

## Cultural determinants of workplace arbitration in the U.S. and Italy\*

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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 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 U.S. 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 U.S. 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 U.S. 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 section 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 which 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 40 hours work per week, prohibit child labor, prescribe standards for a safe and healthful workplace, require unpaid leave for illness, childbirth and adoption and to care for an ill family member, and set certain standards for pensions and health insurance voluntarily provided by employers.<sup>628</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

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<sup>628</sup> As of 2014, the Patient Protection and Affordable Care Act requires employers with 50 or more employees to provide health insurance for employees who work at least 30 hours per week. See 26 U.S.C. § 4980H(a); 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980H(c)(4)(A).

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, since 7.5% of employees in the private (nongovernmental) sector and 38.7% of employees in the public (governmental) sector have union representation.<sup>629</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 having a duty to enforce the laws. Section 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. 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 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. 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 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 U.S., 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

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<sup>629</sup> *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, Bureau of Labor Statistics (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* 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).

of the disciplinary code, the notice period for termination of employment, and non-competition 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 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 (inter-confederate agreements). This happened, for example, for individual and collective dismissal; before the legislature intervened to regulate the subject, the only regulation was contained in inter-confederate 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, however, 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>630</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, safety - of the subordinate workers. 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 art. 1418 of the civil code). The law is unbreakable; it cannot be modified or waived by the contract.

Until the 1970s there were few situations where law and contract overlapped. Accordingly, there was a mutual relationship of non-interference 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, also integration between the various sources. In practice then, the relationship 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. Contractual sources are today 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

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<sup>630</sup> There are, however, some recent signs of change caused by the trend, common in all industrialized countries, of decentralized negotiation.

the regulation of employment relationships (illustrated by the case of the criteria of choice of workers to be dismissed collectively).<sup>631</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 U.S. and Italy

#### A. 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 application of labor contracts.<sup>632</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>633</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>634</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

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<sup>631</sup> According to the 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: seniority, number of dependents of each worker, organizational reasons.

<sup>632</sup> See generally Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

<sup>633</sup> *Id.* at 417-20.

<sup>634</sup> *Id.* at 419.

accept arbitration awards as binding.<sup>635</sup> Today arbitration is included in virtually all collective bargaining agreements.

In 1947, Congress added provisions to the National Labor Relations Act, which covers most private sector businesses, to encourage unions and employers to use alternative dispute resolution methods to resolve disagreements over both contract negotiation and contract interpretation.<sup>636</sup> Additionally, Congress made labor agreements enforceable in the federal courts.<sup>637</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 20<sup>th</sup> century, the Supreme Court decided that agreements to arbitrate disputes under collective bargaining agreements were enforceable as a matter of national labor policy.<sup>638</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>639</sup> Because arbitration 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>640</sup> “[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”<sup>641</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>642</sup>

The *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>643</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>644</sup> In the third *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>645</sup> Over time another narrow exception to enforcement evolved, denying enforcement to arbitration

<sup>635</sup> LAURA J. COOPER, et al., *ADR IN THE WORKPLACE* 11-12 (3d ed. 2014).

<sup>636</sup> *Id.* at 13; 29 U.S.C. §§ 158(d), 201, 203.

<sup>637</sup> 29 U.S.C. §185.

<sup>638</sup> See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>639</sup> See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>640</sup> 363 U.S. at 578.

<sup>641</sup> *Id.* at 578.

<sup>642</sup> *Id.* at 581.

<sup>643</sup> *Id.* at 582-83.

<sup>644</sup> *American Mfg.*, 363 U.S. at 568.

<sup>645</sup> *Enterprise Wheel & Car*, 363 U.S. at 597.

awards that violate public policy.<sup>646</sup> Based on the *Trilogy* and its progeny, few arbitration decisions under labor agreements are appealed and fewer still overturned by the courts.<sup>647</sup> Since unionization in the private sector has decreased, however, there are fewer labor arbitrations.

