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Contextual Analysis in Arbitration

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CONTEXTUAL ANALYSIS IN ARBITRATION

Pat K. Chew*

ABSTRACT

The arbitration process is embedded in a much larger context than the four walls in which the arbitration occurs. Exploring and studying that context—including the arbitral institution, the arbitrators, each party, the arbitration process, and the broader cultural and political environment—inform what actually occurs and to what extent one party may have inherent advantages over the other. This article illustrates this contextual analysis in two diverse settings: domestic employment arbitrations and international trade arbitrations. These analyses reveal one party's advantages over the other, which are explained in part by market and cultural forces in which these arbitrations are embedded. Interdisciplinary, empirical, and cross-cultural insights further complement these analyses.

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INTRODUCTION

AMID the hoopla of alternative dispute resolution (ADR) processes in the 1980s, Richard Delgado and his co-authors in their classic 1985 article, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, pointed to potential problems.¹ They noted that the informalities of ADR could increase bi-

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1. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

ases against disadvantaged parties while litigation's formality offered some procedural checks and balances against such risks. Since that article, surprisingly little has been written about the ADR risks that Delgado raised.²

In Part I, this article revisits the concept of bias in the arbitration process by explaining a "contextual bias" as revealed through a "contextual analysis" of the arbitration process. In Parts II and III, it illustrates contextual analysis in two types of arbitrations: employment disputes and international trade disputes. While contextual analysis generally provides a better understanding of what occurs in the arbitration process, as demonstrated in Parts II and III, it particularly uncovers advantages that one party may have over the other.

I. CONTEXTUAL ANALYSIS

In the first generation of studies on bias in dispute resolution, researchers focused on individuals' transparent, blatant, and intentional prejudices.³ Now, in the second generation of bias studies, we recognize that there are many biases, including less apparent, more subtle, and unintentional ones.⁴ This article explores contextual bias that is revealed by a contextual analysis of arbitration. What does contextual analysis require? Foremost, it acknowledges (1) that dispute resolution processes, including arbitration, do not occur in a vacuum; (2) that what influences the arbitration process is not just within the four walls of the arbitration hearing; and (3) that arbitration and the forces that impact it are embedded in a broader context.

Stavros Brekoulakis, for instance, describes systemic bias that is revealed through a study of the institutions (i.e., political and legal frameworks) in which dispute resolution is embedded.⁵ Focusing on judges and litigation, Brekoulakis observes three such institutional forces.

He notes, for instance, that the selection process of national judges is clearly informed by political considerations, but other institutional forces, such as gender, race, and religious factors, are also at play. These forces yield a very homogeneous judiciary group.⁶ For example, as of 2015, U.S. federal judges were 80% white and 74% male.⁷ The Supreme Court also

2. Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817 (2017); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1062 (1996).

3. Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. INT'L DISP. SETTLEMENT 553, 559–68 (2013).

4. *Id.* at 561.

5. *Id.* at 570–83.

6. *Id.* at 573–77.

7. *Demography of Article III Judges, 1789–2015, Gender*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/demography/gender> [<https://perma.cc/9H6V-86HH>] (last visited July 23, 2017); *Demography of Article III Judges, 1789–2015, Race and Ethnicity*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/demography/race-and-ethnicity> [<https://perma.cc/9XGU-KSLS>] (last visited July 23, 2017).

illustrates homogeneity. Since the 1980s, Roman Catholic and Jewish Supreme Court Justices have been overrepresented relative to their representation in the general population.⁸ Since 2010, every Supreme Court Justice has graduated from one of three law schools: Yale, Harvard, or Columbia.⁹

Furthermore, judges' values and conduct are shaped by their distinct professional role and tenured status. As Brekoulakis describes¹⁰:

The privileges of a tenured judiciary post accords national judges a status of established authority that further informs their attitude towards the law. National judges enjoy absolute immunity and they are often appointed to preside over commissions, committees and tribunals of all kinds. These privileges reinforce the perception of them, as well as their self-perception, as guardians of the State interests and order.

Finally, the legal doctrine of *stare decisis*, that is, following the precedents of one's own and higher courts, is also an influential institutional force.¹¹ While the rationale of "standing by things decided" has fairness and efficiency purposes, it also constrains judicial decision-making to certain legal solutions.

