by lawyers ($\beta = 0.193$; $p < .05$). This is in line with extant literature which shows that employees who are not represented by attorneys are associated with adverse

outcomes in arbitration as well as litigation (Colvin, 2011; Colvin & Gough, 2015; Gough, 2018; Lamare, 2020; Clermont & Schwab, 2004, 2009; Nelson, Nielsen & Lancaster, 2010).

3.5 DISCUSSION

The empirical findings of this paper provide an overall assertion of the notion that discrimination cases going into arbitration and litigation have distinctive characteristics and outcomes. The results deserve further interpretation and discussion.

3.5.1 Case and Party Characteristics across Arbitration and Litigation

The finding that compared to discrimination cases resolved in courts, arbitrated cases have significantly lower number of hearing sessions can be interpreted as arbitration attracting less complicated cases that do not need the level of discovery available in courts. This subliminally alludes to the idea that both, arbitration, and litigation, should be available as options so that parties could choose the platform that best suits their case as well as other circumstances.

Results on motions to dismiss supports the expectation that arbitration is associated with a significantly lower number of motions to dismiss. This can be interpreted to suggest two different things. First, more meritorious cases are taken into courts to receive higher award amounts. However, considering the fact that there is a stark difference in the usage of pre-trial dispositive motions between arbitration and litigation, this result may just mean that litigation as a forum uses such motions at a higher rate. Nonetheless, I treat this finding as a support for the notion that these pre-trial dismissals should be included in forum outcomes comparisons.

I also find support for the counter-intuitive idea that arbitration has a higher disposition time compared to litigation. As already discussed, one reasons for this contradictory result may be due to the inclusion of pre-trial dismissals in litigation. It may be that the allegations getting dismissed prior to a trial (on average) get disposed considerably faster compared to arbitration

cases that go all the way to a hearing. Keeping this in mind, it would be meaningful to test disposition times using data from other studies. If case durations turn out to be low for employment arbitration conducted outside the context of the securities industry or voluntary arbitration as well, it would be a cause for concern for arbitration as a dispute resolution system that is based on efficiency as one of its key pillars.

Lastly, employee representation also varies across forums. Employees who are not able to find attorneys or decide to represent themselves, are more likely to take their cases into arbitration. This makes sense as arbitration, compared to litigation, is a more informal and less complicated system in which pro se employees are able to perform better (Sherwyn, 2003). I discuss implications of this finding in relations to the second hypothesis on win rate.

3.5.2 Employee Win Rate across Forums

Results of the second hypothesis demonstrate that after accounting for all the variations in case and party characteristics, compared to litigation, arbitration is associated with a higher probability of employees winning their cases, compared to litigation. Although this finding fits with pro-arbitration studies, I caution against generalizing these results and interpreting them at face value. The main reason for this is once again the fact that these results are based on a post-dispute voluntary arbitration system and not pre-dispute mandatory arbitration. When given the option to decide the forum after a dispute arises, parties and their respective counsels are able to strategically decide what forum will benefit them for the particular case at hand (James, 2016). This, as discussed in a previous section, leads to a selection effect sending different kinds of cases into each of the two forums. Henceforth, the win rate difference I find should be interpreted keeping in mind (i) variations in case characteristics that get selected into each of the two forums, and (ii) differences in characteristics of arbitration and litigation as dispute resolution platforms. I use theoretical foundations laid by Schwartz (2009) to present this explanation.

In a post-dispute voluntary arbitration system, it takes both parties to agree to arbitrate (Sherwyn, 2003). FINRA's voluntary arbitration system for discrimination cases also follows this policy (FINRA Rule 13201). When both employee-plaintiffs and defendant-employers agree to arbitrate, it means that both parties and their respective representatives conclude that arbitration presents a strategically better platform to resolve the dispute. Based on the premise that arbitration is cheaper and as fair as litigation, Schwartz (2009) states that there are two kinds of cases that both parties generally agree on arbitrating: low-cost/low-stake cases that both parties do not deem worthy enough to be taken into expensive court systems; and low-cost/high-stake cases that are straight-forward, less complicated, and do not need the vigorous and extensive procedures of discovery that courts provide. This seems logical because it does not make economic sense for employees and employers to litigate cases where the process cost of litigation is higher than the potential reward (low-stakes cases), or where the process cost of litigation can be avoided to gain a similar outcome (high-stakes cases). Even when the potential outcome is not similar, a cost-benefit analysis may suggest that arbitration serves as the better choice. When arbitration is considered to be the better choice and both low-cost/low-stakes and low-cost/high-stakes cases are ostensibly filed into arbitration, the cases are primarily settled or decided by the arbitrator(s). High-stakes cases are more likely to settle though – firms can be expected to avoid binding resolutions when the damages are potentially high (Eisenberg & Hill, 2003).