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>648</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 post-hearing 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 even 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. 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.<sup>649</sup> There is no systematic determination of which decisions are published. 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

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<sup>646</sup> See *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 63(2000) (recognizing public policy exception to enforcement of arbitration awards but refusing to overturn arbitration award reinstating truck driver who twice tested positive for illegal drugs on public policy grounds).

<sup>647</sup> 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).

<sup>648</sup> The description of the labor arbitration procedure that follows is drawn from COOPER, ET AL., *supra* note 635, at 19- 29.

<sup>649</sup> COOPER, et al., *supra* note 635, at 1021-23.

is followed by most arbitrators.<sup>650</sup> 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>651</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>652</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>653</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>654</sup> These concerns caused courts initially 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>655</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>656</sup>

All in all, labor arbitration as a method of settling contract interpretation disputes has been relatively noncontroversial in since the mid-twentieth century in the private sector and in the last 20 years in the public sector as well. 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.

## 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>657</sup> Accordingly the courts initially refused to enforce such agreements at all. In 1925, Congress passed the Federal Arbitration Act (“FAA”), making arbitration agreements enforceable.<sup>658</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>659</sup>

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<sup>650</sup> *Id.* at 285-88.

<sup>651</sup> *See supra* note 629.

<sup>652</sup> MARTIN H. MALIN, ET AL., PUBLIC SECTOR EMPLOYMENT 611-12, 615 (2d ed. 2011)

<sup>653</sup> *Id.* at 677-78, 699.

<sup>654</sup> *Id.* at 718-50.

<sup>655</sup> *Id.* at 677-78, 718-50.

<sup>656</sup> *Id.*

<sup>657</sup> 363 U.S. at 578.

<sup>658</sup> 9 U.S.C. §§ 1-14 (1925).

<sup>659</sup> 9 U.S.C. §1.

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. 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>660</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.<sup>661</sup> The Court concluded that an agreement to arbitration was merely an agreement to a different forum, not a waiver of rights.<sup>662</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>663</sup>

Ten years later in *Circuit City v. Adams*, the Court was faced with an arbitration agreement in an employment contract.<sup>664</sup> The Court read the exclusion for employment contracts very narrowly, holding that it excluded only contracts of transportation workers like the expressly mentioned "seaman" and "railroad employees", despite the fact that the scope of interstate commerce is substantially broader today.<sup>665</sup> This decision opened the door to widespread adoption and enforcement of arbitration agreements in employment.

Since that time agreements to arbitrate 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>666</sup> Since most employment statutes were passed before such agreements were enforceable, they do not bar arbitration.<sup>667</sup> Although the arbitration agreements are typically 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>668</sup>

Other defenses to arbitration are that there was no agreement to arbitrate<sup>669</sup> or that the employee cannot effectively vindicate the statutory rights in arbitration.<sup>670</sup> In addition, the generally applicable defenses to the enforcement of any contract apply.<sup>671</sup> In employment arbitration, the company chooses the arbitration system. Some agreements limit damages, shorten the statute

<sup>660</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614 (1985); *Shearson/American Exp. Inc. v. McMahon* 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Exp. Inc.*, 490 U.S. 477 (1989).

<sup>661</sup> *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991).

<sup>662</sup> *Id.* at 29.

<sup>663</sup> *Id.* at 25 n.2.

<sup>664</sup> 532 U.S. 105 (2001).

<sup>665</sup> *Id.* at 119.

<sup>666</sup> *Gilmer*, 500 U.S. at 27-28.

<sup>667</sup> An exception is the whistleblower protections under the Dodd-Frank Act, a financial reform bill, which bars pre-dispute 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).

<sup>668</sup> *Id.* at 33.

<sup>669</sup> See, e.g., *Jones v. Halliburton Co.*, 583 F.3d 228 (5<sup>th</sup> Cir. 2009) (finding no agreement to arbitrate claims filed by employee of contractor in Iraq for sexual assault which occurred after work hours in the employee's bedroom in employer-provided housing.)

