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# Cultural Determinants of Workplace Arbitration in the U.S. and Italy

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# Cultural Determinants of Workplace Arbitration in the United States and Italy

Maurizio Del Conte\*  
Ann C. Hodges†

*Although Italy and the United States are both advanced industrial economies, the law and practice of workplace arbitration differs significantly in the two countries. This Article explores those variations and analyzes the reasons for the divergent evolution of arbitration. The Article concludes that historical and cultural differences in legal systems and labor and employment relations are explanatory forces. While the United States could provide a more balanced system of arbitration by learning from the Italian system's greater protection of workers, given the current reality neither system seems likely to undergo significant change in the near future.*

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## I. INTRODUCTION

Globalization of employment is making knowledge of labor and employment law of all nations an imperative. At the same time, comparative legal studies can help nations learn from one another and

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improve on existing legal systems. As the United States Supreme Court is hurtling U.S. employment law into private dispute resolution and the Italian labor law system is under substantial pressure for reform as a result of economic stresses, a comparative study of workplace arbitration in the two countries is timely.

This Article looks at the law and impact of workplace arbitration in the United States and Italy with a goal of analyzing the influences that led to the current systems and determining whether the countries can derive any useful lessons from one another. First, the Article looks briefly at the labor and employment law systems in the two countries. This analysis lays the backdrop for a discussion of the evolution and use of arbitration in the two countries. The Article then moves to an analysis of the similarities and differences between arbitration in Italy and the United States and the reasons for those differences. Finally, the Article focuses on lessons that can be drawn from the two systems.

The employment arbitration system in the United States is currently weighted in favor of employers and could learn from the Italian protection of workers. The Article suggests several modifications that would provide better balance in the current system. But the Article concludes that the historical and cultural forces that have shaped arbitration in the two countries make it unlikely that either will change significantly in the near future.

## II. LAW AND CONTRACT IN THE UNITED STATES AND ITALY

The legal systems governing the workplace in the United States and Italy vary dramatically. These differences contribute to the differential approach to arbitration in the two countries. This Part will briefly explore the legal systems in order to assist in understanding the source of the differences in the use of arbitration.

In the United States, statutes set minimum terms and conditions of employment that can be expanded by labor unions negotiating with employers; by individual employees negotiating with employers, typically highly skilled, highly paid employees; or by employers acting unilaterally. Statutes set a relatively low minimum wage; require overtime pay at a higher rate for more than forty hours work per week; prohibit child labor; prescribe standards for a safe and healthful workplace; require unpaid leave for illness, childbirth, adoption, and care

for an ill family member; and set certain standards for pensions and health insurance voluntarily provided by employers.<sup>1</sup>

The law provides benefits through mandatory insurance for workers who are unemployed or injured on the job and requires contributions from the employer and employee into a national retirement system. In addition, the law prohibits discrimination based on race, religion, national origin, gender, age, citizenship, genetic makeup, and disability. The law also determines who is an employee and who is an independent contractor not protected by employment laws. Most employees are at will, meaning that they can be fired at any time for any reason. Employees can negotiate contracts of employment that limit the employer's authority to terminate them, but few have the power to do so unless represented by a union.

For most employees in the United States, the employment laws and terms set by their employer govern their work because only 7.5% of employees in the private (nongovernmental) sector and 38.7% of employees in the public (governmental) sector have union representation.<sup>2</sup> The laws are normally enforced by filing a lawsuit in court, using an attorney hired by the employee or by filing a claim with a government agency with a duty to enforce the laws. Part II will explain how and when arbitration can substitute for judicial enforcement.

Union-represented employees are governed by a negotiated collective bargaining agreement, an enforceable contract including terms and conditions of employment in addition to the minimums required by law.<sup>3</sup> This contract applies only to the employees represented by the union, however, so most employees are unaffected by these agreements. A contract will typically provide wage rates far in excess of the minimum wage; overtime premium pay in addition to what is required by law; and pay for holidays, vacations, funeral leave, and sick leave. It may provide

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1. As of 2014, the Patient Protection and Affordable Care Act requires employers with fifty or more employees to provide health insurance for employees who work at least thirty hours per week. See 26 U.S.C. § 4980H(a), (c)(2)(A), (c)(4)(A) (2012). The effective dates of the insurance mandate have been postponed by regulation to 2015 and 2016, depending on employer size. Press Release, *Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015*, U.S. DEP'T TREASURY (Feb. 10, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx>.

2. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, U.S. BUREAU LAB. STAT. (Jan. 24, 2014), <http://www.bls.gov/news.release/union2.t03.htm>. For some explanations of the decline in union representation and, accordingly, power, see JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* 16–22 (2010); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 579–84 (1992).

3. LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 3 (3d ed. 2014).

for certain benefits to be allocated by seniority, i.e., the length of time employed by the employer. Such benefits might include layoff and recall in times of reduced workload, promotions, and work assignments. A union contract will almost always require just cause for discipline and discharge, protection not normally available by law except for some government employees. In some industries, such as construction, mining, and longshoring, there is a history of multiple employers negotiating one contract with a union.<sup>4</sup> In many cases, however, one employer negotiates with one union and sometimes only one facility of the employer negotiates with one union. Some contracts are negotiated on a national or statewide basis with local supplements, but many are exclusively local agreements.

As discussed further below, these contracts are typically enforced using arbitration. In the United States, the law relating to unions and collective bargaining and the protection of efforts to deal with the employer collectively is known as labor law. The law relating to all employees, union and nonunion, is known as employment law.

The Italian system operates quite differently, being more regulated and affording more protections to the workers. Traditionally, the law governs certain areas of employment and others have been covered by collective agreements, generally negotiated on a much broader basis and covering many more workers than in the United States. Among the subjects traditionally regulated by law in Italy are many similar to the United States, such as discrimination on grounds like marriage or pregnancy, nature of the work relationship (employment or self-employment), social security, health and safety in the workplace, and protection for union activity. In contrast to American law, however, Italian law provides protection against unjust dismissals. Contracts in Italy cover subjects such as job duties, career development, special types of pay under the contract, violations of the disciplinary code, the notice period for termination of employment, and noncompetition covenants.

The two countries differ significantly in the form of unionization and the coverage of collective bargaining agreements. In Italy, the organization of workers has occurred, with some rare exceptions such as managers and air traffic controllers, based on the type of employer for which they work. As a result, trade unions operate in particular industries or sectors. The collective contracts are typically nationwide sector agreements containing the minimum economic and normative

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4. Comment, *The Status of Multiemployer Bargaining Under the National Labor Relations Act*, 1967 DUKE L.J. 558, 558-59 & n.3.

terms of employment for all the workers in a certain productive sector (the category), regardless of union membership. For some areas or institutions of general interest, however, agreements may cover all categories of workers (interconfederate agreements). This happened, for example, for individual and collective dismissal; before the legislature intervened to regulate the subject, the only regulation was contained in interconfederate agreements. In some cases, collective bargaining follows individual local and territorial contexts, with specific norms for certain areas of the country (territorial agreements). It is the nationwide sector collective contract that now represents the main instrument of collective negotiation in the regulation of employment relationships and that governs the various types of collective contracts and agreements in Italy.<sup>5</sup>

The relationships between contractual sources and legal sources in labor law are constructed hierarchically as in all of civil law, with the legal source having automatic prevalence over the contractual source. This model is founded on a fundamental postulate: that the heteronomous source (the law) has the imperative task of safeguarding the fundamental rights—of freedom, dignity, and safety—of the subordinate workers.<sup>6</sup> Consequently, every norm produced from a contract—be it individual or collective—that lowers the system defined by the heteronomous precept will be annulled and replaced by the corresponding legal precept (in application of article 1418 of the civil code).<sup>7</sup> The law is unbreakable; it cannot be modified or waived by the contract.<sup>8</sup>

Until the 1970s, there were few situations where law and contract overlapped. Accordingly, there was a mutual relationship of noninterference, and as a last resort in case of conflict, the law prevailed over the contract, a criterion of unbreakability *in peius*.

At present, however, the overlap of autonomous (contractual) and heteronomous (legal) sources is the norm in the regulation of labor law, creating a situation of continual conflict, competition and, often, integration between the various sources. In practice then, the relationship

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5. There are, however, some recent signs of change caused by the trend, common in all industrialized countries, of decentralized negotiation. See Legge 14 Settembre 2011, n. 148 in G.U. 16 settembre 2011, n. 216 art. 8. For an international overview of the phenomenon, see ROGER BLANPAIN ET AL., *DECENTRALIZING INDUSTRIAL RELATIONS AND THE ROLE OF LABOUR UNIONS AND EMPLOYEE REPRESENTATIVES* (2007).

6. See RAFFAELE DE LUCA TAMAJO, *LA NORMA INDEROGABILE NEL DIRITTO DEL LAVORO* (1976).

7. Art. 1418 Codice civile [C.c.] (It.).

8. *Id.*

between autonomous and heteronomous sources is better explained in terms of competing sources—even though they are hierarchically ordered, they do not simply follow an abstract hierarchical criterion. Today, contractual sources are sometimes involved in actual normative procedures, as the presupposition for the law and as the content of the law. In many cases, contractual sources deviate from legal sources (for example in the case of a change of worker's duties); in others, laws are integrated (as in the case of the proposal of staff leasing legitimated during collective bargaining); in yet others, contractual agreements are proposed as alternative sources to the law for the regulation of employment relationships (illustrated by the case of the criteria of choice of workers to be dismissed collectively).<sup>9</sup>

In all these cases, the legislature realizes that collective bargaining constitutes the most suitable instrument of social regulation and so does not exercise its regulatory power. Theoretical debate on the topic has for some time highlighted a progressive enrichment and diversification of the functions of bargaining. In an evolving economic and social context, bargaining has come to involve issues in which it does not perform its traditional acquisitive function regarding wage increases and new guarantees, but rather “administers” risks to which a group of workers are exposed. With increasing frequency in the last few decades, often thanks to specific legal delegation, collective bargaining has been entrusted with the additional task of collaborating in the organization of labor and in particular handling company crises and the ensuing employment problems.