Cases that end up in courts are those where either one or both parties decide against arbitration. According to Sherwyn (2003), in most such cases, the forum that is advantageous to one side is disadvantageous for the other. These are high-cost/low-stakes or high-cost/high-stakes cases (Schwartz, 2009). In the high-cost/low-stakes cases, employee-plaintiffs like to keep the costs low and prefer arbitration because the potential compensatory damages are not high enough to consider litigation; however, defendant firms like to pull employees into the expensive litigation system with an ulterior motive of raising process costs and deterring the employee away through

a litigation war-of-attrition defense strategy (Schwartz, 2009). For high-cost/high-stakes cases, employees prefer to litigate because the stakes are high and the employee needs the procedures of discovery available in the court system. However, defendant firms prefer arbitration to restrain the plaintiff's ability to build his/her case through those discovery mediums. Both, high-cost/low-stakes and high-cost/high-stakes cases, that are litigated due to parties' inability to mutually consent on arbitration, are then either settled, dismissed due to pre-trial motions, or decided during a trial. Here again, high-stakes cases are more likely than not, to get settled because defendant firms avoid the risk of losing high-stakes cases at trial.

Based on this model, both forums, arbitration and litigation, are left with low-stakes cases that do not get settled (Schwartz, 2009). For arbitration, as the process cost is low, the low-stakes cases are likely to go all the way to a hearing and get decided by the arbitrator(s), producing a certain employee win rate. However, in litigation, as process costs are high, it may not make economic sense to go all the way to a trial for low-stakes cases as well (Sherwyn, 2003) – the costs might be more than the expected reward. Therefore, parties probably settle the low-stakes cases (or voluntarily withdraw them) as well. The best way to verify this explanation would be to examine variations in claim amounts as proxy for case stakes, but due to the unavailability of this data in litigation, that is not possible. However, differences in the settlement rate across both forums may provide some indirect evidence that courts have a higher settlement rate which is why the win rate is low in litigation. Literature also supports the notion that arbitration has lower settlements because lower process costs in arbitration reduce the incentives to settle (Eisenberg & Hill, 2003).

To dig deeper into this, I try to estimate whether there is a difference in the settlement rate between arbitration and litigation. Specifically, I calculate the number of cases that got settled in arbitration versus litigation. I collect data on pre-trial settlements and calculate the percentage of claims that got settled in litigation. For arbitration, as the data does not include settled cases, I use

macro-level statistics data from FINRA's website to extrapolate the percentage of cases that got settled in arbitration[12]. These calculations show that litigation has an average settlement rate of 79% whereas arbitration has an average settlement rate of 66%. The approximately 13% higher settlement rate in litigation can theoretically be attributed to the low-stakes cases getting settled or voluntarily withdrawn in the litigation forum, reducing the overall employee win rate.

Although I calculated settlement rates to complement my results and my interpretations of those results, variations in the settlement rate across both forums should be considered when comparing arbitration and litigation outcomes anyway. Settlements are the most common form of disposition in arbitration and in litigation: Clermont and Eisenberg (2002) show that more than 70% of claims are known to get settled prior to a trial in litigation; Colvin & Pike (2014) show that around 60% arbitration claims are settled before a hearing in arbitration. There is a school of thought that as employees are likely to receive a compensation in a settlement, these cases signify employee-plaintiff victories and should therefore be included in the comparison mix of case outcomes between arbitration and litigation (Sherwyn, 2003). Scholars allege that ignoring these settlements may technically bias the win rate analysis and present litigation as an employee unfriendly forum with a low employee win rate because majority of the meritorious cases get

[12] Arbitration - The FINRA website Statistics page (https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/2020#top15controversyindustry) presents information on the total number of discrimination allegations (not cases) filed per year. To calculate how many cases these allegations signify and how many of them got settled, Table 9 in appendix presents the calculation across the years 2011-17. Symbol A presents the number of discrimination allegations filed (taken from the FINRA website). Symbol B presents discrimination cases resolved at an arbitration hearing (data from FINRA dataset). Among these resolved cases, I calculate the percentage of cases that had one, two, or three discrimination allegations. I find that 55.8% cases had one allegation per case, 41.6% cases had two allegations per case, and 2.6% had three allegations per case. Using this information, I extrapolate the number of allegations filed for the cases that got resolved at a hearing (symbol F). Then I subtract this number from the total number of allegations filed for that year (symbol G). Symbol G therefore signifies the number of allegations settled. I then convert these number of allegations settled into number of cases settled according to the ratio presenting cases with one, two, or three allegations (symbol K). Now I have information on the total number of cases resolved (symbol B) and total number of cases settled (symbol K). Adding them provides the total number of cases filed (symbol L). I then calculate the percentage of cases settled (symbol M = K / L). An average of all percentages across the years (from 2011-17) shows that 66% of the discrimination cases filed in arbitration got settled prior to a hearing.