These institutional factors, Brekoulakis concludes, yield judicial decision-makers that are "a cohesive group . . . [who] share 'a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions.'"¹² Or as Judge Posner summarizes: "We can expect the output of a career judiciary to display low variance, to be of uniformly professional quality, but to be uncreative."¹³

Indeed, studies indicate judges' overall similarity in approaches over time, reflecting a common socialization in personal and professional lives.¹⁴ Brekoulakis finds judges are not acting in bad faith but rather are sincerely interpreting the law and events as shaped by the values and culture of the institutional context in which they are embedded.¹⁵ The result, nonetheless, is systematic bias toward their values and belief systems.

Turning to this article's focus, how would a contextual analysis of the kind illustrated by Brekoulakis be applied to the arbitration process? To begin, it is critical to think much more expansively about the context in which arbitration is embedded. As an initial framework, the context includes (1) the cultural and societal environment, (2) the political and economic environment, (3) the arbitral administering institution, (4)

8. Joel Eastwood, Jessica Ma & Stephanie Stamm, *How Trump Nominee Neil Gorsuch Would Affect the Supreme Court's Mix*, WALL ST. J. (Mar. 20, 2017), <http://www.wsj.com/graphics/supreme-court-diversity/> [Perma link unavailable].

9. *Id.*

10. Brekoulakis, *supra* note 3, at 575 (footnote omitted).

11. *Id.*

12. *Id.* (quoting JOHN GRIFFITH, *THE POLITICS OF THE JUDICIARY* 19 (5th ed. 1997)).

13. *Id.* at 576 (quoting Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1264 (2005)).

14. *Id.* at 576–77.

15. *Id.* at 577.

traditional attributes of the arbitration process, (5) each party to the arbitration, and (6) the arbitrators.¹⁶ Each of these parts of the context has its own history, norms, values, priorities, and dynamics that may affect the arbitration process. Most pertinent to our discussion, this contextual analysis explores what might advantage or disadvantage one of the parties, possibly creating an unfair bias in favor of one party.

II. EMPLOYMENT ARBITRATIONS

To further illustrate the process of contextual analysis in arbitration, we discuss in more detail two very different actual examples of arbitration. This allows us to move from an abstract discussion to a more concrete analysis of what is occurring. However, to the extent that arbitrations occur in different contexts than those described here, the contextual analysis would likewise differ.

The first example is employment arbitrations administered by the American Arbitration Association (AAA). The second example is international business disputes administered by the China International Economic Trade Arbitration Commission (CIETAC). In addition to qualitative observations, empirical studies enhance the contextual analysis for each type of arbitration.

III. AAA EMPLOYMENT ARBITRATIONS

A. CONTEXTUAL ANALYSIS

The AAA administers many arbitrations on employment disputes: employees allege some kind of mistreatment and the employer defends against those allegations.¹⁷ The arbitrations administered as part of employers' employee grievance programs, sometimes called employer-promulgated arbitration, are the focus of our discussion. A substantial percentage of these disputes deal with employer discrimination claims.¹⁸

16. In Brekoulakis's analysis of international arbitration, for instance, he observes the following. Unlike litigation, arbitration is not bound by *stare decisis*. Although arbitrators may refer to legal precedents, unless the parties instruct them otherwise, they do not bind them. Furthermore, the arbitrators' decisions are, as a general rule, not reviewable by the courts. Arbitrators' decisions are presumed final; the parties are not able to appeal.

At the same time, arbitrators have little job security. For instance, while federal judges in the United States are appointed for life, arbitrators are not similarly situated. Instead, their job security is linked to whatever or whoever determines if they will be selected as the arbitrator, among many other potential arbitrators, for the next arbitration case. Thus, the context in which arbitration occurs endows the arbitrators with a great deal of discretion and control in how to resolve the dispute since they are not bound by *stare decisis* and their decisions are final. Given the arbitrators' considerable discretion, whoever controls the arbitrator selection process is also critical since they decide who the decision-makers will be. Brekoulakis, *supra* note 3, at 573–83. As we shall subsequently discuss, depending on the type of arbitration, this may be the parties themselves or the arbitral administering institution.

