Forced arbitration: Designed to suppress claims

By Jahan Sagafi and Michelle Erickson

Concerned with the success of the civil rights and women's rights movements in the 1960s and cultural challenges to corporate power, conservatives in the 1970s planned their legal revolution. In recent decades, this effort has borne fruit. Ballooning corporate power and substantial erosion of the public sphere have caused a yawning chasm between rich and poor. One of the conservative legal architects' greatest achievements is forced arbitration: the privatization of the public court system coupled with attacks on one of the strongest tools for civil law enforcement — the class action.

How? They've sold it on "efficiency" grounds. While studies confirm that the corporate system of private arbitration is less fair than the public courts (resulting in workers and consumers winning less often and recovering less money), forced arbitration's proponents often argue that its speed and efficiency compensate for those flaws. Informality, diminished discovery rights, and no appeal rights all bring finality sooner, they say.

Is this true? In a world where public discourse is peppered with deception and dishonesty, especially in the context of political power grabs by the wealthy, doublespeak is used to mask injustice. So it's important to look clearly at what forced arbitration is — and what it isn't.

It turns out that arbitration isn't nearly as fast or efficient as conservative theoreticians suggest. Sadly, the reality of forced arbitration has begun to reveal that it is highly inefficient — on top of being producing unjust.

Let's start with the lay of the land. Companies have imposed arbitration agreements with class action waivers on at least 60 million American workers. There are over 800 million consumer arbitration agreements in effect. The major effect is to eliminate accountability for corporations, because arbitration is just too onerous for working people to pursue. A recent study revealed that, during 2014-18, AAA and JAMS held a few thousand arbitrations each year for consumers and workers, and an average of 438 of them have won each year. That's fewer than the 440+ Americans injured or killed by lightning annually. American consumers and workers have a better chance of getting struck by lightning than winning an arbitration. Literally.

How does arbitration work, compared to a class action? Whereas a class action on behalf of 1,000 individuals might require discovery regarding two class representatives and a sample of 20 class members, then a class certification motion, before proceeding to the merits, individual arbitration of those 1,000 claims would require 1,000 mini-proceedings. No matter how "mini" they are, that makes individual arbitration 10-100x more costly — for both sides — than a class action. Each case gets relitigated à la Groundhog Day, plus the defendant must pay the arbitrator fees again and again, rather than relying on a judge employed by the people, for the people.

Critically — and this is why conservative corporatists love forced arbitration — most of the 1,000 individuals won't know they have claims, understand how to pursue them, feel comfortable seeking and selecting a lawyer, or want to take hours and months out from their regular lives to try to prove their claims, for the chance to recover a few thousand dollars.

So, rather than be held accountable for harming 1,000 people, a company can defend against a few dozen individuals in arbitration.

At a recent arbitration conference, experts — including those in the arbitration industry — acknowledged this: Forced arbitration is designed primarily to suppress claims.

Sometimes this approach backfires. For example, Uber pursued this strategy, but then 60,000 drivers filed arbitrations. These cases could cost Uber around $600 million and take decades to resolve.

These huge arbitration costs exist because the only way that even the most conservative courts can stomach forced arbitration is that the defendant company guarantees that it will pay all fees specific to arbitration. Otherwise, companies could simply price Americans out of the justice system more directly. But companies have begun to try to slip out of even this minimal procedural guarantee (even though they wrote it into their own adhesive contracts), by simply refusing to pay their share of fees. This generally cripples the process, because the arbitration provider will then refuse to allow the case to proceed. It's like a corporate defendant being able to turn off the electricity at the courthouse. And the provider hesitates to risk the company's ire by demanding timely payment, fearing that the company will choose a competitor arbitration provider in tomorrow's version of its contract.

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Recently, a driver (represented by the authors at Outten & Golden) sued in court, arguing that the defendant's five-month delay in fee payment constituted a waiver of its right to force him to arbitration. *Brunner v. Lyft*, 3:19-cv-04808 (N.D. Cal.).

This kind of corporate gamesmanship destroys the promise of "efficient" arbitration. It helps explain why 85% of arbitrations take just as long as equivalent cases in court. And in the remaining 15% of cases, litigation is only six months longer. This fall, California responded by enacting Senate Bill 707, which requires defendants to honor their obligation to pay arbitration fees within 30 days of the due date or risk waiving their right to force individuals to arbitration.

Companies have more procedural tricks available to slow down arbitrations.

Confidentiality clauses also drive inefficiency by limiting plaintiffs' ability to informally learn about other wrongdoing (e.g., whom else did he harass?), pushing plaintiffs to need more formal depositions. *See, e.g., Ramos v. Superior Court*, 28 Cal. App. 5th 1042, 1066 (Cal. Ct. App. 2018). The claim suppression purpose of confidentiality restrictions becomes clearer when you consider that those restrictions don't keep a defendant from using the same information in case after case.

The arbitration providers are complicit in this inefficiency. They generally "manage" cases passively, refusing to move forward until the parties agree about every detail. Should an arbitrator be assigned? Which AAA rules apply, even though the contract explicitly answers that question? Defendants seeking to delay accountability can simply slow roll or refuse to agree, and the process slows to a crawl. AAA allows cases to languish while fees are unpaid, "routinely" granting fee payment extensions.

As workers and consumers call corporate bluffs by filing arbitrations for the common violations, providers become overwhelmed. The system backs up. Arbitrations proceed more slowly. In one recent arbitration pursued by the authors, a single worker with a simple *Dynamex* misclassification claim was told the arbitrator painstakingly selected by the parties could not hold a hearing until summer 2021.