<sup>670</sup> See, e.g., *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 89-90 (2000) (recognizing defense but finding plaintiff failed to establish it).

<sup>671</sup> 9 U.S.C. § 2 (requiring enforcement of arbitration agreements except "upon such grounds as exist at law or in equity for the revocation of any contract").

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>672</sup> There is much litigation about the enforceability of agreements which 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 that the contract is unconscionable or that statutory rights cannot be vindicated.<sup>673</sup> Other courts have ordered arbitration despite the differences from litigation<sup>674</sup> and still others have liberally construed or modified the agreement to make it enforceable.<sup>675</sup> Where the provisions are weighted too heavily in favor of the employer, even courts that generally order arbitration will allow the employee to bring the claim in court.<sup>676</sup>

The Supreme Court has become very favorably inclined to enforcing such agreements, despite efforts 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>677</sup> The Federal Arbitration Act has been found to preempt many state laws that limit enforcement of arbitration agreements,<sup>678</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>679</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>680</sup> but as the Court became more favorably inclined toward arbitration a few lower courts enforced such agreements.<sup>681</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>682</sup> To be enforceable, however, the agreement, must clearly and unequivocally waive the employees' right to litigate.<sup>683</sup> Additionally, the Court did not decide whether the employee was bound by the arbitration agreement if the union refused to

<sup>672</sup> MARION G. CRAIN, ET. AL., *WORK LAW: CASES AND MATERIALS* 1058, 1063–4 (2d ed. 2011).

<sup>673</sup> *Id.* at 1062, 1067–73.

<sup>674</sup> *See id.* at 1063–64.

<sup>675</sup> *See id.* at 1060.

<sup>676</sup> *See e.g.*, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (stating “we 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”).

<sup>677</sup> *See infra* notes 704-705, 709 and accompanying text.

<sup>678</sup> *See, e.g.*, *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

<sup>679</sup> *Arbitration Fairness Act Reintroduced to Curb Forced Arbitration for Consumers, Others*, 14 CLASS 606 (Issue No. 10, 05/24/13).

<sup>680</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

<sup>681</sup> *See Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4<sup>th</sup> Cir. 2001); *Austin v. Owens-Brockway Glass Container Inc.*, 78 F.3d 875, 885 (4<sup>th</sup> Cir. 1996).

<sup>682</sup> *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009).

<sup>683</sup> *Wright v. Universal Marine Service Corp.*, 525 U.S. 70, 79-80 (1998).

arbitrate the employee's claim, which is commonly the union's right under the collective bargaining agreement.<sup>684</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>685</sup> The employee's arbitration agreement does not bind the agency, which has a public interest to vindicate in bringing the claim.<sup>686</sup> Government agencies bring suit only in a very small number of cases, however.<sup>687</sup>

Employment arbitration in the U.S. 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>688</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. 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 is no control over arbitrator quality.<sup>689</sup> A related concern is that, unlike labor arbitration, employers will be repeat players in arbitration while employees will not.<sup>690</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>691</sup>

Proponents of arbitration 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>692</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

<sup>684</sup> *14 Penn Plaza*, 556 U.S. at 249.

<sup>685</sup> *EEOC v. Waffle House*, 534 U.S. 279, 297-98 (2002).

<sup>686</sup> *Id.* at 295-96.

<sup>687</sup> For example, in 2012 the EEOC received 99,412 charges of discrimination and brought suit in only 155 cases. *Charge Statistics FY 1997 Through FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>; *EEOC Litigation Statistics FY 1997 through FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

<sup>688</sup> 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).

<sup>689</sup> This concern has abated in the courts but not among arbitration's critics.

<sup>690</sup> Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUD. 1, 11-16, 20 (2011).

<sup>691</sup> *Id.*

<sup>692</sup> Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 562 (2001); Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 91 (2001).

