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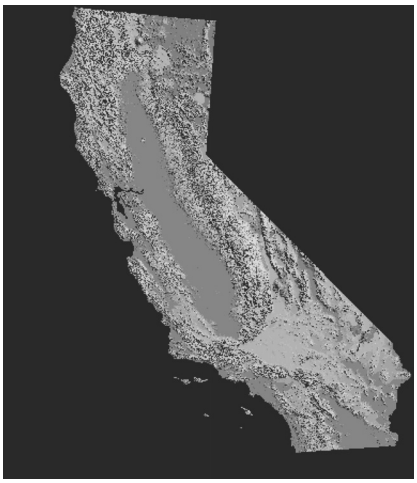

Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure

August 2004

Cover image courtesy of United States Geological Survey

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Executive Summary

In California—and throughout the nation—the use of alternative dispute resolution (ADR) has increased. This rise in the use of ADR has been accompanied by heightened scrutiny. One significant development has been the growing use of pre-dispute arbitration clauses in consumer and employment contracts. But as a well-known professor recently noted, "California is in the eye of the storm" over the enforcement of such clauses.

In 2002, as part of an extended debate, California enacted the Corbett Bill (Section 1281.96 of the California Code of Civil Procedure), which requires private arbitration companies in California to provide quarterly publication of consumer arbitration information on their websites.

While the policy debates have persisted, empirical information has been lacking about arbitration in consumer and employment contexts. To begin filling the need for objective information on which policy choices could be made, the California Dispute Resolution Institute (CDRI) collected and examined data from the websites of six prominent providers of consumer arbitration services. CDRI analyzed a total of 2,175 arbitration cases that had been posted on arbitration provider websites pursuant to the Corbett Bill. The data covers the period between January 2003 and February 2004. This report provides an analysis of the available data, along with descriptions of the arbitration processes offered by a number of the providers, in order to put the data and conclusions into perspective.

This report concludes that—owing to a number of factors, including problems with the statute's requirements—there are inconsistencies, ambiguities, and gaps in the data and that these limit the utility of the information in presenting a clear picture of consumer arbitration in California. Many providers posted required information on their websites. However, a number of data points were not provided. For example, from a policy perspective, this study might be expected to shed some light on the fairness of consumer arbitration, for which three variables might be of particular interest: the amount of an initial claim, the amount of the arbitration award, and the amount of the arbitration fee. Relatively few cases, however, reported data for all three of these variables.

CDRI suggests options for expanding public discourse among all stakeholders regarding the statute and notes that the State, its consumers, and the providers of arbitration services would all be well served by further empirical research and discussion of policy options in this area.

Preface

The California Dispute Resolution Institute is dedicated to understanding and improving alternative dispute resolution (ADR) processes through research, educational programs, and information dissemination for the benefit of policymakers, administrators, providers, and consumers of ADR services. CDRI has been operating since 1998; in April 2003 CDRI became a part of the Leo T. McCarthy Center for Public Service and the Common Good, located at the University of San Francisco. The McCarthy Center's mission is to inspire and prepare students and citizens to pursue lives and careers of ethical public service through education, service, and research in public policymaking and programs for the common good.

CDRI has had support from many sources over the years, principally the William and Flora Hewlett Foundation, to which CDRI remains very grateful. As with all of its projects, this research reflects the views of the authors and does not necessarily reflect the views of the University of San Francisco or its funders.

CDRI strives to publish useful, objective information that can inform and improve the ADR policymaking process. We welcome comments and observations about how we can be more effective in serving this goal. For further information, visit CDRI's website:

http://mccarthycenter.usfca.edu/cdri

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Introduction

Pre-dispute arbitration clauses are becoming an increasingly common feature in consumer and employment contracts. Potential disputants agree in advance to resolve any legal controversies through arbitration, rather than trial. Disputes that are frequently subject to these clauses include those between employers and employees, purchasers of consumer goods and services and the manufacturers or providers of such services, including banks, mortgage lenders, broker/dealers, health care providers, insurance and credit card companies.

To promote discourse regarding alternative dispute resolution (ADR) issues, the California Dispute Resolution Institute (CDRI) and the University of San Francisco School of Law co-sponsored a symposium on mandatory pre-dispute arbitration clauses as part of the 10th Annual ADR Policy Conference in November 2003.[1] According to USF law professor Jay Folberg, who co-moderated the sessions regarding arbitration, "California is in the eye of the storm over the enforcement of pre-dispute arbitration clauses in consumer and employment cases."[2] At the symposium and in the papers presented there, which have now been published in the *University of San Francisco Law Review,* a spectrum of views was presented on the policy issues. One of the papers presented highlighted empirical data that had been collected about employment arbitration over the past several years,[3] but while there were few points of agreement on policy, there was widespread recognition that more empirical research in this area would be warranted.[4] As noted in a recent survey of empirical information regarding ADR by Thomas J. Stipanowich, President of the CPR Institute for Dispute Resolution, the "need for reliable, useful empirical evidence is most crucial in the ongoing debate regarding private justice systems."[5] This is particularly true for consumer arbitration.

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1 The 10th Annual ADR Policy Conference was entitled "ADR in an Adversarial World: Challenges and Opportunities." It was held at the University of San Francisco on November 14, 2003, and was co-sponsored by the California Dispute Resolution Institute, the California Dispute Resolution Council, and the University of San Francisco School of Law. Papers from the symposium have been published in the *University of San Francisco Law Review,* Vol. 38, No. 1, (Fall 2003).

2 J. Folberg, "Pre-Dispute Arbitration Clauses—Can They All Be Right?" *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), pp.1-5.

3 L.L. Maltby, "Employment Arbitration and Workplace Justice," *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), pp.105-118.

4 J.P. Davis, "Arbitration: Trial by Other Means or Settlement by Other Means?" *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), pp.7-16.

5 T.J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,' " prepared for the Symposium on the Vanishing Trial and to be published in the *Journal of Empirical Legal Research,* forthcoming in 2004, manuscript p. 79.

During the past several years, the California Legislature has devoted attention to the topic and in 2002 it enacted legislation, the Corbett Bill (now Section 1281.96 of the California Code of Civil Procedure), which was intended to provide information about certain aspects of consumer arbitration. While a comprehensive study of arbitration would be needed to provide definitive conclusions, in an effort to begin filling in that gap, CDRI conducted a review of the arbitration data posted pursuant to the Corbett Bill on the websites of six prominent providers of consumer arbitration services in California.