Having briefly reviewed the system of employment relations and the legal background in each of the two countries, the stage is now set to place arbitration in context as a part of the system in each country.

### III. ARBITRATION IN THE UNITED STATES AND ITALY

#### A. *Arbitration in the United States*

##### 1. Labor Arbitration

While labor unions in the United States initially resisted arbitration, a number of forces combined to encourage its acceptance and today it is the most common method of resolving disputes over the meaning and

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9. According to Law No. 233/1991, in case of redundancy, the workers to be dismissed must be selected on the basis of the criteria designed by an ad hoc collective agreement. If the collective parties fail to reach an agreement, the criteria are automatically provided by the law as follows: number of dependents of each worker, seniority, and organizational reasons. Legge 23 luglio 1991, n.223 in G.U. 27 luglio 1991, n.43.

application of labor contracts.<sup>10</sup> Both governmental encouragement and negotiation of arbitration agreements by unions and employers in major manufacturing industries fueled the growth of labor arbitration prior to World War II.<sup>11</sup> As aptly stated in 1940 by Walter Reuther, a leader of the United Autoworkers Union:

You cannot strike General Motors plants on individual grievances. One plant going down will affect the 60 other plants. You have to work out something to handle individual grievances . . . . I don't want to tie up 90,000 workers because one worker was laid off for two months. That is a case for the umpire.<sup>12</sup>

During the war, the War Labor Board, created by the government to deal with labor disputes that might interfere with production of goods needed for the war, "encouraged and then required parties to include grievance arbitration provisions" in collective bargaining agreements, and to accept arbitration awards as binding.<sup>13</sup> Today, arbitration is included in virtually all collective bargaining agreements.

In 1947, Congress enacted the Taft-Hartley Act to encourage unions and employers in the private sector to use alternative dispute resolution methods to resolve disagreements over both contract negotiation and contract interpretation.<sup>14</sup> Additionally, Congress made labor agreements enforceable in the federal courts.<sup>15</sup> These changes further cemented arbitration as the method of choice for contract interpretation issues. As for disputes over contract negotiation, mediation is, and has been, the choice for resolving private sector disputes.

While refusing to enforce arbitration agreements in other contexts, in the middle of the twentieth century, the Supreme Court decided that agreements to arbitrate disputes under collective bargaining agreements were enforceable as a matter of national labor policy.<sup>16</sup> In a series of cases collectively known as the *Steelworkers Trilogy*, the Court adopted standards that were very deferential to arbitration, enforcing both agreements to arbitrate and arbitration awards.<sup>17</sup> Because arbitration

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10. See generally Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

11. *Id.* at 417-20.

12. *Id.* at 419.

13. COOPER ET AL., *supra* note 3, at 10-12.

14. *Id.* at 13; 29 U.S.C. §§ 158(d), 201-203 (2012).

15. 29 U.S.C. § 185.

16. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957).

17. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).



provisions in labor agreements were the quid pro quo for agreements not to strike, the Court concluded that the judicial hostility toward arbitration agreements in other contexts was not appropriate.<sup>18</sup> “[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”<sup>19</sup> Arbitration is the method of peacefully filling contractual gaps and resolving the disputes about the meaning of the contract, avoiding interruptions of production.<sup>20</sup>

The *Steelworkers Trilogy* established that the courts should decide whether the parties agreed to arbitrate a particular dispute but that absent the clearest evidence of exclusion from arbitration, the courts should order arbitration.<sup>21</sup> The Supreme Court cautioned the lower courts to avoid entanglement in the merits of the claim in deciding whether the parties agreed to arbitrate.<sup>22</sup> In the third *Steelworkers Trilogy* case, the Court adopted the same deference upon judicial review of arbitration awards. The courts should not review the merits of the arbitrator’s decision, but should enforce the decision so long as the award “draws its essence from the collective bargaining agreement.”<sup>23</sup> Over time, another narrow exception to enforcement evolved, denying enforcement to arbitration awards that violate public policy.<sup>24</sup> Based on the *Steelworkers Trilogy* and its progeny, few arbitration decisions under labor agreements are appealed and fewer still overturned by the courts.<sup>25</sup> Since unionization in the private sector has decreased, however, there are fewer labor arbitrations.<sup>26</sup>

The parties to collective bargaining agreements determine the arbitration procedure and it varies widely, although some generalizations are possible. The procedure is not commonly specified in the agreement.<sup>27</sup> Many arbitration hearings follow a relatively formal, judicial-like format using opening and closing arguments, direct and cross-examination of witnesses, and in many cases, written posthearing

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18. *Warrior & Gulf*, 363 U.S. at 578.

19. *Id.*

20. *Id.* at 581.

21. *Id.* at 582-83.

22. *Am. Mfg.*, 363 U.S. at 568.

23. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

24. *See E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 63 (2000) (recognizing the public policy exception to enforcement of arbitration awards, but refusing to overturn an arbitration award that reinstated a truck driver who tested positive for illegal drugs on public policy grounds).

25. *See Michael H. LeRoy & Peter Feuille, As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. POL’Y REV. 191, 204 (2007).

26. *Id.* at 194, 204.

27. The description of the labor arbitration procedure that follows is drawn from COOPER ET AL., *supra* note 3, at 19-29.

briefs to the arbitrator. The rules of evidence that apply in court do not formally apply in arbitration. Some parties choose more informal procedures and may omit briefs, formal statements, and formal examination of witnesses. Some unions and employers use attorneys in arbitration, while others prefer to employ trained lay representatives.

Arbitrators are selected by the method negotiated by the parties. Most agreements provide for one neutral arbitrator, but some use a system of three, or occasionally five, arbitrators, one or two chosen by each party and a neutral. Most agreements provide that an arbitrator is chosen separately for each dispute, known as “ad hoc.” Ad hoc arbitrators are chosen by mutual agreement or using the services of an impartial arbitration agency such as the Federal Mediation and Conciliation Service, a federal agency; the American Arbitration Association, a private organization; or a state or local government agency. When the parties receive a list of possible arbitrators from an agency, the most common method of choosing from the list involves alternately striking names until only one remains. Some parties select one or a small group of arbitrators to serve as “permanent” arbitrator(s) for all the disputes arising during the course of the contract. The use of permanent arbitrators reduces delay and eliminates the need to educate the arbitrator about the industry in each hearing.

The arbitrators that conduct labor arbitrations are not licensed or regulated by the state. Many arbitrators are lawyers, while others are academics or retired professionals, often from the field of labor relations or human resources. Most arbitrate part-time, while some individuals earn a living as arbitrators. Arbitrators are paid by the parties, with the union and employer commonly dividing the cost of arbitration.

Arbitrators typically issue written decisions supported by reasoning, days, weeks, or sometimes months after the hearing.<sup>28</sup> In some cases, however, the parties request an immediate oral decision from the arbitrator. There are several sources that publish the decisions of arbitrators where the parties agree to publication.<sup>29</sup> There is no systematic determination of which decisions are published, however, because it depends exclusively on party agreement. Arbitration decisions are not precedential in the American system, but the parties’ expectations and the system of arbitral selection have resulted in development of a “common law” of arbitration that is followed by most arbitrators.<sup>30</sup>

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28. The above mentioned description of the labor arbitration procedure can be found in COOPER ET AL., *supra* note 3, at 19-29.

29. *Id.* at 1021-23.

30. *Id.* at 285-88.

Arbitrators whose decisions are too far outside the mainstream of this common law run risk being deemed unacceptable by parties choosing arbitrators.

Unionization in the governmental sector in the United States remains much higher than in the private sector.<sup>31</sup> Collective bargaining law for government employees is established by individual states, with only the law for federal employees promulgated by the federal government. Arbitration has become a feature of this sector as well, both for purposes of deciding issues of contract interpretation and for determining what the collective bargaining agreement will be when the parties cannot reach agreement in negotiations. The latter form of arbitration, known as interest arbitration, is uncommon in the private sector where strikes are allowed, but common in the public sector where most jurisdictions prohibit strikes.<sup>32</sup> Arbitration of grievance disputes in the public sector developed later and more slowly than in the private sector. The major factor slowing development of arbitration in this sector is concern about delegating the authority of the government to unelected arbitrators.<sup>33</sup> Another factor is the many laws affecting the terms and conditions of employment of government employees, which frequently relate to or overlap with the provisions of collective bargaining contracts.<sup>34</sup> These concerns initially caused courts to reject arbitration altogether and even after arbitration was accepted, to limit the authority of arbitrators by prohibiting arbitration of some disputes and refusing to enforce arbitration awards in others.<sup>35</sup> While arbitration of public sector contract disputes has become more widely accepted over time, courts in public sector cases remain less deferential to arbitration.<sup>36</sup>

All in all, arbitration as a method of settling labor contract interpretation disputes has been relatively noncontroversial since the mid-twentieth century in the private sector and in the last twenty years in the public sector. Its success was a factor in the increasing consideration of arbitration as a method of resolving disputes in the nonunion workplace, commonly referred to as employment arbitration.

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31. See *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, *supra* note 2.

32. MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT 611-12, 615 (2d ed. 2011).

33. *Id.* at 677-78, 699.

34. *Id.* at 718-50.

35. *Id.* at 677-78, 718-50.

