Arbitral Precedent: A Theoretical and Empirical Inquiry

W. Mark C. Weidemaier
Background

- Contrasting (stylized) views
  - Ad hoc, “lawless”
  - Systemic, “law-making”

- Core question (Carbonneau): Do “modern-day arbitrators fashion a commercial, antitrust, employment, maritime, securities, and contract law?”
Some characteristics of precedential systems

- **Structural**: e.g., Reasoned, accessible awards
- **Benefits to system users**
- **Norms concerning arbitrator’s role (maker vs. applier of law)**

**Arbitration**

**Award**
Reasoned Awards ... Causes and Benefits

**Contract**

**Provider Rule**

**Public Mandate**

**Reasoned Awards**

**Information**
- parties
- third-parties

**Legitimacy**
- parties
- courts
- other regulators
- private enforcers

**Status/Expertise**
- arbitrators
- lawyers
Some possible hypotheses...

1. Arbitration as uniformly “ad hoc” or “lawless”?  
2. Reasoned, accessible awards *sufficient* to generate precedent?  
3. Use of arbitral precedent:  
   - Labor > Class Arbitration > Employment > Securities?  
4. Impact of claim type?  
   - *e.g.*, increased reliance on state-supplied law in, say, discrimination cases?  
5. Impact of repeat-play arbitrator?  
   - arbitral precedent reflects arbitrator’s knowledge of system? (RP use more)  
   - use of arbitral precedent signifies status? (RP use more?)  
   - use of precedent (all forms) signals that arbitrator is within the mainstream? (RP use less)
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- Sampling, Coding & Reliability
- Publication bias?
Preliminary data..
Preliminary data...

Awards Citing Arbitral Precedent: Mean Citations per Award

- Labor: 6
- Class: 1
- Employment: 1
Preliminary data... discrimination claims

Use of Authority, by claim type (labor/employment only)

from W. Mark C. Weidemier, The Use and Creation of Precedent in Arbitration (tentative title)
Preliminary data... Role of Repeat-Play Arbitrators

Whether award cites to any form of precedent

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