This report consists of six parts: (1) a brief background on arbitration; (2) brief background information on the statute; (3) a description of the methodology used in gathering the data and creating the database for analysis of the data; (4) our findings about the private arbitration data available on six providers' websites; (5) some observations about data inconsistencies and problems with the reporting requirement; and (6) conclusions and recommendations for improving the quality of information that might be considered for future policy-making.

Background on Arbitration

IT MIGHT BE HELPFUL at the outset to provide some background on arbitration. In a leading text, *Dispute Resolution: Negotiation, Mediation, and Other Processes,* authors Goldberg, Sander and Rogers provide this overview:

> Arbitration has been an alternative to litigation for hundreds of years. It was used as early as the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs (the law merchant) rather than by public law. Commercial arbitration in the United States antedated the American Revolution in New York and several other colonies and is widely used today. Labor arbitration became widespread during the 1940s, and now more than 95 percent of all collective bargaining contracts contain a provision for final and binding arbitration. Additionally, arbitration is used to resolve disputes in the construction industry, disputes between consumers and manufacturers, family disputes, medical malpractice claims, securities disputes, attorneys' fee disputes, disputes between non-unionized employees and their employers, community disputes, and civil rights disputes. It is even used to resolve disputes about salaries to be paid to major league baseball players.[6]

The following quotation from *Forms of Alternative Dispute Resolution* by Ordover and Doneff provides some background on how arbitration is practiced:

> Like mediation, arbitration is established by contract among the parties. Unlike mediation, where the mediator is not a decision-maker, the arbitrator or panel of arbitrators usually reaches a conclusion that is binding on the parties and not subject to appeal. The power of the arbitrator(s), however, is set by the contract.[7]

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6 S.B. Goldberg, F.E.A. Sander, and N.H. Rogers, "Arbitration," in *Dispute Resolution: Negotiation, Mediation, and Other Processes,* 3rd ed., 1999, p.233.

7 A.P. Ordover and A. Doneff, "Alternatives to Litigation," *Forms of Alternative Dispute Resolution,* National Institute for Trial Advocacy, 2nd ed., 2002, p.9.

Parties to a contract can agree to arbitrate before or after a dispute arises. The former agreements are "pre-dispute" arbitration agreements, while the latter are "post-dispute" arbitration agreements. Almost all disputes that go to arbitration are the result of pre-dispute arbitration agreements. As was noted at the symposium mentioned above, pre-dispute arbitration clauses in consumer and employment contracts may be characterized as "non-negotiated agreements to arbitrate all future disputes, imbedded in contracts that are offered on a 'take it or leave it basis.' "[8] As such, they "curtail any meaningful opportunity to pursue a claim in court and limit the right to be part of a class action lawsuit." The use of pre-dispute arbitration clauses (sometimes called "mandatory arbitration") appears to have grown rapidly in recent years.[9]

USF School of Law Professor Jay Folberg, in his introductory article to the symposium, provided some historical background on mandatory arbitration clauses, as excerpted below:

> Plaintiffs' attorneys have long opposed pre-dispute arbitration clauses and, along with consumer advocates, have lobbied for restrictions on their use. State legislative and judicial efforts to directly limit the enforcement of arbitration clauses have been thwarted by the shield provided by the Federal Arbitration Act ("FAA") along with the preemption resulting from the Supremacy Clause. The California Legislature, aware of the preemption obstacle and the increasing use of private arbitration, passed bills that impact the implementation of "mandatory" arbitration by imposing the nation's most strict ethics standards and disclosure requirements on arbitrators and provider organizations. These requirements have provoked judicial challenges and intense debate about the use of pre-dispute arbitration clauses in employment and consumer contracts.[10]

In California, the term "consumer arbitration" has been understood to include employment arbitration. Thus, contracts between employers and employees that include a non-negotiated arbitration clause are deemed "consumer arbitrations," regardless of the employee's level of responsibility in the organization. While parties can agree to their own process, and arbitration providers may use their own particular procedures, there are a number of common

8 J. Folberg, "Pre-Dispute Arbitration Clauses—Can They All Be Right?" *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), supra note 2, at p.1.
9 J. Sternlight, "The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial," *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), pp.17, 30.
10 J. Folberg, "Pre-Dispute Arbitration Clauses—Can They All Be Right?" *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), supra note 2, at p.1.

elements in "consumer" arbitration, and arbitration generally. A case typically begins with a demand for arbitration, which is submitted to the provider of arbitration services. Generally, this is a simple statement of the claim to be submitted to arbitration, with little detail about the contentions of the Claimant. The Respondent is generally required to submit some denial or counterclaim. The provider then begins a process that results in the selection of one or more arbitrators.

Typically, parties are sent identical lists of arbitrators with extensive biographies, listing their qualifications as arbitrators. The parties strike unacceptable arbitrators, rank the rest, and return the list. The provider then determines which arbitrator is most acceptable to the parties. If the process fails to produce an arbitrator, it may be repeated. At some point, if the parties fail to choose an arbitrator, the provider can appoint one who has not been previously rejected. If the parties have chosen a tri-partite arbitrator panel, they each choose an arbitrator and the two party-appointed arbitrators choose a neutral arbitrator.

Arbitrators might be chosen, however, in a number of other ways beyond the typical selection process described above. Sometimes parties in an ongoing lawsuit might have an agreement to arbitrate certain claims, which might specify who the arbitrator will be. In other situations, parties may be contractually obligated to use arbitration and might have designated a specific arbitrator at the time they entered into their agreement. In still other cases, a judge might designate an arbitrator by court appointment when the parties are unable to agree on an arbitrator. (It should be noted that since there may be no administrator in such instances, no information on these arbitrations will be available pursuant to the Corbett Bill.)

Once an arbitrator or panel of arbitrators has been selected, the parties schedule dates for hearings. The procedures and ground rules to be followed may be contained in the published rules of the provider, or might be developed by the parties with the assistance of the arbitrator. The amount of pre-hearing discovery permitted is usually covered in the rules or the agreement of the parties. At the hearing both parties appear, examine and cross-examine witnesses, introduce evidence, and argue their positions. There might be a stenographic record and the parties might file post-hearing briefs. The case concludes when the arbitrator issues an Award, which might be accompanied by an Opinion. Other dispositions are possible, a case might be settled before an award is issued, a claim might be withdrawn, etc. (See Figure 3 for other examples of possible types of disposition.)

