

**Mandatory Consumer Arbitration:
Has Compliance With California's Landmark Data Transparency Law Been Sufficient to
Accomplish the Legislature's Goals?**

Assembly Judiciary Committee

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Summary. Private arbitration has a long and honored tradition in the resolution of commercial disputes – at least in part because it is so different from the rules and procedures by which judges resolve legal disputes under law in public courts, and because the process is so elastic, and therefore adjustable to the interests of the contracting parties. However, private arbitration has become controversial as applied to the resolution of consumer and employment disputes when the arbitration clause and the rules of the process are imposed by a more powerful business, without negotiation or alternatives by consumers or employees, and often without their voluntary or explicit consent. Many believe that simply making the process voluntary would be enough to ensure that it is fair, but compulsory arbitration has been largely upheld by the courts. Determining whether the process is fair might therefore may be the best policy option. In an effort to gain greater information about the process and outcomes in order to better inform the debate about the claimed deficiencies or advantages of mandatory consumer arbitration, California enacted landmark legislation in 2002 requiring private arbitration companies to collect and publish basic data about the mandatory consumer arbitration cases they handle.

Ten years later, it is appropriate to consider how the statute has worked and whether it has achieved its goals. Unfortunately it seems that the great bulk if not all companies that appear to be doing mandatory consumer arbitrations in California are not complying with the law, and there are many shortcomings in the data. Surprisingly, many arbitration companies fail to report any data whatsoever, and even those that report some information do not comply fully. Moreover, the form in which the available data is published is most often in a format that renders it of little value to researchers and policymakers without laborious reconstruction efforts that have frustrated even some of the most determined experts. As a result, it appears that the Legislature's intention in enacting the statute has evidently not yet been accomplished. This paper reviews the controversies and the available data in an effort to discern whether the statute should be clarified and strengthened in order to better achieve the goal of deterring potential abuses and grounding the arbitration policy debate in empirical data, rather than mere rhetoric.

Introduction. In 2002 the California Legislature enacted landmark legislation to collect some basic information regarding mandatory contractual arbitration of consumer and employment disputes. That bill, AB 2656 (Corbett), was part of a legislative package authored by a bipartisan group of members of the Assembly Judiciary Committee following a hearing examining a host of concerns about the practices of the largely-unregulated private arbitration companies doing business in California. Then, as now, controversy raged over whether private consumer arbitration was fair, in process and in outcomes, for all parties.

AB 2656, codified as Code of Civil Procedure section 1281.96, requires private arbitration companies¹ to periodically publish on their Internet web sites a handful of data points regarding their consumer arbitration proceedings.² Although the measure was opposed by the arbitration industry, it was hoped that the publication of this information would for the first time provide consumers, businesses, policymakers and researchers with helpful evidence from which to assess what was taking place within the "black box" of private arbitration, and to begin to form better opinions and make better policy decisions on the basis of fact rather than fiction, fear or fantasy.³ Ten years later it is appropriate – indeed perhaps overdue – to consider how the statute has worked, and insofar as it has not worked, to ask how it might be improved.

Mandatory Consumer Arbitration Is Increasingly Common, Essentially Unregulated By Law, And Highly Controversial – In Large Part Because It Is So Fundamentally Different From The Resolution of Legal Disputes By The Public Court System. With partisans on both sides arguing the claimed virtues and evils of compulsory arbitration, this Committee over the past 15 years has frequently heard that involuntary private arbitration of consumer and employment rights has become increasingly widespread. Although not widely understood outside of a small circle of legal advocates and specialists, private arbitration is a mostly anything-goes private "court" system, established by legally-enforceable contracts. In the context of consumer arbitration, these clauses are typically drafted by the business and imposed on consumers and employees without negotiation or alternatives.

Contractual Arbitration Has A Long and Distinguished Tradition in The Commercial Context, But Mandatory Consumer Arbitration is More Controversial.