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 employee morale and retention. Finally, some commentators have suggested that arbitration is less beneficial for employers than may initially appear.<sup>693</sup>

Empirical studies of arbitration show mixed results. 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>694</sup> Labor arbitrators under union contracts rule for employees more often than employment arbitrators.<sup>695</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>696</sup> The evidence also suggests 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>697</sup> And low wage employees may have more opportunity to pursue their claims in arbitration.<sup>698</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>699</sup> They are particularly beneficial where each individual has small damages since 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>700</sup> They may attract media attention and adversely affect a company's reputation.<sup>701</sup> Accordingly, there is substantial pressure on companies to settle such claims.<sup>702</sup> These pressures motivate businesses to seek ways to avoid class actions. Arbitration agreements

<sup>693</sup> Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 421-440 (2000).

<sup>694</sup> Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed*, at pp. 22-23, OHIO ST. J. ON DISP. RESOL. (forthcoming 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).

<sup>695</sup> *Id.* at 380, 387, 390.

<sup>696</sup> *Id.* at 373. For a more recent study, see Colvin & Pike, *supra* note 694, at 29 (showing win rates and damage awards lower than litigated cases, particularly when the individually negotiated agreements of high level employees are separated from employer-managed arbitration).

<sup>697</sup> *Id.* at 383-385.

<sup>698</sup> *Id.* at 385, 390. *But see* Colvin & Pike, *supra* note 694, at 32 (finding most cases in arbitration will not be economically viable, leading to a system which is not accessible to employees).

<sup>699</sup> See Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights*, 38 WAKE FOREST L. REV. 173, 204-05 (2003).

<sup>700</sup> Deborah A. Sudbury, et al., *Keeping the Monster in the Closet: Avoiding Employment Class Actions*, EMP. REL. L.J. at 20 (Autumn 2000).

<sup>701</sup> *Id.* at 21.

<sup>702</sup> *Id.* at 6, 22-23.

offer an appealing vehicle to reach such a result, enhanced by recent decisions of the Supreme Court.<sup>703</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>704</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>705</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.

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>706</sup> The court of appeals denied enforcement of the decision, however,<sup>707</sup> and many other courts have refused to follow the decision.<sup>708</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>709</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. 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

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 U.S. been permitted by law.

<sup>703</sup> Because these cases were decided under the Federal Arbitration Act, which governs arbitration of most employment law claims, they apply in employment cases.

<sup>704</sup> 559 U.S. 662. 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 v. Sutter*, 133 S.Ct. 2064 (2013).

<sup>705</sup> 131 S.Ct. 1740 (2011).

<sup>706</sup> D.R. Horton, 357 NLRB No. 184 (2012). The statute does not cover government employees, agricultural employees, employees of railroads and airlines, 29 U.S.C. §§ 152(2), (3), supervisors or managers. 29 U.S.C. §§152 (2), (3), (11); *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974).

<sup>707</sup> 737 F.3d 344 (5<sup>th</sup> Cir. 2013) (denying enforcement in relevant part).

<sup>708</sup> *Id.* at 362.

<sup>709</sup> 133 S.C. 2304 (2013).

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 which recognized arbitration, allowing litigants to opt for an alternative to state judicial power to resolve civil disputes.<sup>710</sup> Art. 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."

Such wording drew a line between two types of arbitration that remains today. Ritual arbitration must conform to the positive rules of law, which set out 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 non-ritual arbitration, where 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. Non-ritual arbitration is far less constrained by law. The decisions and processes in ritual arbitrations follow the civil procedure code, whereas in the case of non-ritual 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>711</sup>

Arbitration was first introduced in the legal system to resolve employment disputes in 1893. Act #15, June 1893, n° 295. 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>712</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>713</sup> Both legal restrictions on individual arbitration<sup>714</sup> and suspicions of private justice and its protection of workers limited the use of arbitration in the workplace.<sup>715</sup> But, as procedure experts point out, some trade unions and employers began to experiment with some forms of non-ritual 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, 11/8/1973.<sup>716</sup>

Although this law authorized non-ritual arbitration where provided by law or contract, it allowed the parties to go to court instead so long as they did so within the terms provided by the contract.<sup>717</sup> The law also authorized judicial review of the merits of the award for "breach of the law

<sup>710</sup> Satta, *Commentario al codice di procedura civile* IV 2 Milan 1971, 162.