Background on the Statute

In 2002, as part of an extended debate on arbitration, the California Legislature enacted the Corbett Bill, which was signed by Governor Gray Davis and became Section 1281.96 of the California Code of Civil Procedure. (See Appendix A for the complete text of the statute.) The Corbett Bill was part of a six-bill package "designed to ensure fairness in private arbitrations" in California.[11] For further details about the legislative context in which the Corbett Bill arose, see Ruth Glick's article, "California Arbitration Reform: The Aftermath."[12]

The statute requires that a private arbitration company which "administers or is otherwise involved in consumer arbitration" make certain information regarding those cases available on its website quarterly. A company that conducts fewer than 50 consumer arbitrations per year need only make its data available on paper, semi-annually. A company that conducts more than 50 consumer arbitrations per year must collect the information required by the statute and post it on its website on a quarterly basis.

According to a summary authored by Kevin G. Baker, counsel for the Assembly Judiciary Committee, the Corbett Bill "[s]eeks to shed some sunshine on the consumer arbitration industry. ... [It] [r]equires that private judging companies collect and make available to the public some basic data regarding their involvement in, and the outcome of, mandatory consumer arbitrations."[13]

According to a summary written by Robert Graham, consultant for the Senate Rules Committee, Office of Senate Floor Analyses, "[t]his bill is part of the Assembly Judiciary Committee's six-bill package to address concerns about the private arbitration industry. These proposals stem from the committee's February 12, 2002 hearing, 'Arbitration in Consumer Disputes: A Focus on Providers,' in which various perceived shortcomings of the private arbitration industry were discussed. That hearing followed a series of stories in the *San Francisco Chronicle*, which reported on many problems faced by consumers who are required to resolve their disputes by binding arbitration."[14]

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11 The six bills were: AB 2504, AB 2574, AB 2656, AB 2915, AB 3029, AB 3030. For more details, see "Update on ADR Reform." *The Capitol Connection,* Judicial Council of California, Administrative Office of the Courts, Office of Government Affairs, Vol. 4, No. 9, (Oct. 2002), p.8.

12 R.V. Glick, "California Arbitration Reform: The Aftermath," *University of San Francisco Law Review,* Vol. 38, No. 1 (Fall 2003), pp.119-138.

13 K.G. Baker, Counsel for Assembly Judiciary Committee, Analysis, Aug. 28, 2002.

14 R. Graham, Senate Rules Committee, Third reading of summary, Aug. 28, 2002.

Methodology

CDRI INITIATED this study in November 2003 by developing a list of arbitration providers from which to collect data. We then created a database into which information from various providers could be entered for analysis. The database was modeled on the reporting requirements of CCP Section 1281.96. This is the first study we are aware of that attempts to review the data made available pursuant to the reporting requirements of the Corbett Bill.

Initially, the California Dispute Resolution Council (CDRC), a leading policy advocacy organization on ADR issues in California, provided CDRI with a list of 31 potential consumer arbitration providers. CDRI contacted all 31 providers. Based on their responses, CDRI determined that 6 would be appropriate for this study. Among the 25 providers not chosen for this study, some indicated that they did not provide arbitration (only mediation). Others were not included in this study because they handled a small number of arbitrations or indicated, for various reasons, their belief that the statute was not applicable to them.

The six providers included in this study are:

- ADR Services
- American Arbitration Association (AAA)
- ArbitrationWorks
- ARC Consumer Arbitrations
- JAMS
- Judicate West

In December 2003 CDRI staff created a database (using Microsoft Excel 2002) containing 21 categories of information derived from the reporting requirements listed in CCP Section 1281.96. Relevant information was downloaded from provider websites and manually entered into the corresponding categories listed below. (See Appendix B for a sample page from the database.) CDRI entered data from the websites of the six private arbitration providers identified above. The database entries span from January 1, 2003 through December 31, 2003.

(One provider, Judicate West, also posted some first-quarter information for 2004, which has been included in our data.) The database is an objective representation of information taken directly from provider websites.

Data entry was conducted from December 2003 through February 2004. This covered the first three quarters of 2003. By early February 2004, all providers had posted fourth-quarter data from 2003 onto their websites. CDRI completed entering fourth-quarter data by early March 2004. As previously noted, CDRI also added some first quarter 2004 data from Judicate West.

Information was compiled based on a total of 21 categories, most of which are derived from items the statute required to be reported. These categories, as they appear in our database, are listed below.

1) ADR Provider: This column lists the full name of the provider.

2) Data Entry Date: This is the date that CDRI entered the provider information into the database.

3) Date Data Posted by Provider: This is the date that the provider posted data onto its website.

4) Data Collection Range: This is the range of dates from which data has been entered.

5) Nonconsumer Party Name: In a majority of cases this is the name of the business entity that was a party to the arbitration.

6) Frequency of ADR Provider Use: This is the number of times a nonconsumer party has arbitrated a case with the provider.

7) Type of Dispute: This describes the area in which the various disputes might be best categorized (e.g. Employment, Medical Malpractice, Insurance, etc.). See Figure 1 in the Findings section of this document.

8) Employment Case—Annual Wage at Issue: This contains the consumer/employee's wage as a monetary range (e.g. $0-$100,000). If the salary is not posted, it is labeled "not provided." See Figure 2 in the Findings section of this document.

9) Filing Date: This is the date that the provider received the request for arbitration.

10) Arbitrator Appointment Date: This lists the date that an arbitrator is formally chosen by the parties, or appointed by the court.

11) Disposition Date: This column lists the date on which the claim is reported to have been resolved.

12) Type of Disposition: This category reports the outcome of the case (e.g. Dismissed, Settled, Award, etc.). See Figure 3 in the Findings section of this document.

13) Prevailing Party: This category is intended to indicate whether the consumer or non-consumer received a favorable outcome. See Figure 4 in the Findings section of this document.

14) Consumer Represented by Attorney: This indicates whether the consumer was represented by an attorney; if affirmative, then the column shows "Yes." See Figure 5 in the Findings section of this document.

15) Amount of Claim: This category reports the amount of the claim involved in the dispute between the parties, when available.

16) Amount of Award: This category reports the amount of any monetary award, when available.

17) Other Relief Granted: This column describes any non-monetary relief granted in an award (e.g. injunctive relief).

18) Arbitrator Name: This category indicates the name of the appointed arbitrator(s). The spreadsheet contains three separate columns. These columns can list as many as three arbi-

trator names, if applicable.