Private contractual arbitration has a long and distinguished history in the commercial context to which it was traditionally contained. Among the reasons for its appeal may be that the parties to the contract can customize the dispute resolution process in whatever way they wish. They may select an arbitrator or arbitration company with expertise in the subject matter of the contract; arbitration takes place in private, so it allows for resolution of the dispute without public scrutiny; the parties may select a particular body of law, or specify that the arbitrator is to resolve the dispute on the basis of principles or factors other than those specified by law; the rules of discovery might be curtailed or enhanced, and the rules of evidence might be applied or rejected; the parties may provide for a right to appeal to a public court, or to another arbitrator. Particularly in an era in which the courts are underfunded, arbitration may be more speedy than litigation.

Until recently, however, arbitration agreements were not used by U.S. businesses with respect to consumers, employees, franchisees, or other weaker parties. Instead, the use of arbitration was

limited to business-to-business or management/union contexts where the parties were of relatively equal bargaining power and sophistication and agreed to use arbitration knowingly and voluntarily. By contrast the new growth of arbitration has come from companies using form contracts, envelope stuffers, and Web sites to require their consumers, patients, students, and employees to resolve unknown future disputes through binding arbitration, rather than in court. The new form of compulsory consumer and employment arbitration has features that were not present in the traditional commercial form, including that the parties are typically of much different sophistication and strength, contracts need not be read or signed by both parties, arbitration clauses are commonly imposed not at the beginning of the relationship between the parties, but after the relationship has already commenced, and companies are increasingly using their arbitration clause not only to require arbitration but also to further limit consumers' procedural and even substantive rights.⁴

As many observers have commented, arbitration clauses are now increasingly common requirements for many jobs and purchases. Essential services like healthcare, nursing homes, education, insurance and banking, and popular products such as cellular phones, credit cards, cable TV, and Internet providers typically come with fine-print contracts in which customers waive their right to resolve legal disputes through the traditional public court system. Whether or not knowing and voluntary, the customer agrees to submit disputes to arbitration and, in most cases, agrees not to participate in class proceedings, either in court or before an arbitrator.

One prominent legal scholar has summed up the arguments as follows:

Businesses and other supporters of required arbitration argue that arbitration is cheaper, faster, and more effective as a means for dispute resolution than litigation. Professional arbitrators are neutral, they contend, outcomes are at least as favorable to consumers as the outcomes of litigation, and a majority of participants express satisfaction with the process. Class actions, they argue, are inconsistent with arbitration because they undermine the speed, simplicity, and financial benefits of the arbitration process. More broadly, supporters argue that mandatory arbitration, coupled with class action waivers, benefits all consumers by reducing the price of consumer products. Companies save money, and in a competitive market, pass their savings on to customers, supporters contend.

On the other hand, critics characterize mandatory arbitration as a limited and often unsatisfactory process imposed by economically powerful corporations on unsophisticated consumers without genuine consent. Consumers are deprived of jury trials; instead their claims are judged by private arbitrators who may seek to ingratiate themselves with companies that frequently use their services. As a result, consumers win less often than they should and damage awards are lower than in the public court system. Critics also maintain that mandatory arbitration is detrimental to the public interest in open resolution of legal disputes because arbitration proceedings are typically private and do not result in published opinions; therefore decisions rendered by arbitrators contribute nothing to the body of law, have no deterrent effect on future wrongdoing, and fail to stimulate interest in legal reform. Opponents of mandatory arbitration are particularly critical of arbitration agreements in which consumers waive their ability to initiate or join

in class actions, in or out of arbitration, arguing that class actions are necessary to apprise consumers of corporate malfeasance, to make small claims economically viable, and to hold companies accountable for wrongdoing that results in small losses to many customers. Thus, class action waivers defeat both the rights of individual consumers and the public's interest in enlisting private litigants to enforce the law. Avoiding class actions may save money for companies, but there is no guarantee that the savings will be passed on to consumers and in any event public interests in law enforcement trump private interests in lower prices for consumer products.⁵

The revenue incentives of private arbitration have caused concerns about the advantages enjoyed by "repeat-players," and the potential disadvantages for consumers. As this Committee has also frequently discussed, not only is private arbitration effectively unregulated, it has caused concerns among workers' rights and consumer advocates because it is a revenue-driven system where, critics contend, "repeat players" have unfair advantages when they are involved in forced arbitration against "one-shot" users, such as individual consumers. This may be particularly true where the dispute involves stigmatizing allegations, such as race discrimination, sexual harassment, and elder abuse.