36. *Id.*

## 2. Employment Arbitration

The deference provided to labor arbitration agreements, particularly in the private sector, was not applied to other arbitration agreements. While arbitration substitutes for “industrial strife” in labor contracts, in other cases it substitutes for litigation.<sup>37</sup> Accordingly the courts initially refused to enforce such agreements at all.<sup>38</sup> In 1925, Congress passed the Federal Arbitration Act (FAA), making arbitration agreements enforceable.<sup>39</sup> The statute contains language stating that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>40</sup> It also significantly limits judicial review of arbitration decisions, allowing vacation of the award only on grounds of bias, fraud, corruption, prejudicial arbitral misconduct, or where the arbitrators exceeded their powers.<sup>41</sup>

Despite passage of the FAA, the Supreme Court refused to enforce agreements to arbitrate claims based on rights created by law, as opposed to claims of breach of contract.<sup>42</sup> In the 1980s, however, the Court’s view of arbitration began to change and it began to enforce agreements to arbitrate claims based on laws.<sup>43</sup> In the early 1990s, this trend moved into employment law and the Court began to enforce agreements to arbitrate claims under employment law statutes, beginning with the Age Discrimination in Employment Act in *Gilmer v. Interstate Johnson/Lane Corp.*<sup>44</sup> The Court concluded that an agreement to arbitration was merely an agreement to a different forum, not a waiver of rights.<sup>45</sup> Unless the statute creating the claim barred arbitration, the Court would order arbitration. The Court did not have to deal with the FAA’s exclusion for contracts of employment, however, because the arbitration provision in *Gilmer* was not contained in an employment agreement.<sup>46</sup>

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37. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

38. *See MALIN ET AL.*, *supra* note 32, at 728.

39. 9 U.S.C. §§ 1-14 (1925).

40. *Id.* § 1.

41. 9 U.S.C. § 10 (2012).

42. *See, e.g., Wilko v. Swan*, 346 U.S. 427, 434-38 (1953); *COOPER ET AL.*, *supra* note 3, at 739.

43. *See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614, 626 (1985); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 480 (1989).

44. 500 U.S. 20, 23 (1991).

45. *Id.* at 29.

46. *Id.* at 25 n.2.

Ten years later in *Circuit City Stores, Inc. v. Adams*, the Court was faced with an arbitration agreement in an employment contract.<sup>47</sup> The Court read the exclusion for employment contracts very narrowly, holding that it excluded only contracts of transportation workers like the expressly mentioned “seamen” and “railroad employees,” despite the fact that the scope of interstate commerce is substantially broader today.<sup>48</sup> This decision opened the door to widespread adoption and enforcement of arbitration agreements in employment.

Since that time, agreements to arbitrate employment law claims have been enforceable, subject to certain limited defenses. One is that the statute that gives rise to the dispute does not allow such agreements.<sup>49</sup> Because most employment statutes were passed before such agreements were enforceable, however, they typically do not bar arbitration.<sup>50</sup> Although the arbitration agreements are usually imposed on employees as a condition of employment, courts have rejected the argument that the employee’s lack of bargaining power alone is a defense to enforcement.<sup>51</sup>

Other defenses to arbitration are that there was no agreement to arbitrate<sup>52</sup> or that the employee cannot effectively vindicate the statutory rights in arbitration.<sup>53</sup> In addition, the generally applicable defenses to the enforcement of any contract apply.<sup>54</sup> In employment arbitration, the company chooses the arbitration system. Some agreements limit damages, shorten the statute of limitations for filing claims, require the employee to pay part of the costs of arbitration, limit the ability to bring a class action, permit the employer to choose the arbitrator, or limit discovery of evidence in the possession of the other party.<sup>55</sup> There is much litigation about the enforceability of agreements that use a process that is not equivalent to that available in court. Some courts have refused to enforce agreements with some or all of these provisions on grounds

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47. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

48. *Id.* at 119, 121.

49. *Gilmer*, 500 U.S. at 27-28.

50. An exception is the whistleblower protections under the Dodd-Frank Act, a financial reform bill, which bars predispute agreements to arbitrate whistleblower claims. See Dodd-Frank Act, Pub. L. No. 111-203, § 922(c)(2), 124 Stat. 1376 (2010) (codified at 18 U.S.C. § 1514A(e)).

51. *Gilmer*, 500 U.S. at 33.

52. See, e.g., *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009) (finding no agreement to arbitrate the claims of an employee for sexual assault that occurred after work hours in the employee’s bedroom in employer-provided housing).

53. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89–90 (2000) (recognizing the defense but finding that the plaintiff failed to establish it).

54. 9 U.S.C. § 2 (2012) (requiring enforcement of arbitration agreements except “upon such grounds as exist at law or in equity for the revocation of any contract”).

55. MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 1058, 1063–64 (2d ed. 2011).

that the contract is unconscionable or that statutory rights cannot be vindicated.<sup>56</sup> Other courts have ordered arbitration despite the differences from litigation<sup>57</sup> and still others have liberally construed or modified the agreement to make it enforceable.<sup>58</sup> Where the provisions are weighted too heavily in favor of the employer, however, courts that generally order arbitration will allow the employee to bring the claim in court.<sup>59</sup>

The Supreme Court has become very favorably inclined to enforcing such agreements, despite efforts to resist arbitration by lawyers representing employees. In recent years, the Court has decided many cases involving arbitration agreements unilaterally imposed on employees and consumers and most of the decisions favor arbitration.<sup>60</sup> The Federal Arbitration Act has been found to preempt many state laws that limit enforcement of arbitration agreements,<sup>61</sup> contrary to the Supreme Court's jurisprudence in other areas where the trend is to give more power to the states. Efforts to enact a comprehensive federal statute to prohibit imposition of such agreements on employees as a condition of employment have been unsuccessful.<sup>62</sup> As a result of the Supreme Court's decisions, the grounds for refusing to enforce arbitration agreements are more limited, and the trend in the lower courts is toward enforcement.

For many years, a 1974 Supreme Court decision appeared to prohibit unions from agreeing with employers that employees would have to arbitrate legal claims,<sup>63</sup> but as the Court became more favorably inclined toward arbitration a few lower courts enforced such agreements.<sup>64</sup> In 2009, without reversing the 1974 decision, the Supreme Court held that a union's agreement with an employer to arbitrate disputes arising under discrimination laws barred an employee from suing the employer in court for discrimination.<sup>65</sup> To be enforceable,

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56. *Id.* at 1062, 1067–73.

57. *See id.* at 1063–64.

58. *See id.* at 1060.

59. *See, e.g.,* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (“[W]e hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties.”).

60. *See infra* notes 90–91, 97 and accompanying text.

61. *See, e.g.,* *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

62. Jesse K. Kamens, *Arbitration Fairness Act Reinforced To Curb Forced Arbitration for Consumers, Others*, CLASS ACTION LITIG. REP. (BNA) (May 24, 2013), [http://news.bna.com/clsn/CLSNWB/split\\_display.adp?fedfid=31079129&vname=clasnotallissues&fcn=53&wsh=506954000&fn=31079129&split=0](http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=31079129&vname=clasnotallissues&fcn=53&wsh=506954000&fn=31079129&split=0) (subscription required).

63. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974).

64. *See Safrif v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001); *Austin v. Owens-Brockway Glass Container Inc.*, 78 F.3d 875, 885–86 (4th Cir. 1996).

65. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009).

however, the agreement must clearly and unequivocally waive the employee's right to litigate.<sup>66</sup> Additionally, the Court did not decide whether the employee was bound by the arbitration agreement if the union refused to arbitrate the employee's claim, which is commonly the union's right under the collective bargaining agreement.<sup>67</sup>

The Supreme Court has also held that employees who agree to arbitration can still bring their cases to administrative enforcement agencies, which may bring legal claims in court on the employee's behalf despite the arbitration agreement.<sup>68</sup> The employee's arbitration agreement does not bind the agency, which has a public interest to vindicate in bringing the claim.<sup>69</sup> Government agencies bring suit only in a very small number of cases, however.<sup>70</sup>

Employment arbitration in the United States has been far more controversial than labor arbitration. It is imposed on individual employees without bargaining rights as a condition of employment using a system designed by the employer alone. It removes their right to go to court to vindicate legal rights. Critics of employment arbitration complain that these agreements deprive unsuspecting employees of important rights like a jury trial.<sup>71</sup> Additionally, courts have enforced agreements that limit damages, shorten the statute of limitations for bringing claims, and require the employees to pay costs that they would not have to pay in court.<sup>72</sup> Critics argue that arbitration will limit public exposure of discrimination, decreasing the deterrent effect of the laws and allowing patterns of discrimination to continue. A related concern is that development of the law may be suppressed, with fewer judicial opinions interpreting statutes. Others are concerned that arbitration may provide a kind of second class justice especially where there are power

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66. *Wright v. Universal Marine Serv. Corp.*, 525 U.S. 70, 79-80 (1998).

67. *14 Penn Plaza*, 556 U.S. at 249.

68. *Equal Emp't Opportunity Comm'n v. Waffle House*, 534 U.S. 279, 297-98 (2002).

69. *Id.* at 295-96.

70. For example, in 2014, the Equal Employment Opportunity Commission received 88,778 charges of discrimination and filed only 133 lawsuits for enforcement. *Fiscal Year 2014: Performance and Accountability Report*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION 26, 27, <http://www.eeoc.gov/eeoc.plan/upload/2014par.pdf> (last visited Nov. 29, 2014).

71. Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F.L. REV. 17, 34-35 (2003).