<sup>711</sup> Biamanti, voc. Arbitrato (dir. proc. civ.) in *Enc. Dir.* II, 2 Milan 1958 p. 934 ff.

<sup>712</sup> Cecchella *L'arbitrato nelle controversie di lavoro*, Milano 1990, 37.

<sup>713</sup> Flammia *Voce arbitro III Arbitrato e conciliazione in materia di lavoro*. *Enc. Giur.* Treccani VIII aggiornamento. Rome 2000, I.

<sup>714</sup> The code of civil procedure of 1940, in its eighth title dedicated to arbitration (art. 806ff-831), provided only for individual arbitration and expressly excluded its application to industrial disputes of any kind and to social security issues. Punzi *L'arbitrato nelle controversie di lavoro* in *Riv. Arb.* 2001, 389ff.

<sup>715</sup> Tarzia *Manuale del processo lavoro* 5, Milan 2008, 56.

<sup>716</sup> Punzi *L'arbitrato in materia di lavoro: fonti e impugnazioni*, in *Mass. Giur. Lav.* 2010, p. 353.

<sup>717</sup> See Tarzia, *supra* note 715, at 67.

or the contracts or collective agreements."<sup>718</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>719</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 non-ritual arbitration after compulsory conciliation if both parties agreed.<sup>720</sup> The legislature later broadened the controversies on which arbitration was permissible.<sup>721</sup> The new provisions, part of the civil procedure code,<sup>722</sup> authorized non-ritual arbitration after mandatory conciliation<sup>723</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>724</sup> Art. 412 °4 limited review to a single employment tribunal judge in the jurisdiction where the controversy occurred. The time limit filing the appeal was thirty days from notification of the award and the judge's decision was final.

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 art. 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>718</sup> Art. 5, § 2.

<sup>719</sup> Vallebona *Una buona svolta del diritto del lavoro: il "collegato" 2010*, in *Mass. Giur. Lav.*, 2010, p. 210. 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 Giugni *Il diritto del lavoro negli anni 80* in *Gior. Dir. Lav. Rel. Ind.* 1982, at 382, 400; Giugni *Intervista* in *Riv. It. Dir. Lav.* 1992, I, 438. For further analysis of the restrictions of the law, see Vallebona, *supra*, at 210, 214.

<sup>720</sup> See Act #108/1990.

<sup>721</sup> See art. 808 °3 of the civil procedure code which broadens the authority for non-ritual arbitration: "The parties may agree in writing, that in lieu of the provisions of art. 824-bis, the controversy may be decided by arbiters by contractual determination. In all other cases, the provisions of the present title shall apply."

<sup>722</sup> See art. 412 °3 and 412 °4 of the civil procedure code.

<sup>723</sup> As in the case of arbitration for individual dismissals, arbitration must be preceded by conciliation, a prerequisite to any legal action regarding employment. See Luiso *Tentativo obbligatorio di conciliazione nelle controversie di lavoro* in *Riv. It. Dir. Lav.* 1999, ff375; Capponi *Le fonti degli arbitrati in materia di lavoro* in *Mass. Giur. Lav.* 2010 p. 357. If conciliation fails, the parties decide a) the method of initiating an arbitration request and the period of time the other party has to agree; b) the composition of the arbitration board and the procedure for the appointment of the president and members; c) the forms and methods of any investigation; d) the deadline for the award and notification to the parties; and e) the arbitrators' pay. The non-ritual 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).

<sup>724</sup> See Legislative Decrees #80/1998 and #387/1998.

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 U.S. 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 U.S., the parties always remain free to reject arbitration for any particular dispute and go to court, despite a contractual or legal provision 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>725</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>726</sup>

The latest development in Italian arbitration occurred in 2010, in the "employment reform package."<sup>727</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 which may arise in future. Non-ritual 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, in front of arbitral chambers instituted by certification bodies<sup>728</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 U.S. is left to the parties. The previous text of art. 412 °4, c.c.p., 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 art. 409 may also be submitted to the non-ritual conciliation and arbitration board instituted in the following terms," which state procedural rules. 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.