Interestingly, it has been observed that compelled arbitration clauses may be far more prevalent in contractual provisions involving consumers than they are in contracts between businesses – suggesting that businesses apparently use compulsory arbitration clauses to protect themselves against consumer claims, but prefer litigation to resolve their own disputes – which some contend belies their claim that arbitration is truly fair and efficient.⁶

Procedural Differences Between Arbitration and Court Proceedings.

Whatever the competing contentions, there may be agreement that mandatory arbitration and the arbitration companies that profit by it, are far removed from the traditional method by which disputes are resolved by a governmental entity according to the law and by a procedure that is required to adhere to fundamental principles of due process. Private contractual arbitration is subject to little if any regulation, oversight or legal accountability to the parties or the public. Virtually every aspect of the arbitration process – including the selection of the arbitration company, the potential panel of arbitrators, the rules by which the arbitration will be conducted – is determined by the terms of the arbitration clause, not by law. Because the parties are deemed to have agreed to these terms, the courts have generally enforced them absent proof that they are both procedurally and substantively unconscionable. Thus, for example, unlike judges, arbitrators need not be trained in the law – or even apply the law – or render a decision consistent with the evidence presented to them. What evidence is presented may, in fact, be incomplete because parties in arbitration have no legal right to obtain evidence in support of their claims or defenses, or the claims or defenses of the other party, contrary to the longstanding discovery practice in public courts.

Indeed, unlike judges, arbitrators need not explain or defend the rationale for their decisions. There is no need to justify his or her decision because the law and the evidence need not be followed and because there is no legal right for any party to appeal or obtain an independent review of the arbitrator's ruling. Regardless of the level or type of mistake, or even misconduct,

by the arbitrator, the most relief a court may grant to a party in arbitration who has not been treated fairly is to vacate the award, which ironically simply returns the parties to further arbitration, perhaps even with the same arbitrator or arbitration company. The grounds on which an arbitrator's decision may be vacated, moreover, are extremely narrow and the standards for vacatur are stringent. Neither may the parties generally obtain any remedy against the arbitrator for misconduct because arbitrators are afforded substantial if not absolute immunity from civil liability for acts relating to their decisions, even in the case of bias, fraud, corruption or other violation of law.

Doubtlessly Because of the Ongoing Controversy, The Legislature Has Seen A Large Number of Bills Relating to Mandatory Arbitration. Reflecting the controversy discussed above, a review of Committee records reveals that this Committee has seen at least 50 bills concerned with mandatory arbitration in the past 15 years. If the past is any guide, many more may follow.

California's Landmark Consumer Arbitration Data Law Was Intended To Help Inform The Debate Over The Alleged Pros and Cons of Mandatory Arbitration And Deter Potential Abuses. While values such as fairness and choice may be important considerations for both scholars and policymakers, critics and supporters of compelled consumer arbitration have agreed that the debate should be informed by empirical data upon which to ground the competing contentions. Many leading researchers on both sides of the issue have commented that there are few available data sources, and those that exist have been difficult and time-consuming to obtain.⁷

With the goal of improving the availability of hard data and the promotion of reasoned debate, and by transparency to deter any potential abuses, section 1281.96 was designed to begin collecting consumer arbitration information for the first time, starting in 2003. The purpose of this measure was to provide sunshine on the process and outcomes in these cases to better allow researchers and policymakers to evaluate the competing contentions, to deter potential abuses, determine what if any oversight might be needed to ensure that consumer arbitrations are fair and accord with established notions of due process, to reduce any potential incentives to favor business parties, and to help address mounting public skepticism about the integrity of the arbitration process. (See Assembly Judiciary Committee report on AB 2656 (Corbett) of 2002.) Although opposed by the private arbitration industry, the measure passed with bipartisan support.