17. For the official AAA website, see AM. ARBITRATION ASS'N, <https://adr.org> [<https://perma.cc/H7M7-G5PB>] (last visited July 8, 2017).

18. See Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

Employees' agreement to these arbitrations are typically conditions of their employment. These agreements also constitute employees' waivers of their right to litigate.

A contextual analysis begins with a better understanding of the key players, including the AAA, employers, employees, and arbitrators. In addition, the arbitration process itself is analyzed. Highlights of a contextual analysis are discussed below.

The AAA is the largest U.S. provider of ADR services in an increasingly competitive market. To maintain its market position, it is dependent on its business reputation as a professionally run, acceptably priced, dependable provider of ADR services. Its customers are typically businesses of all sizes. While the AAA is a non-profit enterprise, its business must stay financially viable, so it is sensitive to growing its business and satisfying its customers.

Employers in these disputes are typically private companies of all sizes. If they are large companies, they are likely to be "repeat players" in the arbitration process and therefore more familiar with the process itself and possible arbitrators. Employers are attracted to arbitration because it has the potential to be faster and less expensive than litigation, as well as confidential. Also, importantly, in these employer-promulgated grievance programs, employers have substantial control over the arbitration process since they craft the program and its procedures. As with any party, they prefer to prevail in the dispute. While the arbitration outcomes do not establish, nor are bound by, legal precedents, employers are nonetheless sensitive to setting internal precedents for their own employees and human resource policies.

Employees in these disputes are individuals who are rarely repeat players;¹⁹ in fact, this is likely to be their one and only encounter with employment arbitration. Thus, they are less sophisticated and knowledgeable about the process. In addition, they also tend to have less access to company documents about their dispute and their employee history given the limited discovery often provided in arbitration. While an employee's attorney may be more familiar with the process, it is unlikely the employee's experience and knowledge about the process and the arbitrators are comparable to those of the employers and their lawyers. In addition, while employers may view the dispute as "just one more dispute," employees have much more at stake. By bringing their complaints, they may well be jeopardizing their job or career.

Arbitrators, unlike judges, but like practicing lawyers, are in the business of providing professional arbitrating services. As such, they have market pressures to develop and keep their client base and to maintain their reputation as a reasonably "attractive" arbitrator candidate. (This is in contrast to judges, whose role is akin to public servants. Federal judges, for instance, are appointed for life to assure they are insulated from polit-

19. See Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 418 (2010).

ical and economic pressures in their decision-making.) Recent research indicates arbitrators often are selected by word-of-mouth, and women are underrepresented among arbitrators.²⁰ At the same time, arbitrators have considerable unchecked discretion given the characteristics of the arbitration process.

While in theory the arbitration agreement and the *arbitration process* are negotiated and agreed to by both parties, in practice, arbitration in these cases is part of an employee grievance procedure in which employees must “take it or leave it” as part of the hiring process and the terms and conditions of their employment. The employer typically designs the arbitration process, to the extent the laws allow, in a way that is most advantageous and convenient for them. It typically covers an expansive scope of disputes and includes an arbitrator selection process with which they are familiar. As is typically the case in private arbitration, arbitrators have considerable discretion in reasoning and decision-making. Unless parties specify otherwise, the arbitrators are not bound by legal precedents, the arbitrators’ decisions are final and binding, and the proceedings are private and confidential.

A *synthesis* of a contextual analysis of these AAA administered cases reveals the following. Some key players have real market pressures. The AAA and the professional arbitrators function as professional businesses that need to financially sustain themselves through client attraction, maintenance, and, ideally, growth of business. The AAA and arbitrators are thus incentivized to keep their customers, particularly their repeat customers—corporate employers—satisfied. Lawyers and managers of corporate employers, in the best interest of the corporation, are looking for qualified arbitral administrators and arbitrators who are, if not favorably disposed, at least receptive to management perspectives and arguments. Because corporate employers are most likely to be the repeat players, they are most familiar with the arbitration industry, prospective arbitrators, and the issues and arguments in these cases.

In these ways, there is information asymmetry between the corporate employer as one party and the less experienced, less sophisticated employee claimant as the other party. Given these contextual dynamics, particularly the market forces and the information asymmetry, one might predict that corporate employers are advantaged in these types of arbitrations.