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 to appoint the neutral

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<sup>725</sup> See Vallebona, *supra* note 719, at 210. The serious limitations to the arbitral institution were also stressed by 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 715, at 68.

<sup>726</sup> See Vallebona, *supra* note 719, at 211.

<sup>727</sup> Art. 31 of Act #183/2010.

<sup>728</sup> The Biagi reform (Act #30, 14/2/2003, and Legislative Decree 10 September 2003 #276) 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.

arbitrator and decide the location of the arbitration. The controversy is decided within twenty days of the hearing by the issuance of an award.

The award of the arbitrators, duly authenticated, carries "the force of law on the parties", the same as art. 1372 of the civil code dealing with contracts. Controversies about the validity of the non-ritual 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.

The noteworthy change allows the parties that opt for non-ritual 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>729</sup> Thus, employment disputes resolved by contractual arbitration are subject to challenge, as in art. 808 °3, c.c.p., only where the arbitral convention is invalid, the arbitrators overstepped the limits of the mandate, the appointment of arbitrators was not in conformance with convention, the arbitrators had legal incapacity, the arbitrators 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 U.S. 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 §8 art. 31, Act #183/2010) to agree to non-ritual arbitration for any controversy that may arise from the contract, precluding in advance any recourse to legal action. Such a clause is enforceable only if "certified", in order to ensure "the effective will of the parties to assign to arbitrators any such controversy as may arise from the employment contract."<sup>730</sup> Such a covenant reproduces the aspects of arbitration set forth in art. 808, §1, c.c.p., 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 art. 101 of the Constitution providing "no special judges may be instituted", and with art. 24, which guarantees free access to a judge for the protection of one's rights.

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>731</sup>

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<sup>729</sup> A. Vallebona *L'arbitrato irrituale nel sistema del diritto del lavoro dopo il "Collegato"*, in *Mass. Giur. Lav.*, 2010, p. 363.

<sup>730</sup> For the certification procedure see note 728.

<sup>731</sup> On that issue and on good practice in the use of non-ritual arbitration, see Vallebona, *supra* note 719, at 216. Cf. Capponi, *supra* note 723, at 357.

Under labor law, art. 412 <sup>o</sup>4 regulates invalidation of non-ritual arbitration as follows: "Controversies regarding the validity of the non-ritual arbitral award pursuant to art. 808 <sup>o</sup>3 c.c.p., are decided by a single employment judge." 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 non-ritual arbitration with the model of invalidation, which is exclusively procedural.<sup>732</sup> And in any event, invalidation of an arbitral award is lawful where it violates inalienable provisions at law and in collective accords.<sup>733</sup>

Lastly, the new art. 412 <sup>o</sup>4 c.c.p., enables the parties to ask arbiters to decide *ex aequo et bono*.<sup>734</sup> Since, 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, considering the transactional nature of non-ritual awards, between award at law and award *ex aequo et bono*."<sup>735</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 section 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 U.S. than in Italy. And arbitration is a voluntary process in both countries, although employees in the U.S. 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 U.S. 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.

<sup>732</sup> For a brief compilation of the issues raised by the new non-ritual arbitration system, see Capponi, *supra* note 723, at 361.

<sup>733</sup> For example the provisions regarding health and safety, the right to organize, decent salary and all the rights directly or indirectly protected by the Constitution. See E. Ghera, L. Valenti, *Un primo commento al Collegato lavoro*, in *Mass. Giur. Lav.*, 2010, at 864.

<sup>734</sup> This concept is similar to equity in the American legal system.

<sup>735</sup> Ghera & Valenti, *supra* note 103, at 860.