In the 10 years that have elapsed since enactment of the statute, the Legislature's purpose has been reinforced. One prominent supporter of arbitration has remarked, "there now appears to be a consensus that the future of arbitration should be decided by data, not anecdote."⁸ Nevertheless, the dearth of evidence has caused experts to call for more and better data, noting that "despite the importance of systematic empirical evidence to Congress and other policymakers when they consider consumer and employment arbitration, the available empirical evidence is limited in important respects."⁹

When data has been posted and made available as required by section 1281.96 it has generated spirited discussion and critique that many believe has advanced and elevated scholarly and public understanding of the competing claims. Two notable examples of studies relying on section 1281.96 data are an analysis of AAA's employment arbitration cases,¹⁰ and a study by the

consumer advocacy group Public Citizen of data reported by the National Arbitration Forum following litigation to force disclosure of the data.¹¹

Other empirical studies have generally been based on a limited review of actual case files. Unfortunately, the most rigorous studies tend to focus on just one arbitration company – American Arbitration Association – apparently because it may be the most transparent. However, even those who have conducted the AAA studies caution against extrapolating the results from this company, which may have the highest standards in the consumer arbitration industry and therefore may not be representative of other private arbitration companies.¹² This caution may be even more valuable for policymakers, given that public policy is typically designed to regulate and prevent the abuses of the worst actors, rather than the best.

Despite This Worthy Goal, California's Consumer Data Publication Law Has Apparently Not Been Successful In Generating Required Data – In Part Because There Has Seemingly Been At Most Only Partial Compliance By The Arbitration Companies From the Outset. Where consumer arbitration data has been properly reported pursuant to the law, the statute has facilitated a robust debate about outcomes in these arbitration proceedings. Nevertheless, Committee staff has been able to locate only two studies in the past ten years that rely on the reported data.¹³ As experts have noted, the paucity of research appears to reflect that the data is not sufficiently complete or reliable to offer researchers a useful source of information from which to analyze the consumer arbitration process.

The initial assessment of the statute was conducted the first year after the law went into effect. Conducted by the California Dispute Resolution Institute (the now-defunct foundation arm of the ADR industry trade group California Dispute Resolution Council), the CDRI study, issued in 2004, examined a selected group of six arbitration companies (five of which continue to do business currently).¹⁴

Despite excluding those companies that claimed not to be covered by the statute, CDRI found "inconsistencies, ambiguities, and gaps in the data ... that ... limit the utility of the information in presenting a clear picture of consumer arbitration in California."¹⁵ Specifically, CDRI found that while many private arbitration companies posted information on their websites, a number of data points were not provided.

CDRI stated, "For example, from a policy perspective, this study might be expected to shed some light on the fairness of consumer arbitration, for which three variables might be of particular interest: the amount of an initial claim, the amount of the arbitration award, and the amount of the arbitration fee. Relatively few cases, however, reported data for all three of these variables."¹⁶ Indeed, CDRI observed that the amount of the claim was omitted in nearly 1400 of approximately 2200 cases studied; the amount of award was omitted in over 1600 of 2200 cases; and the arbitrator's fee was not reported in 771 of the 2200 cases. Other data fields had similar or even lower rates of compliance – employee salary provided in only 73 of 313 cases; and the identity of the prevailing party was identified in only 302 of 2200 cases.

Moreover, contrary to the statute's requirement, only two of the six studied companies posted the number of times the non-consumer (business) party used its services.¹⁷ Among the reasons cited

by the companies for noncompliance was that these companies felt that the statutorily required information could not be gathered reliably and/or economically, apparently because in some cases they were dependent on their arbitrators or the parties to provide it.¹⁸ Noting a phenomenon that apparently has continued to the present, CDRI observed that only one of the reporting arbitration companies (AAA) provided the most valuable information for evaluating arbitration fairness, and even AAA did not do so consistently.¹⁹

The following year, a 2005 scholarly study reviewed data reported by AAA and JAMS from the first two years of the data collection law, and likewise found that much of the required data was missing or incomplete – particularly the required information regarding amount of claim, amount awarded, any other relief granted, and prevailing party. The authors concluded: "This report represents a first, preliminary analysis of the disclosed data. It suggests that the private arbitration service providers in question are not providing the information that is critical to an analysis of how the consumer party fares in [consumer] arbitration."²⁰

More recently, others have likewise observed that missing data required by the statute undermines the effectiveness of the law.²¹

New Review By UC Hastings Law School Shows Continuing Widespread Problems With Data Reporting – Half of Consumer Arbitration Companies Apparently Fail To Report Any Data, And No Company Complies Completely With California Law. A new study by the Public Law Research Institute at UC Hastings College of Law,²² to be released and discussed at the Committee's March 18th oversight hearing, reveals that the longstanding and pervasive issues of arbitration company compliance with the consumer data law appear to persist.