B. EMPIRICAL SUPPORT

Recent empirical research supports this prediction of employer advantages and also deepens our contextual analysis. Two studies exemplify this. In the first, Alexander Colvin studied all employer-promulgated em-

20. Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, MARQ. UNIV. L. SCH. LEGAL STUD. RES. PAPER NO. 14-04, at 19 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390278 [<https://perma.cc/WZ2U-8S2F>].

ployment cases reported by the AAA over a four-year period.²¹ Almost half of the cases dealt with employer discrimination complaints.²² Colvin observed that, compared to litigation, “(1) employees’ win rates are lower in arbitration, (2) award amounts are less, and (3) disputes are disposed of in a shorter time.”²³ Thus, employee plaintiffs as a group are substantively worse off in arbitration than in litigation, although the disputes are resolved more quickly. Also, strong evidence of a repeat player effect again shows employees’ disadvantages: employee win rates and awards are significantly lower when the employer has been in multiple arbitrations.²⁴ In addition, strong evidence of a repeat employer-arbitration pairing effect is illustrated: employees have lower win rates and receive smaller damage awards when the same arbitrator is involved in more than one case with the same employer.²⁵

A second study also supports this prediction of employer advantages. I studied a particular type of employment arbitration: AAA arbitration cases on sex discrimination and sexual harassment disputes over a four-year period (2010–2014).²⁶ After analyzing a number of variables, my first observation was consistent with Colvin’s results: plaintiff employees have lower success rates than in litigation.²⁷

The second relevant observation requires a bit more explanation. Empirical studies in sex discrimination and sexual harassment cases in the *federal courts* consistently reach the same conclusion about the effect of the judge’s gender on case outcomes.²⁸ The judge’s gender makes a difference, with female judges more likely than male judges to hold for the plaintiffs, who most typically are women employees. A common explanation is that female judges, given their own life experiences, are more likely than male judges to recognize and understand the sexual discrimination and harassment—particularly the more subtle forms.²⁹ Furthermore, I argued that these more personal insights inform the law in constructive ways, increasing the probability that the plaintiff’s complete story is understood.³⁰

Given this consistent finding among judges, one might predict a similar effect in arbitration—that the arbitrator’s gender would make a difference in arbitration outcomes. I found, surprisingly, that was not the case.

21. Colvin, *supra* note 18, at 1.

22. *Id.*

23. Pat K. Chew, *Comparing the Effects of Judges’ Gender and Arbitrators’ Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195, 206–07 (2017) [hereinafter Chew, *Gender Effects*].

24. Colvin, *supra* note 18, at 1.

25. *Id.*

26. For further details on this study, see Chew, *Gender Effects*, *supra* note 23, at 196.

27. *Id.*; see also Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

28. Chew, *Gender Effects*, *supra* note 23, at 196.

29. *Id.*

30. *Id.* at 202–03.

The decision-making patterns of female and male arbitrators were substantially the same (i.e., exhibited no significant difference).³¹ Female and male arbitrators were equally unlikely to hold for the plaintiffs, who again were most typically female employees.

So, if female judges contribute their gender-specific experiential insights to interpreting the facts and the laws in sex discrimination and harassment cases, why did these empirical findings suggest that female arbitrators do not? Perhaps the contexts, particularly the market context, are sufficiently dissimilar. For instance, unlike female judges who are largely insulated from market pressures in their decision-making process, female arbitrators are not. Female arbitrators, like their male counterparts, must win the confidence of their clients, especially repeat players. Since employers are the repeat players (and thus represent future business opportunities), female arbitrators feel pressure to at least appreciate management perspectives on whether sexual discrimination or harassment occurred. To the extent they cannot, they are no longer considered viable arbitrators.