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 U.S. being a common law country and Italy a civil law country. Thus, most, though certainly not all, 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, since 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 U.S. 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 U.S. more clearly separating contract and law.<sup>736</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 U.S. 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>737</sup> while in Italy such protection exists by law. A related explanation is the focus of U.S. unions on what has been called "business unionism" or "bread and butter" unionism.<sup>738</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>739</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>740</sup>

Under the Italian legal system, there is no distinction between rights based on the law and rights based on the contract, since according to Article 1372 of the Civil Code, "the contract has the force of law between the parties". 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.

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<sup>736</sup> For an analysis of the detrimental effects of this separation for employees, see generally Stone, *supra* note 629.

<sup>737</sup> The exception is the state of Montana, which has a statute requiring just cause for termination. MONT. CODE ANN. § 39-2-904 (2013).

<sup>738</sup> KENNETH DAU-SCHMIDT, ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 34, 84 (2014).

<sup>739</sup> *Id.* at 34-38, 71-74, 83-85.

<sup>740</sup> *Id.* at 84. For a criticism of labor arbitration as detrimental to employee rights, see Stone, *supra* note 629, at 629-31.

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 Labor Court in order to have the union-busting ceased and the status quo restored. The Court injunction has indirect impact on the individual workers' positions (for instance, reinstatement to their jobs if the anti-union 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 Labor Court. While the U.S. also prohibits discrimination based on union activity as well as other interference with such rights,<sup>741</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>742</sup>

Since 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 the employment arbitration, which for both jurisdictions, has as its object the worker's rights provided by law or contract.

Arbitration of legal disputes<sup>743</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>744</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>745</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 U.S. is rooted largely in differences in the judicial systems. While the courts in Italy actively protect the rights of workers, the courts in the U.S. and in particular the Supreme Court, which has driven much of the move toward arbitration, are far more inclined to support business.<sup>746</sup> A recent empirical analysis of judicial decisions in the Supreme Court from 1946-2011 concluded that in the

<sup>741</sup> 29 U.S.C. §§ 158(a) (1), (3).

<sup>742</sup> *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

<sup>743</sup> As distinguished from contractual disputes.

<sup>744</sup> 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).

<sup>745</sup> *Id.* at 166.

<sup>746</sup> 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 pro-business court since the 1930s); Sternlight, *supra* note 744, at 855-56 (suggesting corporate influence as an explanation for the differing acceptance of arbitration in the U.S. 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 pro-business in certain respects but suggesting it is not extremely so).

1960s there was a decline in the Court's support of business interests, but the pro-business inclination began to increase with the Burger Court in 1969.<sup>747</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 pro-business orientation.<sup>748</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>749</sup> The study also demonstrated that justices appointed by Democratic presidents, who would generally be expected to be less favorable to business, have, over time become more supportive of business interests.<sup>750</sup>

A subsequent analysis of the 2011-12 term of the Court concluded that the decisions of that term, including both consumer<sup>751</sup> and employment cases, favored business even more clearly than decisions in earlier terms of the Roberts Court.<sup>752</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>753</sup>

In addition to pro-business 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>754</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>755</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>756</sup> Professor

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<sup>747</sup> Lee Epstein, William M. Landes, Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013).

<sup>748</sup> *Id.*

<sup>749</sup> *Id.*

<sup>750</sup> *Id.* at 1472-73.

<sup>751</sup> As noted *supra* note 703, several of the cases that impact employment arbitration were consumer cases applicable to employment law because both arise under the FAA.

<sup>752</sup> Corey Ciochetti, *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 pro-business, the term analyzed was quite clearly pro-business). 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.

<sup>753</sup> *Id.* at 460-61.

<sup>754</sup> See Kenneth W. Starr, *The Roberts Court at Age Three: A Response*, 54 WAYNE L. REV. 1015, 1025 (2008) (acknowledging the Court's pro-business bent but suggesting that a more persuasive explanation for the Court's decision is its skepticism about the value of litigation).

<sup>755</sup> Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 161-62 (2013)

<sup>756</sup> Finkin, *supra* note 744, at 167, quoting IAN MACNEIL, AMERICAN ARBITRATION LAW 172 (1992).