Surveying all identifiable arbitration companies conducting consumer arbitration, some of the major findings of the Hastings Public Law Research Institute study are:

- ✓ Roughly half of the private arbitration companies that appear to be conducting business in California fail to post any of the required information. (Report, pages 5-7.)
- ✓ Of the remaining half, no arbitration company complies fully. (Report, page 1.)
- ✓ Of the reporting companies, 90 percent fail to disclose the amount of the claim – an important factor in evaluating the outcome of the arbitration process. (Report, pages 11-12.)
- ✓ No company conducting employment arbitrations fully complies with the requirement to identify the employee's salary range – an important factor in evaluating whether arbitration outcomes potentially vary based on the wealth of the claimant. (Report, pages 12-13.)
- ✓ Approximately half of the reporting companies do not, or do not consistently, report the frequency with which the business party has used the arbitration company previously – an important factor in evaluating potential "repeat-player" bias. Two of the noncomplying companies have apparently been in business throughout the ten-year life

of the statute because they were identified as failing to provide this information in a 2004 study; they have apparently failed to comply from the very outset of the statute. (Report, pages 14-16.)

- ✓ While most of the reporting companies report the type of disposition (*e.g.*, settled, withdrawn, award made) at the conclusion of the case, many companies do not report the type of disposition in the terms required by the statute. (Report, pages 21-22.)
- ✓ A number of reporting companies fail to state or to indicate clearly which party prevailed – a basic factor by which to evaluate outcomes. (Report, pages 19-20.)
- ✓ A number of companies do not fully comply with the requirement to report the fees charged by the arbitrator, or the allocation of those fees to the parties – a key question in the debate over the cost of mandatory consumer arbitration. (Report, pages 26-27.)
- ✓ Most companies fail to report any information regarding other relief granted. (Report, page 19.)
- ✓ Only one reporting company publishes its information in a spreadsheet format, making it useful for reviewers. The other reporting companies simply publish a text file (PDF format), some of which run to nearly 80,000 cases, which are virtually useless to researchers because they do not allow data to be sorted by field. (Report, pages 22-24.)
- ✓ Of the reporting companies, approximately one-third post outdated information. (Report, page 8.)

Potential Policy Concerns Arising From The Absence of Required Data. Unfortunately, the significant omission of required data may continue to foster skepticism of mandatory consumer arbitration. Some may ask: if arbitration is as fair as its supporters claim, why do arbitration companies fail to publish the required information?

In addition – apart from the problem of tolerating violations of a legal obligation – the failure of arbitration companies to provide the required data may also have the effect of skewing the conduct of consumer arbitrations by permitting unscrupulous arbitration companies to gain an unfair competitive advantage over their law-abiding competitors. Like other providers of services, arbitration companies compete with each other to attract business. This competition can take a variety of forms, giving rise to the criticism that it gives arbitration companies an incentive to structure the arbitration process to favor businesses, which are more likely than consumers and employees to be repeat players in arbitration. Some observers contend that self-regulation may be a valuable constraint against the perceived incentive for arbitration companies to favor business parties who offer the promise of repeat business.²³ However, the value of self-regulation would appear to be largely lost, or at least unascertainable, without transparency. For example, AAA has adopted important due process safeguards for consumer cases, and reportedly will refuse to handle any case that does not meet its standards. Businesses that fall below this standard may seek to move their arbitrations to a less-demanding arbitration company, a

phenomenon that would go unnoticed if that arbitration company were permitted to disregard the data reporting law.