Litigation – Calculation of litigation is straight forward as the data was readily available from the FJC dataset. Calculating an average of the percentage of cases settled (symbol Q = N / P) every year (from 2011-17) shows that on average, 79% of the discrimination cases filed in litigation got settled prior to a hearing.

settled and do not even reach a trial (Schwartz, 2009). Keeping this in mind, I encourage future research to incorporate settlements in their empirical analyses. Doing so will produce a holistic comparison between the two forums and help ascertain whether the low employee win rate found in litigation is actually a function of higher settlements in litigation.

3.6 CONCLUSION

The variations in case characteristics, party characteristics, and outcomes across both forums suggest that both arbitration and litigation are distinct forums that attract different kinds of cases and hence serve different needs. This is probably the essence of why arbitration still exists. Arbitration serves as a relatively less complicated forum where employees are able to go pro se or resolve less complex or low-cost cases that they would generally prefer not to take into public courts. On the other hand, litigation serves as a platform where parties can take their complex, high-merit or high-cost cases.

Such differences in case and forum characteristics also play a role in influencing case outcomes. This paper shows that compared to litigation, arbitration has a relatively higher employee win rate. However, as litigation has a slightly different way of handling disputes (i.e., motions to dismiss and settlements), the low win rate in litigation should not be interpreted to mean that litigation is an adverse platform. In fact, this question regarding which forum is better seems to be somewhat amiss – both forums cater different needs and could serve as the better choice in different circumstances.

Looking at it in this perspective, voluntary arbitration seems to be a good and balanced system where parties and their attorneys can choose the forum based on their valuation of the dispute. Moreover, this agency to choose the forum, where employees are not forced and mandated to arbitrate their grievances, also signals procedural as well as perceived justice for employees. I do not hold post-dispute voluntary arbitration as the epitome of an arbitration system, but it can

serve as good foundation to improve and expand arbitration as an employment dispute resolution system.

Tables

Table 5: Summary Statistics by Forum

Variables	**Forum**	
	Arbitration (N = 310)	***Litigation (N = 130)***
Case characteristics		
Number of hearing sessions (median)	10.0*	43.0*
Motion to dismiss (% of observations)	23.5*	80.8*
Disposition time in days (median)	551.5*	504.0*
Party characteristics		
Employee has a lawyer (% of observations)	83.9*	100.0*
Employer has a lawyer (% of observations)	99.4	100.0
Decider is male (% of observations)	80.0	70.8
Employee is male (% of observations)	64.8	63.1
Employee race (% of observations)		
Caucasian	87.4	83.1
African American	1.0	0.8
Asian	3.6	7.7
Hispanic	8.1	8.5
Win-rate		
Employee wins (% of observations)	36.1*	2.3*

Notes: χ^2 tests are used for categorical variables. Equality of medians tests are used for continuous variables.
Statistically significant at the * .01 level or lower

Table 6: LPM Results for Effects of Employee Representation on Forum Selection

	Forum	
	Arbitration	
Variables	**β**	***Robust S.E.***
Case characteristics		
Number of hearing sessions	-0.005***	0.001
Motion to dismiss	-0.360***	0.075
Disposition time	0.000***	0.000
Party characteristics		
Employee has a lawyer	-0.285***	0.087
Employer has a lawyer	0.006	0.185
Decider is male	0.075	0.069
Employee-plaintiff is male	-0.035	0.060
Plaintiff race (ref = Caucasian) African American Asian Hispanic	 0.019 -0.172 -0.035	 0.306 0.105 0.073
Constant	0.857	
N	440	

Notes: Includes time (year-based), location (state-based), and firm (employer-based) fixed effects. Robust standard errors are clustered by employer. Statistically significant at the *** .01; ** .05; or * .10 level.