IV. CIETAC INTERNATIONAL TRADE ARBITRATIONS

A. CONTEXTUAL ANALYSIS

This second illustration of a contextual analysis deals with a very different type of case and context than the first example of AAA employment cases. These are international business arbitrations (in particular, foreign trade and investment disputes administered by the Chinese arbitral institution, CIETAC) between foreign parties and Chinese parties during 1990–2000. This decade was a very formative period in China’s development of foreign trade and investment.³²

Once again, we can study the arbitral administering institution, traditional attributes of the arbitration process, each party to the arbitration,

31. Chew, *Gender Effects*, *supra* note 23, at 208 (footnotes omitted) (“[O]f the 121 cases in the study, employee plaintiffs are successful in only 14%. ‘Success’ was defined broadly to include any case outcome where the plaintiff received some part of what they claimed. If only cases where the plaintiff was totally successful are considered, their success rate drops to 8.3% of the cases. This plaintiff success rate is less than the 25.2% success rate in all employment arbitration cases, indicating that employees are even less likely to win sex discrimination and sexual harassment cases than other employment disputes. Moreover, the success rate for employees in arbitration is notably less than the 27% success rate for employees in litigation as indicated in the Peresie study.”).

	M %	F %	Total %
Judges in SD/SH cases	24.0%	39.0%	27%
Arbitrators in SD/SH cases	14.7%	13.0%	14%

32. Pat K. Chew, *Opening the Red Door: An Empirical Analysis of CIETAC Arbitrations 1990–2000*, HARV. NEGOT. L. REV. (forthcoming 2017) [hereinafter Chew, *CIETAC Door*]. For detailed studies of Chinese arbitration and CIETAC, see also KUN FAN, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* (2013) and GU WEIXIA, *ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES* (2012).

and the arbitrators. Of particular relevance here is the political and cultural environment in which the arbitration is embedded. While more detail on each of these components of the context are provided elsewhere,³³ highlights of a contextual analysis are as follows.

The arbitral administrative institution, CIETAC, was then and remains the dominant provider of arbitral services for foreign trade and investment disputes in China.³⁴ While theoretically independent of the government, it remains affiliated with the China Council for the Promotion of International Trade (CCPIT), which is the government entity for regulating and fulfilling the political and economic goals in foreign trade and investment. Thus, in practice, CIETAC is influenced by the Chinese Communist Party and its goals in nation building.³⁵

Dispute resolution, including the *arbitration process*, has a long and culturally-linked history in China with some prominent characteristics.³⁶ The Chinese preferred informal (mediation and arbitration) over formal processes (litigation). These informal processes allowed the parties and arbitrators to resolve disputes consistent with norms and moral values, which are much preferred to resolving disputes according to rigid legal rules. Similarly, Chinese arbitrators opt for more contextual and flexible interpretations rather than strict contractual and legal interpretations. Relational and transactional priorities dominate over technical rules.³⁷

The Chinese *arbitrators* view their role consistent with this arbitration process described above.³⁸ Experts in Chinese arbitration describe arbitrators more as conciliators rather than adjudicators.³⁹ Arbitrators view themselves as representatives of CIETAC and of the state, there to help the parties restore balance in their relationship rather than as judges of the parties' rights. As part of a socially-interconnected and collectively-oriented professional community, they are also familiar with the priorities and values of Chinese business parties.⁴⁰

The *Chinese parties* to the dispute also find the dispute resolution process a familiar, almost intuitive process. Like CIETAC and the arbitrators, they are in sync with state priorities and goals. Thus, they skillfully strategize how the arbitration process serves their interests and the interests of other key players. Given the limited number of possible CIETAC arbitrators, the Chinese parties can learn from both formal and informal channels a great deal about each one.

33. Chew, *CIETAC Door*, *supra* note 32.

34. *Id.*

35. *Id.*; see also FAN, *supra* note 32, at 179 (describing the top-down structure of Chinese arbitration).

36. See FAN, *supra* note 32, at 181–212.

37. See Chew, *CIETAC Door*, *supra* note 32.

38. *Id.*

39. See, e.g., WEIXIA, *supra* note 32, at 34–38.

40. See Chao C. Chen, Xiao-Ping Chen & Shengsheng Huang, *Chinese Guanxi: An Integrative Review and New Directions for Future Research*, 9 *MGMT. & ORG. REV.* 167 (2013).

The only key players in these arbitration processes who are not in sync with the arbitration process are the *foreign parties*. Particularly, if they are from a Western country, such as the United States, they view the arbitration process quite differently than CIETAC, the arbitrators, and the Chinese parties. They are more likely transaction-driven rather than relationally-driven while more focused on contract and legal rights than cultural norms or political priorities.⁴¹ At the same time, they have less information about the CIETAC arbitration process and the arbitrators themselves, although they are more expert in technical legal analysis.