Private Enforcement Of The Consumer Arbitration Data Obligation. Section 1281.96 does not contain an express private right of action. However, it does envision that the statute would be enforceable because it expressly provides that the liability of private arbitration companies is limited. Specifically, the statute provides in subdivision (d): "No private arbitration company shall have any liability for collecting, publishing, or distributing the information required by this section."

At the time the act was passed, the Unfair Competition Law (UCL) allowed for private enforcement by any person to obtain equitable relief without proof of damages. This statute was amended by Prop. 64 in 2004, which added a requirement that plaintiffs prove injury in fact and loss of money or property. Prop. 64 effectively eviscerated private enforcement of most consumer protection statutes through the UCL by imposing a heightened damages requirement for a statute that provided only injunctive relief. Prior to the passage of Prop. 64, one private lawsuit was filed against an arbitration company (National Arbitration Forum) by the author of the statute (Senator Corbett) for failing to post the required data. That action was later dismissed for lack of standing after the passage of Prop. 64. A related action was subsequently initiated by the San Francisco City Attorney, resulting in the posting of data. This data was later the subject of a report by the national consumer advocacy group Public Citizen, which brought significant attention to the practices of the NAF, and additional litigation by the Minnesota Attorney General. Settlement agreements were ultimately reached by which the National Arbitration Forum was prohibited from conducting further consumer arbitration cases in California and nationwide.

Other States Have Enacted Similar Statutes Modeled On California Law, With Some Differences Regarding Additional Required Data And Specific Remedies. Since the enactment of section 1281.96, three jurisdictions have adopted similar provisions: The District of Columbia in 2010; Maryland in 2010; and Maine in 2011. These laws were evidently based on our model because they are virtually identical. While somewhat duplicative of Section 1281.96 because our statute requires reporting of all consumer arbitrations, regardless of location, for arbitration companies doing business in the large California market, these laws also reflect some potentially important differences.

The District of Columbia statute,²⁴ for example, requires additional data fields, such as the name and location of the consumer's attorney, if represented. The D.C. statute also requires that the publication format be computer-searchable database that permits searching with multiple search terms in the same search. In addition, the D.C. statute provides an express right of action allowing any affected person or entity, including the Attorney General of the District of Columbia, to request a court to enjoin the arbitration organization from violating the section and order such restitution as appropriate, and provides that the arbitration organization shall be liable for that person or entity's reasonable attorney fees and costs where that person or entity prevails or where, after the action is commenced, the arbitration organization voluntarily complies with the section.

Maryland likewise requires the name of the consumer's attorney, if represented, the address at which the arbitration took place, specification regarding the type of consumer dispute at issue.²⁵ Maryland also provides for an express private right of action specifying that a consumer or the Attorney General may seek an injunction to prohibit an arbitration organization that has engaged in or is engaging in a violation of the law from continuing or engaging in the violation and allows for the prevailing plaintiff's reasonable attorney's fees and costs.²⁶ In addition, the Maryland statute provides that failure to comply may be a reason, although not the sole reason for a court to refuse to enforce an arbitrator's award in a consumer arbitration. The law further provides that failure to comply may be considered as a factor in determining whether a consumer arbitration agreement is unconscionable or otherwise unenforceable under law.²⁷

Like the District of Columbia, Maine requires specification of consumer case types and whether the provider has or had a financial interest in a party or the legal representation of a party in the arbitration, or whether a party or legal representative of a party in the arbitration has or within the preceding year had a financial interest in the provider.²⁸ It also requires that an arbitration company must notify the Attorney General in writing of any website upon which the information is posted, and requires the Attorney General to include those links on the Attorney General's publicly accessible website.²⁹

Assuming Compliance Could be Obtained, Would the Statute Be Improved By Additional Data Fields And Revised Format? As drafted, the statute seeks basic information about the time, cost and outcome of consumer arbitration in a "computer-searchable" format. Unfortunately, many private arbitration companies – with the notable exception of AAA – have interpreted "computer searchable" to mean a simple text file, which many commenters have noted is virtually useless for research purposes. One fundamental improvement therefore might be to make more clear that a spreadsheet format, such as that used by AAA, is necessary.