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, indirect.<sup>757</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>758</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>759</sup> The combination of pro-business 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 has 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. The lack of class consciousness in the U.S. and the reduced influence of labor unions exacerbates this absence of focus on the loss of rights.

In contrast to the U.S., 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 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 non-ritual arbitration,<sup>760</sup> similar to employment arbitration in the U.S., 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

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<sup>757</sup> *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., *id* which is consistent with the findings of scholars analyzing the business orientation of the Supreme Court. Perhaps, however, that fact doesn't 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.

<sup>758</sup> *Id.* at 168.

<sup>759</sup> 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; *Stolt Nielsen v. AnimalFeeds*, 559 U.S. 662; *American Express v. Italian Colors Restaurant*, 133 S.C. 2304 and *14 Penn Plaza v. Pyett*, 556 U.S. 247.

<sup>760</sup> Non-ritual 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 U.S.

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.

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 on 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 waive employee rights to litigate also, 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. 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 the expectation created by judges convinced that they must protect employees.<sup>761</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 art. 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>762</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 non-contractual torts, unfair trade practices or anti-competitive trade behavior. It does not apply to the employment contract.

In addition, Article 103 of the Code of Civil Procedure 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

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<sup>761</sup> See L. ZOPPOLI, *Certificazione dei contratti di lavoro e arbitrato: le liaisons dangereuses*, Working Paper C.S.D.L.E. “Massimo D’Antona” – IT, 2010, n. 102; P. ALLEVA, G. NACCARI, *Legge “Sacconi”: un fascio di incostituzionalità*, in *il Manifesto*, 25 marzo 2010; M. ROCCELLA, *Lo squilibrio legalizzato tra imprese e lavoratori*, in *il Manifesto*, 21 ottobre 2010; F. SCARPELLI, *Giurisprudenza, tutela dei diritti, arbitrato: l’ossessione del legislatore di centrodestra*, Note informative, 2010, 47.

<sup>762</sup> A recent decision by the Supreme Court (Corte di Cassazione Penale, Sez. VI 1 luglio 2010, n. 32252) found an employer who required an employee to provide a pre-signed letter of resignation as a condition of hiring guilty of extortion.

the same employer may bring a variety of individual petitions, when the connection described above exists. A not uncommon 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 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 U.S., 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, since 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, with 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 U.S. could learn from the Italian system a measure caution regarding protection of employee rights. While the American courts are not considered pro-employee, the American jury system provides a counterweight to the relatively pro-employer 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 U.S. 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>763</sup> Jurors also tend to award more damages to employees than arbitrators in these cases.<sup>764</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>765</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>766</sup> This fact has convinced some commentators to advocate an arbitral forum that is easier for employees to navigate without legal representation.<sup>767</sup>

Taking into account the Italian concern for employees' rights, the U.S. 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 the government to provide information to enable employees to make an informed choice about arbitration.<sup>768</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.

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>769</sup> And employers remain free to choose a provider with standards favorable to the employer. Additionally, as no, courts have imposed some standards under the Federal Arbitration

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<sup>763</sup> Mahony & Wheeler, *supra* note 694, at 378-90. As noted by Mahony & Wheeler, however, caution must be used in assessing the studies, because all have limitations. *Id.*

<sup>764</sup> *Id.* at 384-85.

<sup>765</sup> *Id.* at 379, 384.

<sup>766</sup> *Id.* at 382.

<sup>767</sup> St. Antoine, *supra* note 692, at 91-93.

<sup>768</sup> 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 (2012) (proposing a rating system).

<sup>769</sup> 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).

Act.<sup>770</sup> Existing standards vary by court, however, and their very 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 U.S. could learn from the Italian system a heightened sensitivity to the protection of employee rights. If arbitration is 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 power of business interests and the weakness of workers, however, this changes seems unlikely.

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<sup>770</sup> See *supra* note 676 and accompanying text.