72. *See, e.g., Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 231-32 (3d Cir. 1997) (ordering arbitration, although the agreement reduced the statute of limitations and waived punitive damages, and holding that whether the waivers were effective was for the arbitrator to decide); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258-62 (11th Cir. 2003) (requiring arbitration where the losing party was required to pay the fees of the other party and holding that it did not prevent the plaintiff from vindicating his rights under the statute, although he would not be required to pay the employer's fees in courts if he lost the case).

differentials between the parties and no control over arbitrator quality.<sup>73</sup> A related concern is that, unlike labor arbitration, employers will be “repeat players” in arbitration while employees will not.<sup>74</sup> Thus employers may be able to secure more favorable arbitrators because they are more knowledgeable about their qualifications, and more favorable decisions, because the arbitrator will want to ensure future business.<sup>75</sup>

Proponents of arbitration, however, suggest that a quicker, cheaper method of dispute resolution may benefit employees, particular those with small claims that are unattractive to the plaintiffs’ bar because of the small legal fees generated.<sup>76</sup> While some employees may win large jury verdicts in a litigation system, many others cannot get to court because of the cost of litigation. Some argue that there is no real evidence of a repeat player effect in arbitration and that indeed, employees win arbitration cases on a regular basis. They argue that while employees may trade off certain rights they gain benefits from agreeing to arbitration and it should be permissible. In response to the complaint that arbitration should be at the employee’s option rather than imposed by the employer, arbitration’s fans assert that it is inefficient for an employer to establish an arbitration system if it cannot insure that employees will utilize it. Proponents also urge that there are many incentives for complying with the law and the prospect of a large and public jury verdict is only one; most employers will comply based on the risk of arbitration claims, bad publicity and administrative enforcement, as well as to improve employee morale and retention. Finally, some commentators have suggested that arbitration is less beneficial for employers than may initially appear.<sup>77</sup>

Empirical studies of arbitration show mixed results. It is difficult to obtain data and difficult to determine how to make accurate comparisons

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73. This concern has abated in the courts but not among arbitration’s critics. See *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 26 (1991) (indicating that arbitration is merely a different forum that does not entail relinquishing any substantive rights); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *STAN. L. REV.* 1631, 1649-50 (2005); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protection*, 80 *BROOK. L. REV.* (forthcoming 2015) [hereinafter Sternlight, *Disarming Employees*].

74. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. EMPIRICAL LEG. STUD.* 1, 11-17, 20 (2011).

75. *Id.*

76. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *OHIO ST. J. ON DISP. RESOL.* 559, 563 (2001); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *IND. L.J.* 83, 91 (2001).

77. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 *RUTGERS L.J.* 399, 421-40 (2000).



of arbitration and litigation.<sup>78</sup> Some employees win arbitration cases, although evidence indicates that employee victories are more common in cases based on contracts than in cases involving legal claims.<sup>79</sup> Labor arbitrators under union contracts rule for employees more often than employment arbitrators.<sup>80</sup> There is some evidence that employees prevail more often in arbitration than in court, although the validity and significance of this evidence is much debated,<sup>81</sup> and recent research suggests that the higher win rates are attributable to the inclusion of individually negotiated agreements of highly compensated employees.<sup>82</sup> The evidence also indicates that employees receive greater monetary damages in court than arbitration, but the studies do not consider cases that settle prior to litigation, which may affect their validity.<sup>83</sup> Additionally, low-wage employees may have more opportunity to pursue their claims in arbitration.<sup>84</sup> These studies have fueled, though not settled, the debate about the use of employment arbitration.

Among the recent controversies is the enforcement of employment arbitration agreements that limit class or collective claims, which involve groups of employees or consumers joining together to sue their employer or business. Such actions are available under most U.S. employment laws.<sup>85</sup> They are particularly beneficial where each individual has small damages because an individual lawsuit would require the employee to spend more to litigate the case than is at stake. If many employees with the same claim can join together, the cost of litigation is shared, the process is more efficient, and the employer held to account. For the employer, class actions can be expensive and time-consuming to litigate.<sup>86</sup> They may attract media attention and adversely affect a

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78. Sternlight, *Disarming Employees*, *supra* note 73, at 16.

79. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 64-65, 74 (2014); Douglas M. Mahony & Hoyt N. Wheeler, *Adjudication of Workplace Disputes*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 361, 380 (Kenneth G. DauSchmidt et al. eds., 2009).

80. Mahony & Wheeler, *supra* note 79, at 380, 387, 390.

81. *Id.* at 373.

82. See Colvin & Pike, *supra* note 79, at 74-76, 81 (showing that win rates and damage awards are lower than those in litigated cases, particularly when the individually negotiated agreements of high-level employees are separated from employer-mandated arbitration).

83. Mahony & Wheeler, *supra* note 79, at 383-85.

84. *Id.* at 385, 390. *But see* Colvin & Pike, *supra* note 79, at 81-82 (finding most cases in arbitration will not be economically viable, leading to a system that is not accessible to employees).

85. See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 204-05 (2003).

86. Deborah A. Sudbury et al., *Keeping the Monster in the Closet: Avoiding Employment Class Actions*, 27 EMP. REL. L.J. 5, 20 (2000).

company's reputation.<sup>87</sup> Accordingly, there is substantial pressure on companies to settle such claims.<sup>88</sup> These pressures motivate businesses to seek ways to avoid class actions. Arbitration agreements offer an appealing vehicle to reach such a result, enhanced by recent decisions of the Supreme Court.<sup>89</sup>

In 2010, the Court ruled in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* that a party could not be ordered to arbitrate class claims unless the arbitration agreement specifically provided for class arbitration.<sup>90</sup> Then in 2011, the Court held in *AT&T Mobility v. Concepcion* that a state law that invalidated certain arbitration agreements that precluded class claims was preempted by the Federal Arbitration Act and thus unenforceable.<sup>91</sup> These cases make arbitration agreements that ban class actions enforceable, allowing employers to escape class action claims. Critics argue that this allows employers to avoid liability altogether because the cost will prevent many employees from arbitrating individually.<sup>92</sup>

A more recent development may make this device less useful to employers, however. In January 2012, the National Labor Relations Board held that employers who promulgate arbitration agreements that prohibit employees from filing class actions in both arbitration and court violate the employees' right to engage in concerted activity, which is protected by the National Labor Relations Act.<sup>93</sup> The court of appeals denied enforcement of the decision, however,<sup>94</sup> and many other courts have refused to follow the decision.<sup>95</sup> Nevertheless, the NLRB

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87. *Id.* at 21.

88. *Id.* at 6, 22-23.

89. Because these cases were decided under the Federal Arbitration Act, which governs arbitration of most employment law claims, they apply in employment cases. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (applying the FAA to employment law claims).

90. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Where the parties agreed to allow the arbitrator to decide whether a class action was permissible under a contract that was silent on the issue, however, the Court followed its general policy of deference and refused to set aside the arbitrator's interpretation that the agreement allowed class actions. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013).

91. 131 S. Ct. 1740, 1748 (2011).

92. Sternlight, *Disarming Employees*, *supra* note 73.

93. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012). The statute does not cover government employees, agricultural employees, employees of railroads and airlines, supervisors, or managers. 29 U.S.C. § 152(2)-(3), (11) (2012); *Nat'l Labor Relations Bd. v. Bell Aerospace Corp.*, 416 U.S. 267, 268-69 (1974).

94. *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 362 (5th Cir. 2013) (denying enforcement in relevant part).

95. *Id.*

reaffirmed this interpretation of the statute in 2014 in *Murphy Oil*, indicating that the agency will continue to invalidate such agreements.<sup>96</sup>

Most recently, a 2013 decision by the Supreme Court in an antitrust case contributes further to the primacy of arbitration and its ability to prevent class actions. In *American Express Co. v. Italian Colors Restaurant*, the Court enforced a class action waiver in an arbitration agreement between merchants.<sup>97</sup> The Court found that the law did not ban class action waivers nor guarantee the right to bring a class claim, even if an individual claim would cost more to litigate than was available in damages.<sup>98</sup> This case seems likely to encourage more employers to use arbitration agreements to limit employee class actions and also casts doubt on the viability of the defense to arbitration based on inability to vindicate a statutory claim in arbitration.

### B. *Italian Arbitration*<sup>99</sup>

In contrast to the United States, arbitration in the workplace in Italy has been limited. Italy's civil law system is more protective of workers than U.S. law, and that tradition is reflected in the judicial and legislative treatment of arbitration. Much of the legal development relating to arbitration has been statutory and only recently has arbitration similar to that in the United States been permitted by law.

Arbitration in Italy was first recognized by the law in 1865. "About conciliation and settlement" was the "preliminary title" of the Italian code of civil procedure (C.p.c.) that recognized arbitration, allowing litigants to opt for an alternative to state judicial power to resolve civil disputes.<sup>100</sup> Article 20 sets forth that the "arbiters decide in conformity with the rules of law where the settlement may not have authorized them to reach such amicable compromise as might have been wished for."<sup>101</sup>

Such wording drew a line between two types of arbitration that remains today. Ritual arbitration must conform to the positive rules of law, which determine the structure, proceedings, and outcome of the process. In ritual arbitration, the award is vested with the same import as any decision by a judicial body. In contrast is nonritual arbitration, where

96. *Murphy Oil USA*, 361 N.L.R.B. 72 (2014).

97. 133 S. Ct. 2304, 2311 (2013).

98. *Id.* at 2309.

99. The *Tulane Journal of International and Comparative Law* would like to thank Sara Lelli for her hard work and time spent during the substantiation of the Italian sources in this Article.

100. 4 SALVATORE SAITTA, COMMENTARIO AL CODICE DI PROCEDURA CIVILE pt. 2, at 162-63 (1971) (author's translation).

101. Art. 20 Codice di procedura civile [C.p.c.] (It.) (author's translation).

the parties entrust a third party (a sole arbiter or board) to reach such agreement as will resolve the controversy that arose between the parties. Nonritual arbitration is far less constrained by law. The decisions and processes in ritual arbitrations follow the C.p.c., whereas in the case of nonritual arbitrations, also known as contractual arbitrations, it is up to the arbiters to draw up the parameters of the arbitration, such as the processes and rules of the forum.<sup>102</sup>

Arbitration was first introduced in the legal system to resolve employment disputes in 1893.<sup>103</sup> Act 15 vested the arbitration panel committee with a judicial function in controversies with a ceiling of lire 200, in addition to the prevalent conciliatory function, but left the parties free to grant the panel the flexibility of arbitration.<sup>104</sup> Despite this development, for many years thereafter both the law and practice hindered the use of arbitration in workplace disputes.