19) Total Arbitration Fee: This column reports the total fee charged by the arbitrator and arbitration provider, if any. The spreadsheet contains three separate columns. These columns can list as many as three arbitrator fees, if applicable.

20) Consumer Allocation Fee: This column indicates the amount of arbitration fees paid by the consumer as a percentage of the total arbitration fees charged by the arbitration provider for its services in that case (e.g. 50%).

21) Nonconsumer Allocation Fee: This column indicates the amount of arbitration fees paid by the nonconsumer as a percentage of the total arbitration fee charged (e.g. 50%).

Once all the data had been entered, CDRI staff began its analysis. As indicated in greater detail below, CDRI computed averages, medians, and performed a variety of sortings of the providers' data. This report analyzes those results, all of which were double-checked to ensure accuracy.

After conducting our numerical analyses, we contacted providers to better understand apparent gaps in the data. Many of the terms above raise definitional issues. For example, if a Claimant sought $20,000 but received an award for $2,000, the Claimant would be considered the "prevailing party"—despite receiving much less than was originally sought. For more discussion of similar issues, please see the "Problems Encountered in Collecting Reported Data" section of this report.

Findings

In total, 2,175 cases were collected from six arbitration providers and entered into the database for analysis. The final count of cases is a result of providers' fourth-quarter website data entries, changes and/or elimination of data from the first three quarters of 2003.

In general, inconsistencies, ambiguities and the lack of reported data in some areas limit this study's utility for the purposes of informing policy (see "Problems Encountered in Collecting Reported Data"). Thus, some of the concerns evident in the legislation, such as whether a "repeat user bias" exists in consumer arbitration, cannot be addressed by the data available in this study.

From a policy perspective, this study can shed some light on certain aspects of consumer arbitration. Three variables are of particular interest: the amount of claim, award amount and the arbitration fee. Relatively few cases report data for all three of these variables, however. For example, of the 2,175 cases examined in this study, only 313 cases (14.4%) reported information for all three of these variables. Additionally problematic is that virtually all of the data for these three variables comes from one provider, AAA. If one excludes AAA from the analysis, only 6 out of 1,201 cases (0.5%) reported data for all three variables.

What follows is a description of reported data for the variables in the study. The statistics presented are formulated on the basis of the reported data only. While it is possible to analyze these numbers in many ways, they offer an incomplete picture. Because arbitration as it is currently practiced in California is more complicated than the variables of this study can analyze, this data might not yield adequate information upon which definitive conclusions about the efficacy of private arbitration in California can be reached.

❖ Time of Disposition

Using the 2,175 entries in the database, we calculated the number of days between the filing date (FD) and the disposition date (DD). For example, if a filing date of January 1, 2003 and a disposition date of February 1, 2003 were listed, it was assumed the dispute had taken 31 days to conclude. We observed that 1,559 entries contained a filing date that was earlier than the disposition date; in 13 cases the disposition date was recorded as earlier than the filing date (see Table 1 below). Using the 1,559 cases, we calculated the average and the median of the time to disposition. In 603 cases, either the filing date or the disposition date, or both, were not provided. Of the 1,559 cases we examined, we found that the average disposition time was 116 days and the median was 104 days. The shortest disposition time posted by providers was 1 day, while the longest was 559 days.

Table 1 —Time Between Filing Date and Disposition Date (Calculated in days)

	Number of Cases	Average	Median
Reported FD and DD	1,559	116	104
FD or DD Not Provided	603	N/A	N/A
DD Earlier in Time than FD	13	N/A	N/A
Total Cases	2,175	N/A	N/A

❖ Amount of Claim

Using the 2,175 entries in the database, we examined the amount of claim (see Table 2 below). In 1,396 cases the amount of claim was not provided. These cases were not included when calculating the average and the median. We observed that 779 cases reported the amount of claim in dispute. We found that the average amount of claim based on these 779 cases was $90,341; the median was $19,800. The notable difference between the average and the median figures might be attributed to the tremendous range in the amount of claim. The lowest claim providers posted was $78, while the highest was $6,500,000.

Table 2—Amount of Claim

	Number of Cases	Average	Median
Amount of Claim Provided	779	$90,341	$19,800
Amount of Claim Not Provided	1,396	N/A	N/A
Total Cases	2,175	N/A	N/A

❖ Amount of Award

Using the 2,175 entries in our database, we examined the amount of award (see Table 3 below). We observed that in 1,635 cases, the amount of award was not provided. In 540 cases, the award amount granted to the prevailing party was reported. Of these 540 cases, we calculated the average award amount to be $33,112 while the median award amount was $7,615. These figures reflect both consumer and nonconsumer awards. The notable difference between the average and the median figures might be attributed to the range in awards. The smallest award posted by providers was $150, while the highest was $2,387,000.

Table 3—Amount of Award

	Number of Cases	Average	Median
Amount of Award Provided	540	$33,112	$7,615
Amount of Award Not Provided	1,635	N/A	N/A
Total Cases	2,175	N/A	N/A

❖ **Arbitrator Fee**

Using the 2,175 entries in our database, we calculated the average and median arbitrator fee (see Table 4 below). In 771 cases the amount of fee was not provided. These cases were not included when calculating the average and the median. We found that 1,404 cases reported the arbitrator fee. Of these cases, we calculated the average arbitration fee to be $2,256 and the median fee to be $870. Note that the data includes information for as many as three arbitrators. The average and median calculation did not include entries with multiple arbitrators because only a small number of entries—20 cases—listed more than one arbitrator. The lowest amount for the arbitration fee was $58 and the highest amount was $105,550.