Researchers have also noted that requiring consistency in certain field responses would improve the utility of reported data, such as the type of consumer dispute.

In addition, various commenters have remarked that additional information may be helpful to address specific policy issues. For example, the prevalence of class arbitration has become a subject of great interest, but is not discernible from the currently required data fields. Others have suggested that the alleged "repeat-player" problem might arise with regard to the lawyers, rather than the parties themselves, in light of the role lawyers play in the selection of arbitrators. If so, the identity of the lawyers may be a useful addition. Likewise, some have argued that it is important to know whether the consumer or the nonconsumer party was the "plaintiff" or initiating party in the arbitration, a point not covered by the existing statute. Other examples might be the amount of provider fees and their allocation; whether the matter was previously filed in court; whether an in-person hearing was held; the assertion of counter or cross claims; the location of the parties and the location of the arbitration; whether attorney's fees were awarded; whether equitable/injunctive relief was requested or awarded; whether the matter was terminated for nonpayment of arbitrator/provider fees; whether the provider declined to administer the case or disqualified a commercial party from future arbitration (*e.g.*, for failure to adhere to consumer due process standards); and whether arbitration companies should record the terms of the clause under which the matter is arbitrated, including for example whether full

discovery was allowed and whether the arbitration was required to be decided under the law and rules of evidence. It is not known whether these or other data points may already be kept by some or all private arbitration companies.

Question Raised By The Lack of Reported Data and The Resulting Lack of Research. The reported lack of full compliance with the statute by any arbitration company operating in California raises a number of questions that may be worthy of the Committee's consideration, including the following:

- Which private arbitration companies administer consumer arbitrations in California?
- Are the currently required data points useful for empirical research?
- Why do some private arbitration companies that apparently administer consumer arbitrations evidently fail to post all of the required data?
- Would it be beneficial for research and policymaking purposes if all arbitration companies that administer consumer arbitrations in California post the required data to allow for examination and comparison?
- Would better transparency potentially deter alleged unfairness in consumer arbitrations?
- Do non-complying arbitration companies gain an unfair advantage over their law-abiding competitors?
- Do arbitration companies that adhere to high standards of practice potentially lose market share to less scrupulous competition?
- Do businesses move their arbitration business to arbitration companies that violate the reporting law in order to conceal unfair outcomes?
- Is a more forceful or explicit enforcement mechanism needed to improve compliance? If so, what form might such a reform take?
- Would it be problematic for private arbitration companies to post the data in a spreadsheet format instead of a simple text/PDF format?
- Are there additional data fields that would be of value for researchers and policymakers?
- Do scholars, advocates or industry representative have any recommendations for other ways the statute could be improved to provide more accurate, complete and timely information about consumer arbitrations?

Endnotes

¹ "Private arbitration company" was intended to mean any nongovernmental entity or individual that holds itself out as managing, coordinating, or administering arbitrations, or providing the services of neutral arbitrators, or making referrals or appointments to, or providing lists of, neutral arbitrators, including any entity owned, in whole or in part, by any individual, or affiliated with a private arbitration company, but not to include individuals appointed to serve as the arbitrator, entities that administer, make referrals or appointments to, or provide lists of arbitrators in, fewer than five consumer arbitration cases per year, or any self-regulatory organization (SRO) as defined in the federal Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78c(a)(26)) or the federal Commodity Exchange Act (7 U.S.C. Sec. 1 et seq.) and regulations adopted in implementation of those acts. (See AB 3029 (Steinberg) of 2002 which contained the intended definitions of terms for the legislative package but which was not chaptered. See also Assembly Judiciary Committee Report on AB 1713 (Judiciary) of 2003 evidencing the Legislature's intent regarding these definitions.)

² "Consumer arbitration" was intended to mean cases where the process is binding on the consumer and conducted under a pre-dispute arbitration provision contained in a printed form agreement or drafted by the non-consumer party (e.g., adhesion contracts). Consumer cases was meant to be defined as those involving health care and treatment (malpractice), employment (excluding collective bargaining agreements), and transactions by which an individual seeks or acquires any goods or services primarily for personal, family, or household purposes, including financial services, insurance, and other goods and services, as defined in Section 1761 of the Civil Code. (See AB 3029 (Steinberg) of 2002 which contained the intended definitions of terms for the legislative package but which was not chaptered. See also Assembly Judiciary Committee Report on AB 1713 (Judiciary) of 2003 evidencing the Legislature's intent regarding these definitions.)