During much of the twentieth century, arbitrations arising from individual contracts were permitted, but the law prohibited arbitration provisions in collective agreements and arbitrations of individual disputes arising from collective agreements.<sup>105</sup> Both legal restrictions on individual arbitration<sup>106</sup> and suspicions of private justice and its protection of workers limited the use of arbitration in the workplace.<sup>107</sup> But, as procedure experts point out, some trade unions and employers began to experiment with some forms of nonritual conciliation and arbitration by including in collective contracts settlement clauses that were in derogation of the strict rules of employment legal proceedings, leading to legal reform in Act 532, enacted on November 8, 1973.<sup>108</sup>

Although this law authorized nonritual arbitration where provided by law or contract, it allowed the parties to go to court instead as long as they did so within the terms provided by the contract.<sup>109</sup> The law also authorized judicial review of the merits of the award for “breach of the

102. Luigi Biamonti, *Arbitrato*, in 2 ENCICLOPEDIA DEL DIRITTO 899, 901 (Giuffrè ed., 1958).

103. CLAUDIO CECHELLA, *L'ARBITRATO NELLE CONTROVERSIE DI LAVORO* 35 (1990).

104. *Id.* at 37.

105. Rosario Flammia, *Arbitrato III: Arbitrato e Conciliazione in Materia di Lavoro*, in ENCICLOPEDIA GIURIDICA 1, 1 (1999).

106. The Code of Civil Procedure of 1940, in its eighth title dedicated to arbitration (articles 806ff-831), provided only for individual arbitration and expressly excluded its application to industrial disputes of any kind and to social security issues. Carmine Punzi, *L'Arbitrato nelle Controversie di Lavoro*, RIV. ARB. 389, 389-90 (2001).

107. GIUSEPPE TARZIA, *MANUALE DEL PROCESSO DEL LAVORO* 56 (5th ed. 2008).

108. Carmine Punzi, *L'Arbitrato in Materia di Lavoro: Fonti e Impugnazioni*, 5 MASS. GIUR. LAV. 353, 354 (2010).

109. *See* TARZIA, *supra* note 107, at 57.

law or the contracts or collective agreements.”<sup>110</sup> As a result of the broad scope of judicial review, the parties rarely used arbitration but instead went directly to court except in cases involving dismissals of top managers.<sup>111</sup>

The move toward true arbitration began at the end of the twentieth century, with legislation that expanded the availability of arbitration while still retaining for the parties the right to go to court on any claim. In 1990, individual dismissals became subject to nonritual arbitration after compulsory conciliation if both parties agreed.<sup>112</sup> The legislature later broadened the controversies on which arbitration was permissible.<sup>113</sup> The new provisions, part of the C.p.c.,<sup>114</sup> authorized nonritual arbitration after mandatory conciliation<sup>115</sup> where provided by national contracts or collective accords. In addition, the legislature abrogated the provision from the 1973 law allowing broad judicial review.<sup>116</sup> Article 412 section 4 limited review to a single employment tribunal judge in the jurisdiction where the controversy occurred.<sup>117</sup> The time limit filing the appeal was

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110. Legge 11 agosto 1973, n. 533 in G.U. 13 Sept. 1973, n. 237 art. 5 § 2 (It.) (author's translation).

111. Antonio Vallebona, *Una Buona Svolta del Diritto del Lavoro: Il "Collegato" 2010*, 4 MASS. GIUR. LAV. 210, 211 (2010). One of the fathers of labor law called this law “the slaying of arbitration,” noting that the unions and their lawyers were indispensable in its passage but effectively rendered arbitration a nullity by the limitations. See Gino Giugni, *Il Diritto del Lavoro negli Anni 80*, 5 GIOR. DIR. LAV. REL. IND. 382, 400 (1982); Gino Giugni, *Intervista*, 411 RIV. IT. DIR. LAV. 438 (1992) (author's translation). For further analysis of the restrictions of the law, see Vallebona, *supra*, at 210, 214.

112. See Legge 11 maggio 1990, n. 108 in G.U. 11 maggio 1990, n. 108 art. 5 § 6 (It.).

113. See Art. 808(3) C.p.c. (It.), translated in SOMONA GROSS & MARIA C. PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 473 (2010) (“The parties may agree in writing, that in lieu of the provisions of article 824-bis, the controversy may be decided by arbiters by contractual determination. In all other cases, the provisions of the present title shall apply.”).

114. See *id.* art. 412(3)-(4).

115. As in the case of arbitration for individual dismissals, arbitration must be preceded by conciliation, a prerequisite to any legal action regarding employment. See Francesco P. Luiso, *Il Tentativo Obbligatorio di Conciliazione nelle Controversie di Lavoro*, RIV. IT. DIR. LAV. 375 (1999); Bruno Capponi, *Le Fonti degli Arbitrati in Materia di Lavoro*, 5 MASS. GIUR. LAV. 357 (2010). If conciliation fails, the parties decide (1) the method of initiating an arbitration request and the period of time the other party has to agree; (2) the composition of the arbitration board and the procedure for the appointment of the president and members; (3) the forms and methods of any investigation; (4) the deadline for the award and notification to the parties; and (5) the arbitrators' pay. The nonritual arbitral procedure remains an alternative form of resolution as the parties are at all times free to opt for court action or to request the arbitral board of right or any other form of arbitration expressly provided at law (e.g., the one previously mentioned for individual dismissals). *Id.* at 358.

116. See Decreto legislativo 31 marzo 1998, n. 80, in G.U. 8 aprile 1998, n. 65 (It.).

117. Art. 412(4) C.p.c. (It.).

thirty days from notification of the award and the judge's decision was final.<sup>118</sup>

The judge could set aside the award:

- (1) If the arbitration agreement was invalid or the arbiters exceeded their authority and the exception was raised in the arbitral proceedings;
- (2) If the arbiters were not appointed as required by the arbitration agreement;
- (3) If the award was rendered by an ineligible arbiter as defined in article 812;
- (4) If the arbiters did not stay within the conditions set by the parties for the award to be valid;
- (5) If the arbitral proceedings did not allow both parties the opportunity to present their case and to reply to the opponent's case, an essential principle in the Italian legal system that we have translated as confrontation.<sup>119</sup>

The arbitral award is expressly defined as a "contractual award," so it cannot be overturned for breach of the rules of law and collective rules pertaining to the merits of the controversy, but solely for the reasons set forth above. Thus, the review is more similar to that in the United States with the exception of confrontation, which is not required in U.S. arbitration.

Despite legislative changes that allow more arbitration, controversies may be decided by arbiters only where the law or the collective contracts and accords provide for it. Also, unlike the United States, the parties always remain free to reject arbitration for any particular dispute and go to court, despite a contractual or legal provision providing for arbitration. Even after the law changed, legal scholarship heavily slanted in favor of workers argued that controversy over the "validity of the award" still referred to the violation of rules at law pertaining to the merits of the controversy.<sup>120</sup> Collective agreements lost no time insuring that awards could still be challenged on the merits in court, thus depriving the legislation of the intended arbitral finality.<sup>121</sup>

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118. *Id.* art. 412.

119. *Id.* (author's translation).

120. See Decreto legislativo 29 ottobre 1998, n. 387, in G.U. 7 novembre 1998, n. 261 (It.) (author's translation); Vallebona, *supra* note 111, at 210. The serious limitations to the arbitral institution were also stressed by Giuseppe Tarzia, who noted that the award was less binding than the statement of the minutes of conciliation drawn up at the office of the union or in front of the commission. See TARZIA, *supra* note 107, at 69.

121. See Vallebona, *supra* note 111, at 211.

The latest development in Italian arbitration occurred in 2010, in the “employment reform package.”<sup>122</sup> This law provided for true arbitration, enabling the parties to choose between public and private avenues of remedy for controversies that have arisen and that may arise in the future. Nonritual arbitration is allowed, on the basis of collective accord provisions agreed to by the more representative trade associations and certified by the commissions set up by the Provincial Employment Bureau. Arbitration may proceed in front of arbitral chambers instituted by certification bodies<sup>123</sup> or, last but not least, in front of a board set up at the instigation of the parties to the controversy.

In contrast to U.S. arbitration, the statute contains more detailed prescriptions regarding the arbitration procedure, which in the United States is left to the parties. The previous text of article 412 section 4 C.p.c., was replaced by the wording: “without prejudice to the right of each of the respective parties to take legal action and to resort to the conciliation and arbitration procedure provided at law, the controversies listed under article 409 may also be submitted to the nonritual conciliation and arbitration board instituted in the following terms,” which state procedural rules.<sup>124</sup> The petitioner must reference the points of law in support of the claim and may also include a request to decide *ex aequo et bono*, which means in respect to the general principles of the legal system and the regulatory principles regarding the subject matter, also deriving from EU law.<sup>125</sup>

If the respondent accepts the conciliation and arbitration procedure, it appoints its own arbiter, who has thirty days from notification of the appointment to select, with the other arbiter, the president (a neutral arbiter) and the place for the meeting of the board. If the arbiters do not agree, the petitioner may request the president of the court of the district

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122. Legge 13 agosto 2010, n. 151, in G.U. 11 settembre 2010, n. 215 (It.).

123. The Biagi reform (Legge 14 febbraio 2003, n. 30, in G.U. 26 febbraio 2003, n. 47 (It.), and Decreto legislativo 10 settembre 2003, n. 276, in G.U. 9 ottobre 2003, n. 159 (It.)), introduced certification bodies into the legal system to reduce legal disputes under collective agreements regarding the status of workers as employees or independent contractors. The purpose of certification is to assure the free will of the parties in signing the contract. The certification procedure, supervised by an appointed commission, starts with agreement of both parties and must contain the specifications of the contract for which certification is requested. The procedure ends by an ordinance of either certification or rejection, determining whether the contract is for employment or independent contractor status. A positive certification makes it impossible to question the determination of worker status absent a legal decision on the issue.