Table 4—Arbitrator Fee

	Number of Cases	Average	Median
Amount of Fee Provided	1,404	$2,256	$870
Amount of Fee Not Provided	771	N/A	N/A
Total Cases	2,175	N/A	N/A

Other Variables

Analysis was performed on a number of other variables. These figures present data for the following variables:

♦Type of Dispute (Figure 1)
♦Employment Case–Annual Wage at Issue (Figure 2)
♦Type of Disposition (Figure 3)
♦Prevailing Party (Figure 4)
♦Consumer Represented by Attorney (Figure 5)

Figure 1

Type of Dispute (Most common disputes)

Type of Dispute	Cases
Insurance Disputes	618
Employment Dispute Resolution Rules	213
Construction/Fast Track	200
Buyers & Sellers Agreement	170
Medical	129
Medical Malpractice	105
Employment	83
Automobile Repairs/Refund	67
Construction	65
Insurance	65
Contract	59
Professional Liability/Malpractice	50
Real Estate Agreement/Leases	50
Employment Mediation	36
Real Estate	36
Banking	31
Employment Dispute Res-Mediation	30
Health Care Industry	18
HMO	18
Business/Commercial	16
Personal Injury	12
Accident	11
Brown and Root Employment Cases	10
Legal Fees	9
Expedited – Misc.	8
Construction Mediation	6
Stockbroker-Client	6
Blue Cross/Blue Shield Claims	6
Wireless Industry Arbitration Rules	5
Construction (Med-Exp.)	3
Employment Individually Negotiated Contract	3
Home Buyer/Home Seller Arbitration	3
Miscellaneous	3
Not Provided	3
Settlement	3
Commercial Mediation Rules	2
Construction Contract	2
Employment Dispute Resolution Services	2
Entertainment	2
Fee Dispute	2
Real Estate Contract	2
Central Reserve Life Insurance Company	1
Educational Testing Serv. Exp.	1
Employment Dispute Large Complex Cases	1
Health Care (Non-Malpractice)	1
Heard Settled at Hearing	1
Insurance Disputes (Exp)	1
Mediation (Accident)	1
Mediation Settled	1
Partnership	1
Personal Injury Auto	1
Real Estate/Real Property (Non-Construction Defect)	1
Supplemental Securities Procedures	1
Employment Pre-Case	1
Grand Total	**2175**

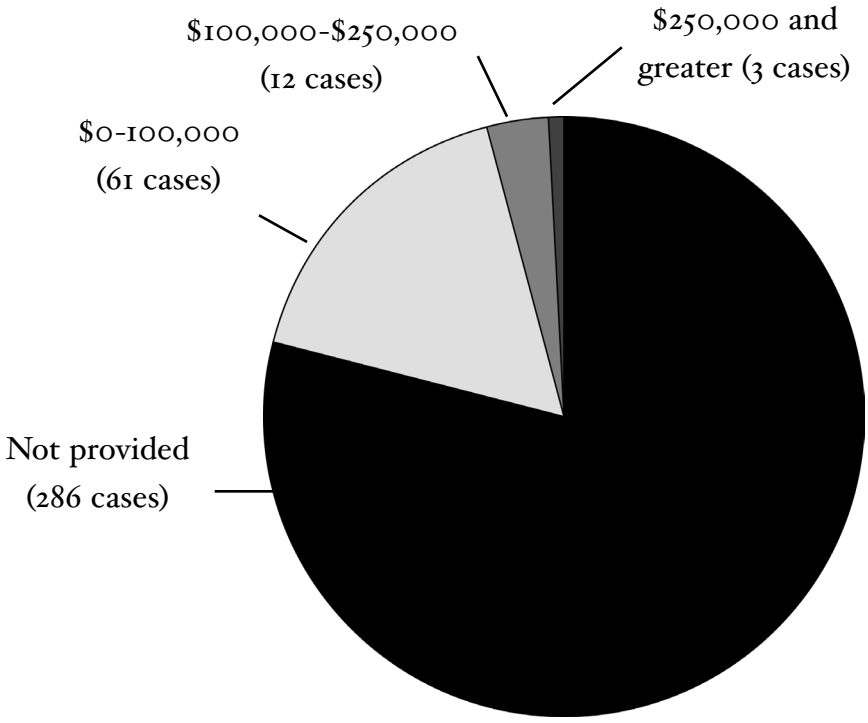
Type of Dispute (Figure 1)

Figure 1 shows the type of case filed with the arbitration provider (e.g. "Employment," "Insurance," "Medical Malpractice," etc.). Figure 1 presents data categories exactly as they were posted on providers' websites. These categories were often listed inconsistently. It appears likely that there is some overlap in these categories, but it was beyond the scope of this study to confirm each case with the providers, or to assume which information could be accurately combined from different categories. There were approximately 50 types of categories reported; the most prevalent type of case was insurance disputes.

Employment Case—Annual Wage at Issue (Figure 2)

Figure 2 shows the salary range of an employee who filed his/her case with the arbitration provider. The statute requires that the annual wage of an employee be calculated in one of three ways: (1) less than $100,000, (2) $100,000 to $250,000 and (3) more than $250,000. For example, the wage range of an employee who earns $50,000 per year would be categorized as "$0-$100,000." In 61 cases the annual employee wage range was less than $100,000; 12 cases listed an annual employee wage range of $100,000 to $250,000; 3 cases listed an annual employee wage range of more than $250,000. In 286 cases, this information was listed as "not provided." In the remainder of the cases, providers indicated that the annual wage was "not applicable."

Employment Case—Annual Wage at Issue (Figure 2)



Type of Disposition (Figure 3)

Type of Disposition	Cases
Award	609
Settlement	586
N/A	407
Withdrawn	175
To Be Set	80
Hearing Set	69
Canceled—Settled Prior	48
Mediation Settled	42
Settled	22
Case Set	18
Mediation Impasse	16
Canceled—Dismissed Prior to Hearing	14
Heard Award	12
Canceled	8
Settled Prior	8
Closed Administratively	6
Worksheet Converted	6
Case Heard	5
Abeyance	4
Business/Commercial	4
Consent Award	4
Dismissed	4
Not Settled	4
Closed	3
Going to Trial	2
Heard Settled at Hearing	2
Off	2
Heard—Dismissed Granted	2
Attorney No Longer Represents Party	1
Canceled; Pending	1
Case	1
Disqualified	1
Employment	1
Heard Settled After	1
In Progress	1
Insurance	1
Limited	1
Objection to Panelist(s)	1
Professional Liability/Malpractice	1
Scheduled for Hearing	1
Split	1
Grand Total	**2175**