³ The required data points are as follows:

- (1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.
- (2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars (\$100,000), one hundred thousand dollars (\$100,000) to two hundred fifty thousand dollars (\$250,000), inclusive, and over two hundred fifty thousand dollars (\$250,000).
- (3) Whether the consumer or nonconsumer party was the prevailing party.
- (4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.
- (5) Whether the consumer party was represented by an attorney.
- (6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.
- (7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.
- (8) The amount of the claim, the amount of the award, and any other relief granted, if any.
- (9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

⁴ Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631 (2005)

⁵ Eisenberg, et al, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871 (2008).

⁶ Eisenberg, et al, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871 (2008);

⁷ E.g., Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 Journal of Empirical Legal Studies 1 (March 2011); Drahozal and Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010); Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 Cardozo J. Conflict Resolution 579 (2009); Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stanford L. Rev. 1631 (2005).

⁸ Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. Arb. & Med. 1, 8 (2009) (emphasis omitted); see also Rutledge, *The Case Against the Arbitration Fairness Act*, Disp. Resol. Mag., Fall 2009, at 4, 4 (stating that "it now appears to be common ground that the policy debate over the Arbitration Fairness Act should focus on empirical data.")

⁹ Drahozal and Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843(2010).

¹⁰ Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 Journal of Empirical Legal Studies 1 (March 2011).

¹¹ See Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (2008).

¹² E.g., Drahozal and Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. On Disp. Resol. 843 (2010); Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 Journal of Empirical Legal Studies 1 (March 2011).

¹³ Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (2008); Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 Journal of Empirical Legal Studies 1 (March 2011).

¹⁴ The companies chosen for this study were: ADR Services; American Arbitration Association; ArbitrationWorks; ARC Consumer Arbitrations; JAMS; Judicate West. See California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure*, at 14 (available at http://www.mediate.com/cdri/cdri_print_aug_6.pdf)

¹⁵ *Id.*, at 5.

¹⁶ *Id.*

¹⁷ *Id.*, at 20-28.

¹⁸ *Id.*, at 27-33.

¹⁹ *Id.*, at 18

²⁰ Bingham and Sternlight, *Arbitration Data Disclosure in California: What We Have and What We Need*, unpublished paper prepared for the 2005 ABA Annual Conference. See also Bingham, *Mediation and Creeping Legalism: Implications for Dispute Systems Design*, 2010 J. Disp. Resol. 129, 150 (2005 study with Sternlight found data required by the California statute to be "incomplete and ambiguous.")

²¹ See, e.g., Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009) at 14 (The California legislation requiring reporting of results is a good model. However, even in California the data reported by some forums is virtually meaningless due to missing information. Even when data is present, results are provided in a way that makes collection labor intensive.); Colvin, *An Empirical Study of Employment Arbitration:*

Case Outcomes and Processes, 8 *Journal of Empirical Legal Studies* 1 (March 2011) at 2 (A general problem with all filings in this area is that they contain some degree of missing data on particular variables.) *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, Public Citizen (2008) at 12 (We could discern the victorious party only in approximately 7 percent of the [AAA's] cases. AAA left the “prevailing party” field – a required disclosure – blank in more than 90 percent of the cases it has reported.

²² Jung, et al, *Reporting Consumer Arbitration Data in California* (March 15, 2013) (to be available at <http://gov.uchastings.edu/public-law/index.php>)

²³ Drahozal and Zyontz, *Private Regulation Of Consumer Arbitration*, 79 *Tenn. L. Rev.* 289 (2012)

²⁴ D.C. Code § 16-4430.

²⁵ MD Commercial Law Code § 14-3903.

²⁶ § 14-3905.

²⁷ § 14-3904.

²⁸ Such relationships are prohibited in California. See Code of Civil Procedure section 1281.92.

²⁹ 10 M.R.S. § 1394.