Table 7: OLS Results for Disposition times across forums

Variables	***Disposition Time***	
	β	**Robust S.E.**
Forum		
Arbitration (ref = Litigation)	232.018***	57.248
Case characteristics		
Number of hearing sessions	4.371***	1.045
Motion to dismiss	1.621	57.874
Party characteristics		
Employee has a lawyer	41.422	120.082
Employer has a lawyer	-50.160	128.725
Decider is male	-38.266	66.815
Employee-plaintiff is male	-26.360	54.684
Plaintiff race (ref = Caucasian)		
African American	190.187	175.337
Asian	-23.874	107.317
Hispanic	131.596	97.544
Constant	832.638	
N	410	

Notes: Includes time (year-based), location (state-based), and firm (employer-based) fixed effects. Robust standard errors are clustered by employer.
Statistically significant at the *** .01; ** .05; or * .10 level.

Table 8: LPM Results for Win rate across Forums

Variables	***Win rate***		
	Coefficient (S.E)		
	Model 1	***Model 2***	***Model 3 (Full model)***
Forum			
Arbitration (ref = Litigation)	-	-	0.325*** (0.060)
Case characteristics			
Number of hearing sessions	-	0.000 (0.000)	0.002** (0.001)
Motion to dismiss	-	-0.222** (0.111)	-0.105 (0.094)
Disposition time	-	0.000 (0.000)	0.000 (0.000)
Party characteristics			
Employee has a lawyer	0.102 (0.086)	0.100 (0.083)	0.193** (0.900)
Employer has a lawyer	-0.169 (0.481)	-0.147 (0.486)	-0.149 (0.519)
Decider is male	-0.007 (0.075)	-0.017 (0.068)	-0.042 (0.064)
Employee-plaintiff is male	0.014 (0.064)	0.023 (0.062)	0.035 (0.056)
Plaintiff race (ref = Caucasian)			
African American	-0.183 (0.336)	-0.146 (0.270)	-0.152 (0.348)
Asian	-0.175 (0.119)	-0.163 (0.114)	-0.107 (0.101)
Hispanic	0.017 (0.130)	-0.024 (0.120)	-0.007 (0.121)
Constant	0.280	0.349	0.071
AIC	331.920	305.232	272.178
N	440		

Notes: Includes time (year-based), location (state-based), and firm (employer-based) fixed effects. Robust standard errors are clustered by employer.
Statistically significant at the *** .01; ** .05; or * .10 level.

Table 9: Calculation of Settlement Rate across Arbitration and Litigation

Item	*Symbol*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*Average*
ARBITRATION									
Discrimination allegations filed (from FINRA website)	A	27	49	53	43	54	58	37	-
Discrimination cases resolved at hearing (from Dataset)	B	11	11	8	8	17	15	7	-
Cases resolved with one allegation (manually checked)	C	6	7	5	4	9	9	3	55.8%
Cases resolved with two allegations (manually checked)	D	5	4	2	4	8	6	3	41.6%
Cases resolved with three allegations (manually checked)	E	0	0	1	0	0	0	1	2.6%
Number of allegations for resolved cases	F = C + (2 x D) + (3 x E)	16	15	12	12	25	21	12	-
Number of allegations settled	G = A - F	11	34	41	31	29	37	25	-
Cases settled with one allegation (55.8%)	H = (G x 55.8%)	6	19	23	17	16	21	14	-
Cases settled with two allegations (41.6%)	I = (G x 41.6%)	5	14	17	13	12	15	10	-
Cases settled with three allegations (2.6%)	J = (G x 2.6%)	0	1	1	1	1	1	1	-
Number of cases settled	K = H + (I/2) + (J/3)	9	26	32	24	22	29	19	-
Total number of cases filed	L = B + K	20	37	40	32	39	44	26	-
Percentage of cases settled	M = K / L	44%	71%	80%	75%	57%	66%	73%	**66%**
LITIGATION									
Number of cases settled	N	22	31	31	23	22	22	24	-
Total number of cases filed	P	27	39	37	26	33	30	31	-
Percentage of cases settled	Q = N / P	81%	79%	84%	88%	67%	73%	77%	**79%**

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CHAPTER 4: CONCLUSION

This dissertation presents two studies to examine ADR usage and outcomes. The first paper examines how a firm's preference to use either employment mediation or arbitration is influenced by its perception of third-party neutral qualifications and neutral sourcing. Results broadly show that firms are concerned about the quality of neutrals they hire. Their preference to use either mediation or arbitration is directly associated with how qualified they believe the third-party neutral is. With regards to sourcing, firms show a greater preference for arbitrators hired from *private third-party agencies*, and they show a lower preference for mediators hired via *courts*. The finding on arbitrator sourcing is interpreted to suggest that since arbitration is a binding resolution with limited option to appeal, firms want to hire highly qualified arbitrators: the stakes are too high in arbitration to take any chances. Therefore, firms prefer to hire from private third-party agencies who advertise themselves as providers of highly qualified arbitrators. Firms prefer qualified mediators as well. However, an important concern in mediation is having discretion and control over the whole process. When mediation is court-annexed, disputant parties are likely to feel that they do not have discretion over the process. Hence, when mediators are sourced as a result of court-imposed mediation, firms are naturally less inclined to use mediation.

