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Arbitration: Who Does it Better?

By: Emma Pearson



Arbitration is a form of dispute resolution used as an alternative to litigation.[1] It has become an increasingly common method of dispute resolution in the United States, with over 9,000 cases and 15 billion dollars going to arbitration in 2021.[2] Arbitration is seen as a beneficial alternative to litigation in the United States for a number of reasons. It takes much less time than traditional litigation so parties can expect to have a resolution to their claim much faster.[3] Additionally, it can be much more cost effective than litigation because it does not have the same extensive discovery process as litigation, which is a source of significant pecuniary and temporal costs.[4] Further, the rules of evidence do not apply to arbitration, so arbitrators can consider evidence that would be deemed inadmissible in a litigation proceeding.[5] Finally, decisions as a result of arbitration are final, meaning that there is no appeals process available to the losing party and the matter is closed after the decision.[6] Arbitration therefore provides a beneficial and unique alternative to litigation for parties seeking a fast and definite answer to their disputes.

Arbitration is not unique to the United States' legal system. The United Kingdom also employs arbitration as a means to solve civil disputes outside of the confines of a court room. Arbitration in the United Kingdom is governed by the 1996 Arbitration Act which states that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense," and "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."^[7] The benefits of arbitration in the United Kingdom are similar to those in the United States – it is a faster, more cost-effective, and (generally) final way to resolve civil claims.^[8] However, the United Kingdom's approach does differ in some key ways. The first is that in the United Kingdom, arbitrators assigned to a case are appointed by the government rather than hired by one of the parties to the dispute.^[9] The other key difference is that the United Kingdom allows a party to appeal damages awarded by the arbitrator if it is found that the decision is "obviously wrong," "the question is one of general public importance," and the decision is "open to serious doubt."^[10]

These differences have significant impacts and should be considered for inclusion in the United States' alternative dispute resolution scheme. In the United States, the parties get to choose the arbitrator, which is often seen as a benefit.^[11] However, this can be unfair in situations of uneven power and wealth dynamics – such as a dispute between a corporation and an individual. Further, corporations will often place mandatory arbitration clauses in employment or consumer contracts that specify that the corporation gets to choose the arbitrator.^[12] Because arbitrators are only paid when selected for a case, it could create inherent bias for the corporation, as the arbitrator is likely unable to ignore the possibility of future work from the corporation.^[13] If a neutral party to the dispute chooses the arbitrator, like the government does in the United Kingdom, this would likely help to eliminate inherent human biases in arbitrators and result in a more just outcome for the parties.

The United States should also adopt the United Kingdom's practice of allowing appeals of damage awards in certain situations.^[14] The United States does not allow for any appeals after a decision is issued for the benefit of providing a definite and final answer to a dispute.^[15] However, having no appeals process inevitably results in some parties having to accept unjust results. The United Kingdom's allowance of appeals in a limited capacity – parties can only appeal the damages awarded and only in circumstances where the decision is "obviously wrong" or concerns a matter of "general public importance"^[16] – still provides a fast and generally final decision, while also allowing greatly unjust decisions to be reviewed and corrected. The United States' arbitration process could benefit from a similar check on arbitrators' powers of decision. If the United States were to implement these two changes into its arbitration processes, it would likely result in more just rulings for parties, particularly in the context of uneven power dynamics between parties.

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[1] *Arbitration Defined: What is Arbitration?*, Jams, <https://www.jamsadr.com/arbitration-defined/> [<https://perma.cc/X3DB-UQQ3>].

[2] *2021 B2B Dispute Resolution Infographic*, Am. Arb. Ass'n., https://www.adr.org/sites/default/files/document_repository/2021_B2B_Infographic.pdf [<https://perma.cc/DVL5-NK8R>].

- [3] *Arbitration Pros and Cons and Do's and Don'ts*, ADR Times (May 29, 2021), <https://www.adrtimes.com/arbitration-pros-and-cons/> [<https://perma.cc/FSN7-AV7T>].
- [4] *Id.*
- [5] See Clifton L. Brinson, *Tips for Maximizing the Benefits of Arbitration*, Am. Bar Ass'n (Mar. 27, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2017/tips-for-maximizing-the-benefits-of-arbitration/> [<https://perma.cc/ZTS8-25AY>].
- [6] *Arbitration Pros and Cons and Do's and Don'ts*, *supra* note 3.
- [7] Arbitration Act, (1996) § 1 Current Law (Eng.).
- [8] Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 Univ. Mia. L. Rev. 831, 850 (2002).
- [9] *Id.*
- [10] Sternlight, *supra* note 8, at 850; Arbitration Act, *supra* note 7, § 69.
- [11] Linda L. Beyea, *Select the Right Arbitrator for Your Case*, Am. Arb. Ass'n. (Dec. 10, 2019), <https://adr.org/blog/select-the-right-arbitrator-for-your-case> [<https://perma.cc/H866-K367>].
- [12] *(Forced) Arbitration in America: Suppressing Claims, Undermining Corporate Accountability, And Perpetuating Injustice: Hearing on H.R. 4445 Before the S. Judiciary Comm.*, 116th Cong. 12 (2019) (statement of Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law).
- [13] *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing on H.R. 4445 Before the H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law).
- [14] Sternlight, *supra* note 8, at 850; Arbitration Act, *supra* note 7, § 69.
- [15] *Arbitration Pros and Cons and Do's and Don'ts*, *supra* note 3.
- [16] Sternlight, *supra* note 8, at 850; Arbitration Act, *supra* note 7, § 69.