Therefore, a *synthesis* of a contextual analysis of these CIETAC-administered trade dispute arbitrations reveals the following. The key players, except for the foreign party, are culture-driven, which includes the priority of nation building through Chinese economic development and adherence to relational priorities. The foreign party is transaction-driven and rights-driven. As is typical with arbitrations, CIETAC arbitrators have considerable discretion in their decision-making given that their decision is confidential and non-appealable. CIETAC, the arbitrators, and the Chinese parties are the insiders to the arbitration process; they are familiar with and in sync with the cultural system in which the arbitration is embedded. In these ways, they have information advantages over the foreign parties. Given this contextual analysis, one would predict that the Chinese parties in these disputes are advantaged.

B. EMPIRICAL SUPPORT

As with the contextual analysis in the AAA employment cases, empirical evidence is consistent with these predictions. I studied over 1,000 representative arbitration cases, looking at myriad variables, including the effect of the nationality of the party on arbitration outcomes.⁴² A number of relevant findings are noted. Approximately 70% of the time, arbitrators make compromise decisions: both claimants and respondents got something for which they argued. This is true for both Chinese and foreign parties.⁴³ An analysis of the arbitrators' granting of full wins and full losses, however, reveals that the nationality of the party did make a significant difference. Consistent with the prediction of the contextual analysis, Chinese party claimants appear to have advantages. They are significantly more likely to receive full wins and less likely to receive full losses than foreign party claimants. In fact, the foreign parties have a no-

41. Chew, *CIETAC Door*, *supra* note 32.

42. *Id.*

43. Consistent with the claimants as a whole, the most likely outcome for both Chinese and foreign claimants are partial wins. Furthermore, both Chinese and foreign claimants have a comparable percentage of partial wins, with Chinese claimants receiving partial wins 71% of the time and all foreign claimants receiving partial wins 67% of the time.

Setting aside the partial wins as a default position for CIETAC arbitrators, we can focus on the arbitrators' decision-making regarding full wins and full losses where they exercise more discretion. Strikingly, Chinese claimants and foreign plaintiffs had markedly different outcome patterns regarding full wins and full losses. These differences were statistically significant ($p=.000$), indicating that these outcomes would not happen by chance.

tably higher probability (about twice as likely) of fully losing than their Chinese counterpart.⁴⁴

SUMMARY AND CONCLUSIONS

Analyzing the broader context in which an arbitration is embedded provides a more complete and nuanced understanding of what is occurring—including possible inherent advantages of one party over the other. In studies on employment cases administered by the AAA, for instance, a contextual analysis suggests that market forces influence the arbitral institution and the arbitrators in ways that provide employer advantages and employee disadvantages in the arbitrations. In another type of arbitration, the Chinese arbitrations of foreign trade and investment disputes, the context in which the arbitration is embedded once again creates forces that shape the arbitration process and outcomes. There, a contextual analysis suggests that cultural and political forces result in advantages for the Chinese parties and disadvantages for the foreign parties.

While these are very different types of cases and contexts, some similar themes emerge. First, the advantages described above are generally unrecognized and unacknowledged—until contextual analysis is used. Second, information asymmetry and insider status can privilege one party, affect who the arbitrator is, and affect how that arbitrator perceives the dispute—and possibly lead to unfair bias.⁴⁵

What are further appropriate inquiries? For example, might these themes occur in other arbitrations? Likewise, we can explore ways that disadvantaged parties can effectively counter the other parties' advantages. If the disadvantages, for instance, are linked to information asymmetry, in what ways can both parties gain information parity? On the other hand, to the extent that arbitration is conceived as a privately-negotiated process, to what extent is absolute parity between the parties possible or even desirable? In other words, are there arbitrations where one party's advantages do not jeopardize the integrity of the process, for example, where both parties are comparably sophisticated in negotiating the arbitration process in which they are engaged?

Claimants	China		All Foreign	
	N	%	N	%
Full win	115	19.3	61	13.9
Partial win	423	71.0	297	67.5
Full loss	58	9.7	82	18.6
Total	596	100	440	100

P=.000

44. See Chew, *CIETEC Door*, *supra* note 32.

45. See CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 17–56 (2014) (discussing the challenges of information asymmetry more broadly).