The second paper contrasts employee success rate between post dispute voluntary arbitration and litigation. Results demonstrate that discrimination cases selected into arbitration and litigation have different case and party characteristics. Specifically, compared to arbitrated claims, cases that go into litigation have a higher number of hearing sessions, are more likely to have motions to dismiss, are more likely to have attorneys representing employee-plaintiffs, and have lower average disposition times. The key finding of the paper is that the employee win rate for arbitration is higher compared to litigation. The lower win rate in litigation is interpreted

keeping in mind that the litigation data includes cases that were dismissed based on a pre-trial motion to dismiss. Most previous studies have not accounted these cases and they only compare cases that reach the stage of a trial (litigation) or hearing (arbitration), an approach that can lead to misinterpretations about these comparisons. Arbitration has a significantly lower frequency of such pre-trial motions – most motions to dismiss are exercised during the hearing itself. Therefore, in order to conduct a balanced comparison, pre-trial dismissals in litigation should be included in the mix of outcomes when comparing arbitration and litigation. There could also be other unaccounted differences in case characteristics which influence outcomes across the two forums. For example, there may be an inclination to take high merit cases into litigation so that the claim can be settled prior to a trial. Although this paper touches upon how the settlement rate varies across both forums, an empirical analysis of settled cases could not be done due to lack of data. Future research should incorporate settled cases into their analyses given the centrality of settlement to the disposition of many outcomes in litigation as well as arbitration.

Other than the specific interpretations made from the results in each essay, findings from both studies can generally be interpreted to suggest that firms do not outrightly prefer ADR over other dispute resolution methods. Rather, their preference to use ADR varies based on factors such as the qualification of third-party neutrals. The second study also indicates that given the option to choose the forum, firms sometimes prefer litigation over arbitration. This, as some previous studies have also shown, suggests that arbitration is not outrightly advantageous to defendant firms. Therefore, arbitration should not be viewed as an inherently biased system; rather, it should be examined closely to identify techniques that can be used make it more feasible, viable, and preferable for its users.

This dissertation identifies two such techniques. Findings from the first essay show that due importance should be given to enhance the overall quality of mediators and arbitrators, regardless of their source. Private as well as government agencies should enhance the quality of neutrals listed on their rosters. This can either imply that they should be well-versed in law (for arbitrators), or have better negotiation skills (for mediators). Sourcing dynamics also suggest that courts should avoid imposing mediation, because mediation is not as effective when it is imposed on to the disputant parties.

Results from the second paper demonstrates that different forms of arbitration should be tested to ascertain which format is more effective. If pre-dispute mandatory arbitration is criticized and is controversial, post-dispute voluntary arbitration might address some of the problems. For example, it can provide an effective foundation to resolve cases that have the best chances of winning in arbitration. Moreover, a voluntary arbitration system, where arbitration is not mandated as a condition of employment, signals procedural justice which then enhances perceived justice. However, voluntary arbitration is not perfect as well. For instance, a potential problem is the war of attrition strategy that is allegedly used by defendant firms. As both parties need to agree to arbitration in a voluntary arbitration system, defendant firms can decide against arbitration so that employees are forced into the expensive litigation forum. This acts as a deterring factor because employees sometimes do not find it worthy to go into litigation, especially when the case is a low stakes claim. A possible solution to this issue may be to create a system whereby employees are allowed to voluntarily choose the forum, and the employer is required to accept that decision. However, this policy may raise questions regarding fairness for defendant firms. Nonetheless, the idea is to improve ADR and let it evolve with the overarching aim of helping disputants resolve their conflicts in a fair, efficient, and cost-effective manner.

Improving ADR and modifying it will help expand the use of ADR. As the first study demonstrates, improving the quality of third-party neutrals is associated with a higher usage of mediation and arbitration. The second study helps uncover whether arbitration outcomes are as good as litigation outcomes. The satiation of this '*effective vindication'* test of arbitration (using empirical studies like the one in this dissertation) is what will determine whether arbitration should expand further.