In a rare case when an individual wins, defendants can delay payment for years with dubious appeals by appealing the judgment on dubious grounds. *See, e.g., Ruhe v. Masimo Corp.*, 640 F. App'x 685, 686 (9th Cir. 2016) (unpublished) (five-year delay for defendant's challenges to arbitrator's impartiality after losing whistleblower claim).

In addition to eroding individual rights, arbitration also obstructs the development of the law, impairing the system's overall effectiveness. Arbitration agreements outsource the justice function from the public sphere to the private sphere. Arbitrators rule, often in secret, and rarely in a published opinion. Thus, the development of the law is removed from the Federal Reporters into a shadow world where decisionmakers are less likely to build on each other's wisdom and engage in a public conversation about the best means for achieving justice, and everyone has a smaller and smaller body of published law to draw on. Private arbitration points to a world with no precedent and an impoverished discourse about what the law is and should be.

But there is good news. As arbitration and other procedural tricks

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Agreement with Quebec is not a treaty with a foreign government

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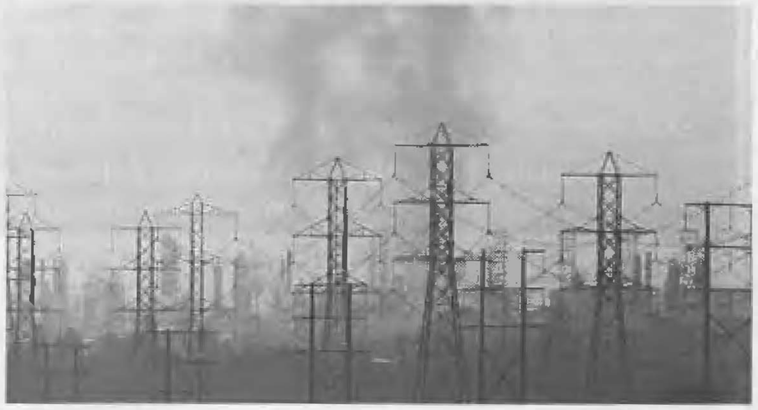
dent sees fit." However, there is a significant question as to whether California has, with Quebec, entered into a "Treaty, Alliance, or Confederation," or other "Agreement or Compact."

The Supreme Court has weighed from time to time on the question of whether a state is overstepping its boundaries in imposing requirements on foreign governments or nationals, or wading into issues reserved under the Constitution for the executive. For example, in 1968 the court ruled that Oregon could not implement a law that barred heirs from receiving bequests from the intestate estate of an Oregon resident, where the heir was a citizen of a country that could confiscate some of proceeds, i.e., this was a cold war law intended to keep bequests from flowing to a communist county. In another case, the court invalidated a California law that imposed sanctions on insurers who did not comply with state disclosure laws regarding claims by Holocaust survivors, holding that was clearly a province of the federal executive branch, and that the state law conflicted with federal law and policy.



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Although there is no dispute that a state cannot enter into a treaty or the like with a foreign government, or otherwise intrude on the executive branch's constitutional powers, it not certain that California entering into the Quebec agreement does that. Rather, it appears that the Quebec agreement was carefully crafted to specifically avoid that problem.

The agreement is generally voluntary in nature. It expressly provides that it "does not, will not and cannot be interpreted to restrict, limit, or otherwise prevail over relevant national obligations of each Party." The "Supervision and Enforcement" section of the agreement has no actionable enforcement mechanism, but rather speaks to cooperation and facilitation. Moreover, by its terms, the Quebec agreement does not modify any existing statues or regulations. Nor, other than a 12-month waiting period, is there a limitation on a party's ability to unilaterally withdraw from the agreement. In essence, the Quebec agreement bears little resemblance to formal treaties, compacts or other agreements between national governments. Instead, it is an agreement by which California and Quebec cooperate to link their respective GHG credits and trading systems in recognition of cross-border impacts of GHG emissions.

What is also unclear is the federal government's contention that California's entry into the Quebec agreement undermines the president's ability to negotiate competitive international environmental agreements, nor it is clear with what federal policy the California action conflicts. The president has stated that he believes climate change is a "hoax," and has initiated the process of disengaging the United States from the Paris Climate Accord. Although the absence of a specific federal policy is not in all instances fatal to a finding of preemption, the federal policy here presumably is that climate change should not be regulated, or at the least, not regulated heavily in the United States. However, if that were truly a basis for a preemption argument, it would mean that the California program itself, with or without Quebec would conflict with federal policy, and no one has made that argument.

It cannot be easily predicted how this case will end, but it does appear that the administration has a tougher road. Ironically, and a point not lost on a number of parties interested in this litigation, is that if the administration is not successful in its endeavor, and is on the losing end of the litigation, it may encourage both California and other states to extend the reach of these types of agreements, both inter-state and with jurisdictions of other nations. Always beware of unintended consequences. ■

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Let's be honest about what forced arbitration is

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are stripping Americans of fundamental substantive rights and a level playing field, popular outrage is growing. The House of Representatives passed the Forced Arbitration Injustice Repeal Act to restore arbitration to its original purpose. Congress passed the Federal Arbitration Act in 1925 to help businesses smoothly settle contract disputes using expert arbitrators familiar with the relevant product (e.g., silk, lumber, potatoes). It was never intended for employment disputes or other asymmetrical conflicts between powerful companies and individuals. In that age before class actions, employment rights, and the New Deal, Congress could not have imagined that the Supreme Court would convert the FAA into a tool for suppressing individual welfare. The FAIR Act would restore Congress's original intent.

So let's be honest about what forced arbitration is: a procedural trick to help companies erase pesky individual rights and consolidate wealth. It wasn't endorsed by Congress. And it's neither fair nor efficient.

Conservative activists had a dream to make forced arbitration a reality. Now, it's time to wake up. ■