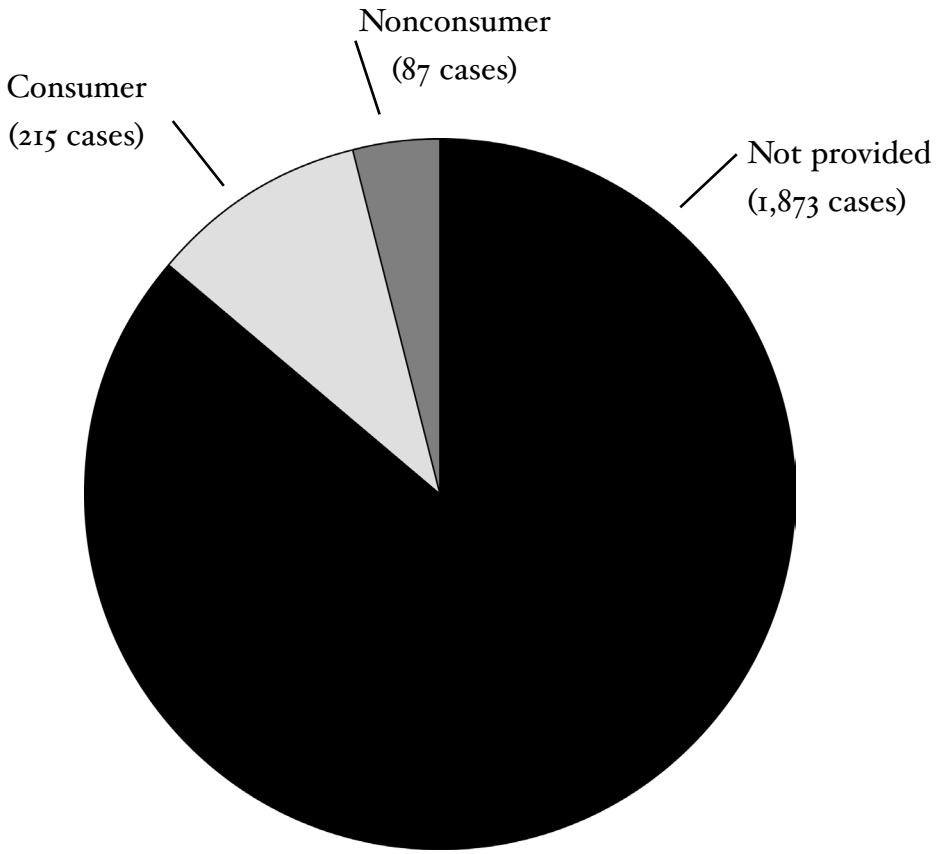
Type of Disposition (Figure 3)

Figure 3 presents data categories exactly as they were posted on providers' websites. These categories were often listed inconsistently. It appears likely that there is some overlap in these categories, but it was beyond the scope of this study to confirm each case with the providers, or to assume which information could be accurately combined from different categories. Figure 3 shows that providers list 41 different descriptions for "Type of Disposition." The most common type of disposition resulted in an "Award" for the prevailing party.

Prevailing Party (Figure 4)

Figure 4 lists whether a favorable outcome was reached for the consumer or nonconsumer as a result of the arbitration session. In the majority of cases this information is not provided. In 215 cases the consumer was listed as the prevailing party; 87 cases listed the nonconsumer as the prevailing party.

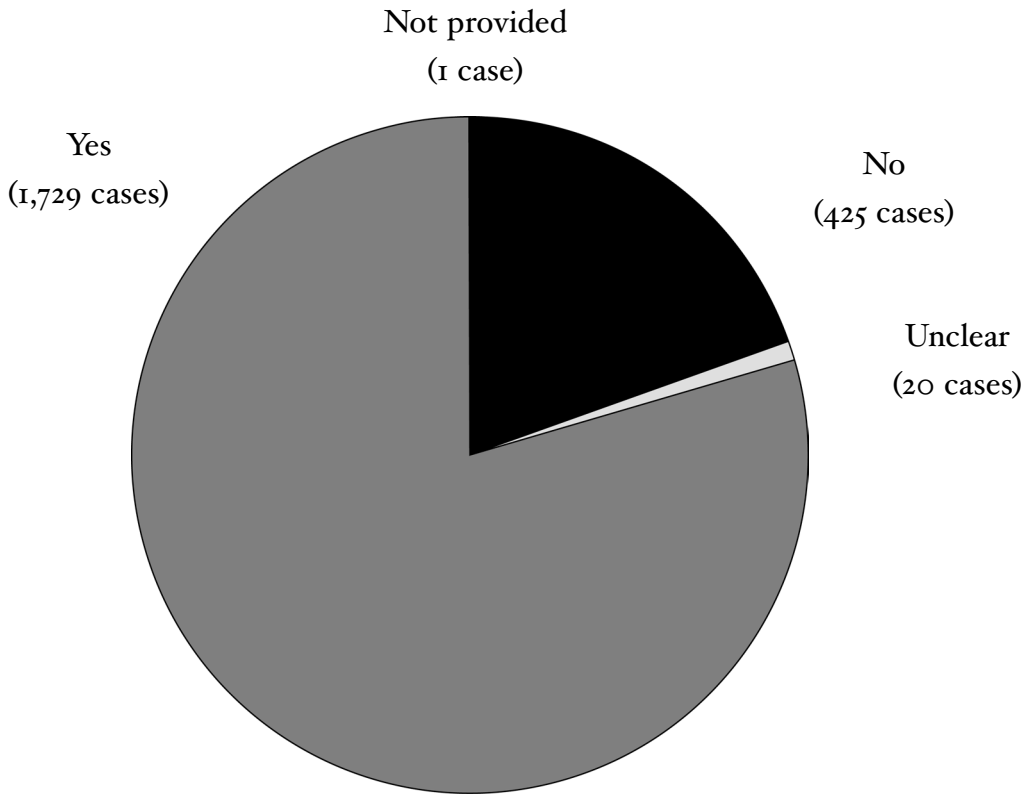
Prevailing Party (Figure 4)



Consumer Represented by Attorney (Figure 5)

Figure 5 lists whether the consumer's attorney arbitrated the case on his or her behalf. The data shows that an attorney represented the consumer party in 1,729 cases of the 2,175 cases in this study. In 425 cases, an attorney did not represent the consumer party. Only 20 case postings were unclear, and in 1 case out of 2,175, this information was not provided.

Consumer Represented by Attorney (Figure 5)



Only a portion of the entries for each category could be analyzed due to unreported, incomplete or inaccurate data reviewed in this study. For example, a consumer case might have been resolved prior to the time an arbitration award was entered resulting in an incomplete entry. Some providers reported cases only after a disposition, while others reported the case when it was first filed and updated the information quarterly as more data became available.

Problems Encountered in Collecting Reported Data

As previously noted, CDRI completed the data-entry collection process in March 2004. Many providers posted required information on their websites. However, a number of data points were not provided. Some providers, however, posted data that resulted in inconsistent, incomplete and/or ambiguous data. Also, some providers omitted, changed or updated information from the first three quarters of 2003 when they posted fourth-quarter data. Such changes occasionally hindered the accurate analysis of data collected.