124. Art. 412(4) C.p.c. (It.) (author's translation).

125. *Id.* § 2.

to appoint the neutral arbiter. The controversy is decided within twenty days of the hearing by the issuance of an award.<sup>126</sup>

The award of the arbiters, duly authenticated, carries “the force of law on the parties,” the same as article 1372 of the civil code dealing with contracts.<sup>127</sup> Controversies about the validity of the nonritual arbitral award, which may be challenged within thirty days of notification, are decided by review of the court with first-level jurisdiction. Once the deadline for appeal has expired, if the parties have declared in writing that they accept the decision or, if the challenge is rejected by the tribunal, the judge, upon request of the parties and having verified the procedural propriety of the award, declares it valid and enforceable.<sup>128</sup>

The noteworthy change allows the parties that opt for nonritual arbitration to agree that the award may not be challenged in front of a judge for violation of collective contracts and accords and rules of law pertaining to the merit of the controversy, as is permitted in ritual forms of arbitration.<sup>129</sup> Thus, employment disputes resolved by contractual arbitration are subject to challenge, as in article 808 section 3 C.p.c., only where the arbitral convention is invalid, the arbiters overstepped the limits of the mandate, the appointment of arbiters was not in conformance with convention, the arbiters had legal incapacity, the arbiters violated the rules set down by the parties, or the requirement of confrontation is violated. Such requirements are essentially procedural and do not bear on the merits, similar to the United States. With this limitation on the scope of review, however, came a prohibition on arbitrating dismissal cases.

Under the 2010 reform, parties to an individual employment contract are also allowed (under section 8 article 31, Act 183 of 2010) to agree to nonritual arbitration for any controversy that may arise from the contract, precluding in advance any recourse to legal action.<sup>130</sup> Such a clause is enforceable only if “certified,” in order to ensure “the effective will of the parties to assign to arbiters any such controversy as may arise from the employment contract.”<sup>131</sup> Such a covenant reproduces the

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126. *Id.* § 10.

127. *See id.* Article 1372 C.c. provides: “The contract has the force of law between the parties. It can be solved only by mutual consent or according to reasons allowed by law. The contract has no effect with respect to third parties.” Art. 1372 C.c. (It.) (author’s translation).

128. Art. 412(4) § 10 C.p.c. (It.).

129. Antonio Vallebona, *L’Arbitrato Irrituale nel Sistema del Diritto del Lavoro Dopo il “Collegato,”* 5 MASS. GIUR. LAV. 362, 363 (2010).

130. Art. 412(4) § 10 C.p.c. (It.).

131. For the certification procedure, see sources cited *supra* note 123.



aspects of arbitration set forth in article 808, section 1 C.p.c., which may be included in the contract or in a separate document.

Doubts about the constitutionality of the form of the arbitration clause seem groundless. Some critics have argued that the new procedure would clash with article 101 of the Constitution providing “no special judges may be instituted,” and with article 24, which guarantees free access to a judge for the protection of one’s rights.<sup>132</sup>

In no way, however, does the new legal procedure impinge on the parties’ right to call upon the judicial authority and to resort to the range of conciliation and arbitration procedures provided by law. Any party to the employment contract may refuse to agree to an arbitration procedure suggested by the other party, because arbitration remains, in every form, an option for the parties and not mandated by law.<sup>133</sup>

Under labor law, article 412 section 4 regulates invalidation of nonritual arbitration as follows: “Controversies regarding the validity of the non-ritual arbitral award pursuant to article 808 section 3 C.p.c., are decided by a single employment judge.”<sup>134</sup> Such wording caused some concern that use of the term “validity” might authorize judicial review of the merits of the controversy. Yet, such position is untenable because the term “validity” is simply meant to connect nonritual arbitration with the model of invalidation, which is exclusively procedural.<sup>135</sup> And in any event, invalidation of an arbitral award is lawful where it violates inalienable provisions at law and in collective accords.<sup>136</sup>

Lastly, the new article 412 section 4 C.p.c. enables the parties to ask arbiters to decide *ex aequo et bono*.<sup>137</sup> Because, according to the same provision, a decision *ex aequo et bono* must be handed down “with respect to the general principles of the legal system and the regulatory principles of the subject matter, such as flow from EU law,” court practice has found that “there does not seem to exist a big difference,

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132. Article 24 of the Italian Constitution provides, “Everyone can take legal action to protect their rights and legitimate interests.” Art. 24 Costituzione [Cost.] (It.) (author’s translation).

133. On that issue and on good practice in the use of nonritual arbitration, see Vallebona, *supra* note 111, at 216. Cf. Capponi, *supra* note 115, at 357.

134. Art. 412 C.p.c. (It.) (author’s translation).

135. For a brief compilation of the issues raised by the new nonritual arbitration system, see Capponi, *supra* note 115, at 361.

136. For example, provisions regarding health and safety, the right to organize, a decent salary, and all the rights directly or indirectly protected by the Constitution. See Eduardo Ghera & Lucia Valente, *Un Primo Commento al Collegato Lavoro*, 12 MASS. GIUR. LAV. 869 (2010).

137. This concept is similar to equity in the American legal system.

considering the transactional nature of non-ritual awards, between award at law and award *ex aequo et bono*.<sup>138</sup>

In summary, arbitration that is more final and binding is now possible under Italian law, with judicial review for procedural defects in the decision. However, the parties always remain free to avoid arbitration and resort to the courts for enforcement of either contractual or legal rights.

Having reviewed the law and practice of workplace arbitration under the U.S. and Italian systems, it is now possible to consider the similarities and differences between the systems.

#### IV. SIMILARITIES AND DIFFERENCES

##### A. *Comparison Between the Two Systems*

The foregoing discussion of arbitration in the labor and employment sector in Italy and the United States reveals a few similarities, but far more differences between the two countries. This Part will first discuss the similarities and then the differences, reflecting on the reasons for the differences. It is clear that each system has evolved in its own way based on the unique nature of the legal system and the culture of the workplace.

Laws in both Italy and the United States authorized arbitration long before it developed as a practice in the employment field. In both countries, there has been resistance to arbitration in the labor and employment law arena, although arbitration is far more widely accepted today in the United States than in Italy. And arbitration is a voluntary process in both countries, although employees in the United States may have no real voice in whether to arbitrate employment claims. In both countries, arbitration is quicker than litigation in most cases, but that has not convinced most parties with a choice, outside of the collective bargaining context in the United States and highly paid employees in both countries, to adopt arbitration to resolve most disputes. Judicial review is limited to procedural violations rather than the merits in both countries, with the exception of ritual arbitration in Italy. Finally, in both countries, there are legal limitations on arbitrating certain types of claims.

Far more significant than the similarities are the differences between the two countries. Some of these differences are rooted in the differing legal traditions, with the United States being a common law country and Italy a civil law country. Thus most, though certainly not all,

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138. Ghera & Valente, *supra* note 136, at 869 (author's translation).

of the development in U.S. arbitration has been in collective bargaining and the courts, while in Italy it is in legislative enactments. Additionally, Italy has a much stronger tradition of protecting workers' rights in both the courts and the legislature. This tradition and the political force that keeps it in place have resisted the spread of arbitration, because the courts are viewed as protectors of workers' rights.

One major difference is that arbitration under collective bargaining agreements, known as labor arbitration, has, for over half a century, been widely accepted in the United States to resolve disputes between unions and employers about the meaning and application of the agreement. Both labor and management have accepted this system as an effective substitute for both economic action, such as the strike, and judicial enforcement. It is used almost exclusively to enforce collective bargaining agreements.

No similar acceptance of arbitration is evident in Italy. This may reflect in part the different labor relations systems in the two countries, with the United States more clearly separating contract and law.<sup>139</sup> The U.S. labor arbitration system evolved at a time when there were few legal rights for employees. Almost all rights came from the negotiated agreement. Further, in the United States just cause protection from termination remains a contractual protection, commonly available in the private sector almost exclusively to employees covered by a union contract,<sup>140</sup> while in Italy such protection exists by law. A related explanation is the focus of U.S. unions on what has been called "industrial unionism" or "bread and butter" unionism.<sup>141</sup> While there has almost always been a more radical element in the American labor movement, over time it has diminished in size and the philosophy of business unionism prevailed.<sup>142</sup> The focus of most unions has been to negotiate and enforce favorable terms and conditions of employment with their employer, with the primary enforcement mechanism being the grievance and arbitration procedure.<sup>143</sup>

Under the Italian legal system, there is no distinction between rights based on the law and rights based on the contract because according to

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139. For an analysis of the detrimental effects of this separation for employees, see generally Stone, *supra* note 2.

140. The exception is the state of Montana, which has a statute requiring just cause for termination. MONT. CODE ANN. § 39-2-904 (2013).

141. KENNETH DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 34, 84 (2014).

142. *Id.* at 34-38, 71-74, 83-85.

143. *Id.* at 84. For a criticism of labor arbitration as detrimental to employee rights, see Stone, *supra* note 2, at 629-31.

article 1372 of the civil code, “the contract has the force of law between the parties.”<sup>144</sup> Instead, there is distinction between laws governing contracts, which may provide for mandatory or nonmandatory rules. Provisions of labor law are in most cases mandatory. The exemption from mandatory rules is generally permitted only if it benefits the employee. Some rules allow limited flexibility, those related to working hours for example, but the general rules (vacation, illness, pregnancy, birth of a child, rest, right to strike, and especially those related to the termination of the employment relationship) are mandatory.<sup>145</sup>

Indeed, the mandatory nature of the right to strike in Italy illustrates another significant difference between the two systems. In Italy, any limitation on the right to strike arising from an arbitration agreement might violate the Italian law barring “anti-union activity” by the employer. In such cases, the union is entitled to bring a claim before the tribunal, composed of one judge, in order to have the union-busting ceased and the status quo restored.<sup>146</sup> The court injunction has indirect impact on the individual workers’ positions (for instance, reinstatement to their jobs if the antiunion conduct of the company resulted in dismissal). The court injunction, which is issued at the end of a quick procedure, may be contested by the employer before the tribunal.<sup>147</sup> While the United States also prohibits discrimination based on union activity as well as other interference with such rights,<sup>148</sup> limits on striking based on arbitration agreements are not considered violations of the law. In fact, the Supreme Court has held that a contract that provides for arbitration of disputes implicitly includes a prohibition on the right to strike, even if the parties did not negotiate any such limits, and despite the express legal protection for the right to strike.<sup>149</sup>

Because the Italian system does not utilize what is known in the United States as labor arbitration, the comparison between the two systems is meaningful only in relation to employment arbitration, which for both jurisdictions has as its object workers’ rights provided by law or contract.

