



## **Not All Arbitrations Are Created Equal**

### *Alternative Dispute Resolution versus Compulsory Contracts*

Recently, Democrats have mounted a campaign against cost-saving and efficiency-promoting arbitration agreements to resolve disputes that arise from voluntary contracts, while at the same time championing the use of imposed, forced contracts in labor negotiations.

The term “arbitration” is used to refer to these two very different situations. The more familiar use of the term “arbitration” refers to a form of alternative dispute resolution, in which two parties *voluntarily* agree to a contract and, *as part of that contract*, agree that their disagreements will be resolved in a system outside the traditional court system.

This type of arbitration has been a regular and accepted part of American contract law for generations. The Federal Arbitration Act of 1925 established a national policy in favor of arbitration. So long as valid contracts comply with certain fairness standards, agreements to resolve disputes between the contracting parties through arbitration “shall be valid, irrevocable, and enforceable.”<sup>[i]</sup> Innumerable Americans have found arbitration to be a fast and inexpensive method of resolving their claims and disagreements. Trial lawyers, on the other hand, traditionally dislike arbitration because it eliminates their chance for a large contingency fee.

Big Labor and the proponents of the ironically named Employee Free Choice Act (EFCA), use the term “arbitration” to refer to a very different system, which is not based on mutual free choice. Under this system, if the company and union cannot reach mutually acceptable terms, a *government appointed “arbitrator” would step into the negotiations and impose contract terms on both parties*. This is a massive government intervention in labor negotiations and is offensive to the freedom of contract and the delicate balance of labor law.

The first, traditional, use of the term “arbitration” describes something that builds on our fundamental principles of freedom of contract -- when both parties reach an arrangement that is acceptable to both. The second use of the term is misleading and describes a policy that upends freedom of contract. In the former, Americans are free to negotiate and agree to contracts, including agreements to the method for resolving their disagreements. In the latter, parties who have disagreements will have contracts forced upon them, possibly contracts that are not acceptable to either side. Under current labor law neither side has to agree to any contract; both have the traditional weapons used in labor disputes – lockouts and strikes – at their disposal. A company is not forced to accept terms that will lead to its demise and a union is not forced to accept any wages or conditions it finds unacceptable.

**The use of a familiar word in a completely different setting must not disguise the fact that Big Labor and the proponents of EFCA support a radical upending of established contract law.**

The consistent position -- supporting arbitration when that alternative to expensive litigation is agreeable to both parties but opposing a third party, a so-called arbitrator, from imposing a contract -- upholds freedom of contract. Americans should be able to contract for arbitrators to resolve their disputes just as they should retain their ability to freely enter into labor contracts.

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<sup>[i]</sup> 9 U.S.C. s. 2

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