After completing our statistical analyses, we conducted brief follow-up interviews with providers to better understand gaps in the data and why certain categories of information seemed to be more difficult for providers to obtain. Some providers we contacted stated that the information requested by the statute could not be gathered reliably and/or economically.

Most providers we contacted said that they depend on the parties and/or their arbitrators to provide information requested by the statute before they can post data on their websites. The lack of information or a delay in obtaining information on a timely basis often results in inconsistent and incomplete data being posted on their websites.

The following offers some other examples of the types of problems encountered:

Date Data Collected By Provider

Although the statute requires that providers post information on their websites on a quarterly basis, some providers used different posting dates. Other providers tend to post data immediately after a consumer case is filed, while some wait until the disposition date is known and post the data at that time. The former method makes data collection difficult because analysts would have to keep track of when new data is posted.

Most providers stated that their practice is to post data on their websites at the end of each quarter. However, many cases are not complete at that time. All information requested by

the statute might not be posted immediately at the end of each quarter because providers depend on the parties and/or arbitrator to notify them of the outcome of each case. Because providers often do not receive this information at the end of the quarter, they cannot post it on their websites in a timely manner.

Nonconsumer Party Name

A provider might have multiple cases from one nonconsumer but list that party's name differently each time. This makes it difficult to calculate the "frequency of provider use" category. For example, some providers handle more than one case for Kaiser Permanente. The party names, however, are listed in various ways: "Kaiser F.H.P. Inc. et al.," "Kaiser et al.," "Kaiser," or "Kaiser Foundation Health Plan."

Providers have informed us that one reason a company's name may differ is because a lawsuit brought by a consumer may be filed using a variety of titles for one or more entities of the same corporation. It could be misleading or a mistake for a provider to simply post "Kaiser" each time multiple Kaiser entities are engaged in a dispute because each entity operates under different capacities and liability theories.

Frequency of Provider Use

Two out of six providers we studied posted the number of times a particular nonconsumer party used its services. The other four did not list this number. One way to obtain a tally of the party names would be to sort the spreadsheet by provider name. This sort could group similar nonconsumer names together and provide the frequency of provider use, regardless of whether a provider posts this information.

Employment Case—Annual Wage at Issue

The statute requires that entries involving employment disputes be accompanied by the annual wage range of the employee (e.g. $0-$100,000). However, a majority of providers list "not provided" instead of listing the employee's salary. Such omissions make it difficult to determine whether there are differences in outcomes between higher-earning employees and lower-earning employees.

Providers said it is difficult to collect this information reliably and economically, because they depend on the parties and/or their attorneys to provide this information to them. In some cases the parties will not provide this information.

In some cases providers said they might have to sift through hearing transcripts, briefs or interview parties to obtain this information. In other cases, providers told us they might have to estimate the employee's wage at issue based on the title and role of a party in their organization. Such estimates can be problematic because a provider might have to make a subjective assessment about the person bringing the claim.

Arbitrator Appointment Date

Although most providers did post the arbitrator appointment date, providers informed us that this information was difficult to state in any uniform way because there is no standard for determining the arbitrator appointment date.

Providers we contacted noted that the appointment date might vary from one provider organization to another. For some providers the appointment date is when a judge appoints an arbitrator; for others it is when the parties choose an arbitrator, when an arbitrator accepts an assignment, when an arbitrator sends a confirmation letter, or when an arbitrator or provider makes an internal notation.

Disposition Date

Some providers list the disposition date, others list the date as "not available," and still others have typographical errors which make the date impossible to interpret. Some cases are still pending at the end of every quarter, which explains why the information is often listed as "not available." Some providers listed the disposition date earlier than the filing date. Missing or unclear disposition dates make it impossible to accurately analyze the length of a case from filing to resolution.

Most providers indicated they depended on the parties and/or the arbitrator to notify them when a case had concluded and what the outcome of the case was (e.g. award, settled, dis-

missed, etc.). If the parties did not provide this information or provided inaccurate information, most providers were unable to track this information and had no choice but to leave this category blank.

Providers suggested that it could be difficult to track a disposition date even if a case went to award because parties are often granted months to challenge the award. For example, post-award proceedings, such as application for attorney fees, might extend the length of a case beyond its apparent "date of disposition."

Prevailing Party

A majority of providers did not list which party (i.e. consumer or non-consumer) prevailed at the end of the case. Therefore, the information in the database does not demonstrate whether arbitration is a favorable alternative for a consumer rather than taking a case to trial.

Providers we contacted said they relied on parties and arbitrators to inform them who the prevailing party was. Providers also said that identifying the prevailing party is not straightforward in cases with multiple parties, multiple claims and/or cross claims. In addition, providers said they often had difficulty categorizing someone as a "prevailing party" if he or she recovered a monetary award which was far less than his or her original claim.

Amount of Claim

Some providers consistently listed the amount of the claim involved in a given case. Other providers, however, did not list this information. Thus, the database likely did not contain sufficiently consistent numbers to yield an accurate average for the amount of claim.

Providers told us they relied on parties and arbitrators to provide this information. In many cases, due to confidentiality concerns, parties will not disclose this information to providers. In some instances the amount of claim can be found in the "Demand for Arbitration" category of a provider's website. In many cases, however, the parties will not specify the dollar amount requested in the claim, or what is gathered might be unreliable or ambiguous.

Some providers indicated they might have to search through legal documents such as plead-

ings and briefs to locate this information. In other cases providers said they would have to interview parties, their attorneys or arbitrators to obtain this information. Such documents are often outdated because the amount of claim can change throughout the arbitration process. Due to confidentiality concerns, however, attorneys and arbitrators might be unable to provide the amount of claim. This makes the task of gathering accurate information problematic.

Amount of Award

A majority of the providers did not list the award amount for a given case. Therefore, the database likely did not contain consistent data that would yield an accurate average award amount.

Providers we contacted indicated that they depend on the arbitrator to disclose the amount of award. Most providers will not estimate the amount of award if the arbitrator does not provide them with this information. In many cases, parties will request that an arbitrator not disclose the amount of award in order to maintain confidentiality. An arbitrator's obligation to respect this privacy could prevent providers from reporting such information. Also, not every award includes a specific dollar amount. Thus, most providers are often unable to post this information on their websites according to the requirements of the statute.