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144. Art. 1372 C.c. (It.) (author’s translation).

145. See Decreto Legislativo 8 aprile 2003, n. 66, in G.U. 14 aprile 2003, n. 87 (It.); Decreto Legislativo 26 marzo 2001, n. 151, in G.U. 26 aprile 2001, n. 96 (It.); art. 40 Cost. (It.); Legge 15 luglio 1966, n. 604, in G.U. 6 agosto 1966, n. 195 (It.); Legge 20 maggio 1970, n. 300, in G.U. 27 maggio 1970, n. 131 (It.).

146. See L. n. 300/1970 art. 28, § 1.

147. *Id.* art. 28, § 3.

148. 29 U.S.C. § 158(a)(1), (3) (2012).

149. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

Arbitration of legal disputes<sup>150</sup> between individual employees and employers is still resisted by many in the United States. Most academic commentators have been critical of the judicial trend toward enforcement of unilaterally imposed arbitration agreements.<sup>151</sup> Similarly, when expressly questioned about arbitration, most employees support it only where the system is fair and the majority of them oppose mandatory arbitration of legal claims as a condition of employment.<sup>152</sup> Courts, however, have widely accepted and enforced “agreements” to arbitrate all disputes related to employment imposed unilaterally by employers on individual employees without bargaining power.

The explanation for the different approach to employment arbitration in Italy and the United States is rooted largely in differences in the judicial systems. While the courts in Italy actively protect the rights of workers, the courts in the United States, in particular the Supreme Court, which has driven much of the move toward arbitration, are far more inclined to support business.<sup>153</sup> A recent empirical analysis of judicial decisions in the Supreme Court from 1946-2011 concluded that in the 1960s there was a decline in the Court’s support of business interests, but the probusiness inclination began to increase with the Burger Court in 1969.<sup>154</sup> While the Burger and Rehnquist Courts (1969-2004) were favorable to business, the Roberts Court, which began in 2005, has exceeded the two previous Courts in its probusiness orientation.<sup>155</sup> Indeed, five of the ten Justices most favorable to business in the time period of the study are current members of the Roberts Court.<sup>156</sup> The study also demonstrated that justices appointed by Democratic presidents, who would generally be expected to be less

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150. As distinguished from contractual disputes.

151. Jean 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 U. MIAMI L. REV. 831, 837-39 (2002); Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 INDUS. L.J. 149, 166-67 (2008).

152. Finkin, *supra* note 151, at 166.

153. See Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) (calling the Supreme Court headed by Chief Justice Roberts the most probusiness court since the 1930s); Sternlight, *supra* note 151, at 855-56 (suggesting corporate influence as an explanation for the differing acceptance of arbitration in the United States and most other countries); see also Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1008 (2008) (acknowledging the Court as probusiness in certain respects but suggesting it is not extremely so).

154. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013).

155. *Id.*

156. *Id.*

favorable to business, have, over time, become more supportive of business interests.<sup>157</sup>

A subsequent analysis of the 2011-12 term of the Court concluded that the decisions of that term, including both consumer<sup>158</sup> and employment cases, favored business even more clearly than decisions in earlier terms of the Roberts Court.<sup>159</sup> Consistent with the earlier study, analysis of the 2011-12 term showed that even liberal leaning justices ruled with business in a number of cases where there was a reasonable argument on the other side of the case.<sup>160</sup>

In addition to probusiness leanings, an alternative, or perhaps complementary, explanation of the Roberts Court's rulings from a more conservative commentator is the Court's view that litigation, and particularly complex litigation, is not an effective method of resolving disputes.<sup>161</sup> A somewhat similar explanation is offered by Professor Matthew Bodie, who suggests that the Roberts Court supports private enforcement of law, including compliance efforts by employers' human resources departments, in lieu of litigation.<sup>162</sup> While Professor Bodie does not focus on arbitration, deferring disputes to arbitration is consistent with a focus on shifting from litigation to employer enforcement of legal norms.

A third plausible explanation for the Supreme Court's infatuation with arbitration is that the Court is simply clearing its docket of cases by enforcing agreements for private justice.<sup>163</sup> Professor Finkin argues that this is the most persuasive explanation of the shift in the Court's view of arbitration because the corporate influence on the Court is, at best,

157. *Id.* at 1472-73.

158. Several of the cases that impact employment arbitration were consumer cases applicable to employment law because both arise under the FAA. *See supra* text accompanying note 89.

159. Corey Ciocchetti, *The Constitution, the Roberts Court, and Business: The Significant Business Impact of the 2011-2012 Supreme Court Term*, 4 WM. & MARY BUS. L. REV. 385, 419-36, 444, 460-63 (2013) (analyzing the 2011-12 term of the Court and concluding that while prior Roberts Court terms were not uniformly probusiness, the term analyzed was quite clearly probusiness). The author also found that the Court both narrowed and expanded statutes and constitutional provisions to reach the decisions favorable to business. *Id.* at 461.

160. *Id.* at 460-61.

161. *See* Kenneth W. Starr, *The Roberts Court at Age Three: A Response*, 54 WAYNE L. REV. 1015, 1025 (2008) (acknowledging the Court's probusiness bent but suggesting that a more persuasive explanation for the Court's decision is its skepticism about the value of litigation).

162. Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 161-62 (2013).

163. Finkin, *supra* note 151, at 167 (quoting IAN MACNEIL, *AMERICAN ARBITRATION LAW* 172 (1992)).

indirect.<sup>164</sup> Further, the judicial shift to enforcement of arbitration agreements coincides with the expansion of judicial claims available to employees, making reducing the docket more attractive.<sup>165</sup>

Each of these rationales has some force as an explanation for the extraordinary acceptance of employment arbitration by the Supreme Court, which has driven acceptance by other courts. Depending on the particular case, the lineup of justices favoring arbitration may vary, based on the views of the justices and the countervailing arguments.<sup>166</sup> The combination of probusiness orientation and the appeal of alternatives to litigation has led to law that permits employers to force employees into arbitration for both contractual and legal rights, and to restrict their ability to bring claims on a class basis. Further, the fact that the opponents of arbitration have not been able to obtain legislative reversal of the Court decisions suggests that the power of business and the weakness of the employee/consumer lobby have an influence on the acceptance of employment arbitration. The failure legislative efforts may also reflect a lack of widespread knowledge or active concern about the impact of arbitration on employees and consumers.<sup>167</sup> The lack of class consciousness in the United States and the reduced influence of labor unions exacerbates this absence of focus on the loss of rights.

In contrast to the United States, Italian law secures the right of each party to bring a claim before the judicial authority, whether asserting a violation of law or contract, and to use the different procedures of conciliation and arbitration provided by law. Each party can always reject a proposal for arbitration advanced by the other party, because arbitration, in all forms, is a free choice of the parties, not imposed by law. For this reason, the agreement to arbitrate must be expressed by the

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164. *Id.* at 165. Professor Finkin also argues that the votes of individual justices on arbitration cases do not always track the political views of the appointing president, which is consistent with the findings of scholars analyzing the business orientation of the Supreme Court. *Id.* Perhaps, however, that fact does not completely denigrate business orientation as an explanation for the Court's decisions but instead shows the pervasiveness of business influence, particularly when combined with the interest in reducing court dockets.

165. *Id.* at 168.

166. For example, the more recent cases restricting class actions and allowing unions to waive employee rights to litigate are largely 5-4 or 5-3 (Justice Sotomayor recused herself in two of the cases), with the conservatives in the majority and the more liberal or moderate justices in dissent. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009).

167. Several nonprofit organizations have recently launched an effort to educate consumers and employees about the impact of arbitration agreements that are often ignored or hidden from those affected. See *Lost in the Fine Print*, ALLIANCE FOR JUST. (2014), <http://www.afj.org/multimedia/first-Monday-films/films/lost-in-the-fine-print>.

employee in relation to each dispute and arbitration clauses are not allowed in employment contracts as in the United States.

The exception in Italy is the recent Act 183 of 2010, which allows nonritual arbitration,<sup>168</sup> similar to employment arbitration in the United States, in limited circumstances. Under this new law, the following rigorous conditions must be met:

- (1) the arbitration clauses must have been established by cross-sector agreements or collective bargaining agreements signed by the most representative organizations of employers and employees at national level;
- (2) the certification bodies before which the arbitration clauses have to be signed must have verified the actual intent of the parties and the clause can't be signed before the expiration of any probationary period or, if none, at least 30 days after the beginning of the employment contract; and
- (3) disputes relating to dismissal cannot be subject to arbitration clauses.<sup>169</sup>

In contrast to the American system, even this limited Italian exception for contractual arbitration agreements seems designed to protect vulnerable employees and insure that arbitration agreements are truly voluntary. Only labor unions, with more power than individual employees, can enter into such agreements. Moreover, arbitration of claims relating to dismissal is not allowed, thereby preventing employees from sacrificing or limiting their most important legal protections. In the American system, unions can also waive employee rights to litigate, including legal claims relating to termination, but the most vulnerable employees are those without unions and they have no protections from compelled arbitration.

Despite the limited acceptance of arbitration enacted in 2010, the Italian labor market reform of 2012 does not contain any reference to arbitration, showing a disregard for this institution.<sup>170</sup> The brief experience of the 2012 Reform confirmed the existence of an extreme resistance in Italy towards forms of private jurisdiction, resulting from a "statist culture" grown mainly by the CGIL (left-leaning trade union) and

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168. Nonritual arbitration need not provide precisely the same procedures as the courts, and there is more flexibility in applying the law. Comparatively, this is similar to arbitration of legal claims in the United States.

169. See Legge 4 novembre 2010, n. 183, in G.U. 9 novembre 2011, n. 262, art. 31, § 10 (It.) (author's translation).

170. See Legge 28 giugno 2012, n. 92, in G.U. 3 luglio 2012, n. 153 (It.).



the expectation created by judges convinced that they must protect employees.<sup>171</sup>

What most distinguishes employment arbitration in the United States from arbitration in Italy is the ability of U.S. employers not only to require the worker to agree to arbitration, but also to condition employment on the signing of clauses that limit rights provided by law, such as caps on damages, reduction of limitation periods, or limits on available discovery. These clauses would be absolutely void in the Italian legal system and might also constitute the crime of extortion, as defined by article 629 of the penal code: “Whoever, by violence or threats, forcing another person to do or omit anything, procures for himself or others an unjust profit and a detriment of others shall be punished with imprisonment between one and five years.”<sup>172</sup>

The problem of arbitration clauses that limit class actions, which carries great importance in the United States, is entirely absent from Italian labor law. In Italy, the class action, which was introduced in 2007 by Act 244, is available to consumers or users who suffer damages from signing form contracts, pursuant to article 1342 of the civil code, or as a result of noncontractual torts, unfair trade practices, or anticompetitive trade behavior.<sup>173</sup> It does not apply to the employment contract.

In addition, article 103 of the C.p.c. of 1942, provides, “More parties can act or be sued in the same process, when a connection exists between the causes that are presented in terms of the object or the title on which they depend, or when the decision depends partially or entirely, on the resolution of the same issues.” Based on this rule, there are cases in which a large number of petitions are filed in a single case. With one judicial claim, a number of employees of the same employer may bring a variety of individual petitions, when the connection described above exists. A common example is collective redundancies caused by the employer’s organization, while a public sector example is legal actions alleging violation of the rules on recruitment examinations brought by

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171. See Lorenzo Zoppoli, *Certificazione dei Contratti di Lavoro e Arbitrato: Le Liaisons Dangereuses* 24 (C.S.D.L.E. “Massimo D’Antona” IT, Working Paper No. 102, 2010); Piergiorgio Alleva & Giovanni Naccari, “*Legge Sacconi*”: un Fascio di Incostituzionalità, IL MANIFESTO (25 marzo 2010), <http://www.dirittisocialiecittadinanza.org/Documenti/un%20fascio%20di%20incostituzionalit%C3%A0.pdf>; F. Scarpelli, *Giurisdizione, Tutela dei Diritti, Arbitrato: L’Obsessione del Legislatore di Centrodestra*, NOTE INFORMATIVE (1 aprile 2010), [http://www.bollettinoadapt.it/old/files/document/6460SCARPELLI\\_GIURIS.pdf](http://www.bollettinoadapt.it/old/files/document/6460SCARPELLI_GIURIS.pdf).

172. Cass. Pen., sez. VI, 1 luglio 2010, n.32525 (quoting a recent decision by the Supreme Court that found an employer guilty of extortion when it required an employee to provide a presigned letter of resignation as a condition of hiring); art. 629 Codice penale [C.p.] (It.) (author’s translation).

173. See Legge 24 dicembre 2007, n. 244, in G.U. 28 dicembre 2007, n. 300 (It.).

the excluded candidates. But this is not a class action and the procedure is identical to the ordinary procedure, be it one actor, five, or one hundred.

*B. Learning from One Another*

From an Italian perspective, it is difficult to answer the question of what the Italian system could draw from the U.S. experience. The resolution of employment disputes in the United States offers a variety of methods that appear to respond mainly to practical needs. In the United States, the authoritativeness of arbitration does not seem to be called into question. This result has been accomplished primarily by the courts. In contrast to Italy, the legislation relating to arbitration has not changed. This does not imply, however, that workers and their lawyers do not challenge individual arbitration agreements imposed when the worker is in a state of maximum weakness, that is, at the time of hiring.

In the Italian civil law system, judges play a key role in turning the “law in the books” into “law in action,” with long and “creative” explanations of the judgments. Paradoxically, excessive and lengthy reasoning that explains the judgment has turned the judge from being the mouth of the law to the subject who gives voice to the law, and becomes master of the meaning of the rule of law.

The more interpretation defines the meaning of the rules, the more crucial the role of the judge in identifying the authentic content of the right in accordance with the rules defined by the case law. If one adds to this the general perception—experienced especially since the 1970s—that the Italian courts in labor cases are biased in favor of the employees because they are considered the weaker party to the relationship, it is easy to understand why in Italy, where the employee has the right to refuse arbitration, the use of arbitration is limited: usually employees bring claims in Labor Court because they think they can count on a judge who favors them.

For this reason, arbitration in Italy is used primarily in cases of high asset value, occurring in legal relationships characterized by significant economic exchanges. The parties in these relationships have a notable lack of confidence in ordinary justice, deemed incapable of deciding the interests at stake, both for cultural inadequacy and excessive bureaucracy.

The judge’s role is crucial in American law as well, but that power has been exercised to interpret the law to force employees into arbitration. The United States could learn from the Italian system a measure caution regarding protection of employee rights. While the American courts are not considered proemployee, the American jury

system provides a counterweight to the relatively proemployer orientation of many courts. Conventional wisdom is that employees fare better in front of juries because jurors relate to the "little guy" suing the big employer. Studies show that employees in the United States generally fare better in court than in arbitration on statutory claims such as discrimination, and, in addition, many cases settle favorably to the employee before trial.<sup>174</sup> Jurors also tend to award more damages to employees than arbitrators in these cases.<sup>175</sup> Thus, it would seem that given an informed choice, many U.S. employees, like Italian employees, would choose to go to court rather than arbitrate claims based on employment statutes.

Even in the Italian system, however, arbitration is utilized in cases involving high asset value. Interestingly, the data on the American system shows that higher paid employees fare better in arbitration on their employment contract claims.<sup>176</sup> These employees are sufficiently powerful to compel an employer to negotiate an employment contract and thus, also likely to be able to hire an experienced lawyer to arbitrate their claim. For these employees, as in Italy, a choice of arbitration may be rational. For most other U.S. employees, however, employment arbitration is not a choice and may require giving up statutory rights with a reduced chance of prevailing on any claim. On the other side of the equation, however, is the fact that many U.S. employees cannot find legal representation for either litigation or arbitration.<sup>177</sup> This fact has convinced some commentators to advocate an arbitral forum that is easier for employees to navigate without legal representation.<sup>178</sup>

Taking into account the Italian concern for employees' rights, the United States might modify the employment arbitration system. There are several possible options. Like Italy, arbitration could be a choice for both parties to each dispute. Alternatively, U.S. law could make the contractual choice for employment arbitration truly optional, refusing to enforce agreements imposed as a condition of employment. This might be accompanied by a requirement that the employer provide information to enable employees to make an informed choice, such as details about the system of arbitration and what the employee loses by foregoing litigation for arbitration or vice versa. Another possibility would be for

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174. Mahony & Wheeler, *supra* note 79, at 378-90. As noted by Mahony & Wheeler, however, caution must be used in assessing the studies, because all have limitations. *Id.*

175. *Id.* at 384-85.

176. *Id.* at 379, 384.

177. *Id.* at 382.

178. St. Antoine, *supra* note 76, at 91-93.

the government to provide information to enable employees to make an informed choice about arbitration.<sup>179</sup> A final option would be to impose express and consistent legal standards on any arbitration system adopted by employers to insure that the system is not unduly favorable to the employer. Any of these options could be instituted by legislation. Because of the current interpretations of the Federal Arbitration Act, however, legislation would have to be enacted at the federal level.<sup>180</sup>

Given the infatuation of the U.S. courts with arbitration, the latter might be the most palatable option. Many arbitration providers already have standards, although they are not legally enforceable.<sup>181</sup> Employers remain free to choose a provider with standards favorable to the employer. Additionally, courts have imposed some standards under the Federal Arbitration Act.<sup>182</sup> Existing standards vary by court, however, and their unpredictability leads to litigation. Mandatory standards imposed by legislation would insure some level of protection of employee rights while still providing the alternative forum that the courts desire. Such a result is unlikely, however, without a more active and effective lobbying effort by advocates of employees and consumers.

## V. CONCLUSION

The Italian and American arbitration systems have evolved in the context of the very different legal systems and cultures in the two countries. As a result, it seems unlikely that the Italian system will draw from the American system. Despite laws authorizing arbitration that is less tethered to the law, the strong belief that the judicial system is the best protector of employee rights limits its use except in cases of high-level employees. The United States could learn from the Italian system a heightened sensitivity to the protection of employee rights. If arbitration were to be used in for individual employees, legislative protection that insures that they are not deprived existing legal protections would provide a more balanced system of dispute resolution. Given the current

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179. See Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System To Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985, 994, 1069 (2012) (proposing a rating system).

180. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 945-48 (1999) (discussing the broad preemptive scope of the Federal Arbitration Act as interpreted by the Supreme Court); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1748-53 (2011) (reiterating that approach).

181. See Sarah Rudolph Cole, *Federalization of Consumer Arbitration*, 2013 U. CHI. LEGAL FORUM 271, 290-91 (advocating implementation of reform by arbitration providers in consumer arbitration).

182. See *supra* text accompanying note 59.

power of business interests and the weakness of workers, however, this changes seems unlikely.