Fourth-Quarter Data

Upon posting their fourth-quarter data, a majority of providers changed, updated or eliminated data from the first three quarters of 2003. For example, AAA eliminated a large number of cases labeled "pre-case." These were cases that AAA determined did not meet their internal filing requirements and/or the posting requirements for CCP Section 1281.96. AAA updated remaining entries such as the disposition date, arbitrator name and/or award amount. Other providers also updated entries in a similar manner.

In order to add fourth-quarter data and update existing data accurately, it would be necessary to sort the database to locate and correct all individual entries requiring updating. Because this was beyond the scope of this review, CDRI updated critical information, such as the disposition date and type of disposition. Other categories, however, such as arbitrator name,

arbitrator fee, award and claim, etc., could not be updated in a timely manner, resulting in incomplete or inaccurate data.

Database Contains Data from 2004

Judicate West not only posted data from all four quarters in 2003, it also started to post information for cases filed in 2004 simultaneously with fourth-quarter data posted in 2003. Some data included cases filed as recently as February 2004. Judicate West's 2004 cases through mid-February 2004 were also entered into the CDRI database.

Conclusions and Recommendations

The Corbett Bill was intended to allow the public access to information on private consumer arbitrations in California. According to its sponsors, the Corbett Bill's purpose was to make available information on how consumer arbitration is actually practiced so consumers could be assured the process was fair and that arbitration providers were not favoring private companies that use their services repeatedly. However, inconsistencies, ambiguities, and data gaps among the information posted by providers limit the utility of this study to inform policy or to present an accurate picture of the fairness of consumer arbitration in California.

CDRI's review of the data posted by providers for 2003, in addition to limited data from Judicate West in 2004, provided a number of instances where inconsistencies, ambiguities, and a lack of reported data in some key areas were noted. For example, some providers emphasize certain fields while failing to provide data in others. Others post incorrect or outdated data and a significant number of providers post a minimum of required information. Nearly all providers changed, updated, or eliminated data from previous quarters each time they posted data for the following quarter. Differences in how providers categorize and report data compromise the data's usefulness.

In order to obtain an accurate statistical representation of the private arbitration field, we believe that further empirical research is needed in consumer arbitration and that the reporting requirement should be re-examined. CCP Section 1281.96 does not take into account difficulties providers have in locating data requested by the statute. Most providers depend on arbitrators and the parties to provide them with this information. Providers have indicated that they lack the necessary time and resources to keep track of changes that occur throughout each case. In order to fully comply with the statute, providers would need a mechanism in place to contact each party and/or their arbitrator to obtain the data. Certain information, such as the amount of claim, which becomes available at different stages in a case, might have to be tracked frequently. Also, arbitrators are ethically obligated to respect the confidentiality of the parties they represent and may not reveal information to providers.

Given the limitations of the Corbett Bill, we recommend consideration of three options for improving gathering information on consumer arbitration. One option would be to amend the statute to take into account the difficulties providers encounter with the reporting requirements. Three possible approaches could be suggested under this option. The first would require providers to post an annual (or biannual) report on their websites that outlines the numbers and types of cases they have received over a calendar year, outcomes in those cases, fees charged, and other information believed to be relevant to the concerns raised about arbitration. A second approach would be to require providers to post information at the completion of each case, rather than each quarter. A third approach would be for the legislature to create uniform pre- and post-arbitration reporting documents for all providers to use as part of the arbitration process. Parties could then be asked to submit a form keyed to statutory requirements to be returned to providers upon initiation and completion of their case. Upon receipt of the form at the conclusion of the case, providers could post the required information onto their websites.

A second option would be to convene a committee to address data collection problems of the existing statute and then to revise the reporting procedures accordingly. By involving providers, arbitrators and other groups in an effort to design a better data reporting system, data collection pursuant to the Corbett Bill might become more reliable and practical.

A third option would be to hold a broader policy discussion involving providers, consumers, and other stakeholders, which would focus on ways to address the concerns that stakeholders have raised in this area. Such a symposium or policy dialogue could draft recommendations and establish guidelines for reporting or address in other ways the broader issues relating to consumer arbitration.

In its present form, CCP Section 1281.96 does not definitively provide consumers, the legislature, or the general public with the information necessary to meet the statute's objectives. Given its limitations, the statute should be revisited and the recommendations and options mentioned above should be considered. Such a course would offer an opportunity to realize the kinds of assurances about consumer arbitration that all would welcome.

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Appendix A

Complete text of CCP Section 1281.96

CCP Section 1281.96

Private arbitration companies; quarterly or biannual publication of consumer arbitration information; liability

(a) Except as provided in paragraph (2) of subdivision (b), any private arbitration company that administers or is otherwise involved in, a consumer arbitration, shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:

(1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.

(2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000).

(3) Whether the consumer or non-consumer party was the prevailing party.

(4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.

(5) Whether the consumer party was represented by an attorney.

(6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.

(8) The amount of the claim, the amount of the award, and any other relief granted, if any.

(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

(b)(1) If the information required by subdivision (a) is provided by the private arbitration

company in a computer-searchable format at the company's Internet Web site and may be downloaded without any fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the Internet, the company shall provide that information without charge to any person who requests the information on paper.

(2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code, and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(c) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

(d) No private arbitration company shall have any liability for collecting, publishing, or distributing the information required by this section.

Appendix B
Sample of Database Categories

ADR Provider	Data Entry Date	Date Data Posted by Provider	Data Collection Range	Nonconsumer Party Name
Provider X	2/3/2004	12/1/2003	1/1/03-12/31/03	Company X

Columns 1-5

Frequency of ADR Provider Use	Type of Dispute	Employment Case—Annual Wage at Issue	Filing Date	Arbitrator #1 Appointment Date
1	Construction	N/A	4/1/2003	4/10/2003

Columns 6-10

Arbitrator #2 Appointment Date	Arbitrator #3 Appointment Date	Disposition Date	Type of Disposition	Prevailing Party
N/A	N/A	12/9/2003	Award	Not provided

Columns 11-15

Consumer Represented by Attorney	Amount of Claim	Award Amount	Other Relief Granted	#1 Arbitrator Name
Yes	$200,000	$95,687	N/A	John X.

Columns 16-20

#2 Arbitrator Name	#3 Arbitrator Name	Total Arbitration Fee	Consumer Fee Allocation	Nonconsumer Fee Allocation
N/A	N/A	$6,000	$0	100%

Columns 21-25