Why time's not up for mandatory arbitration

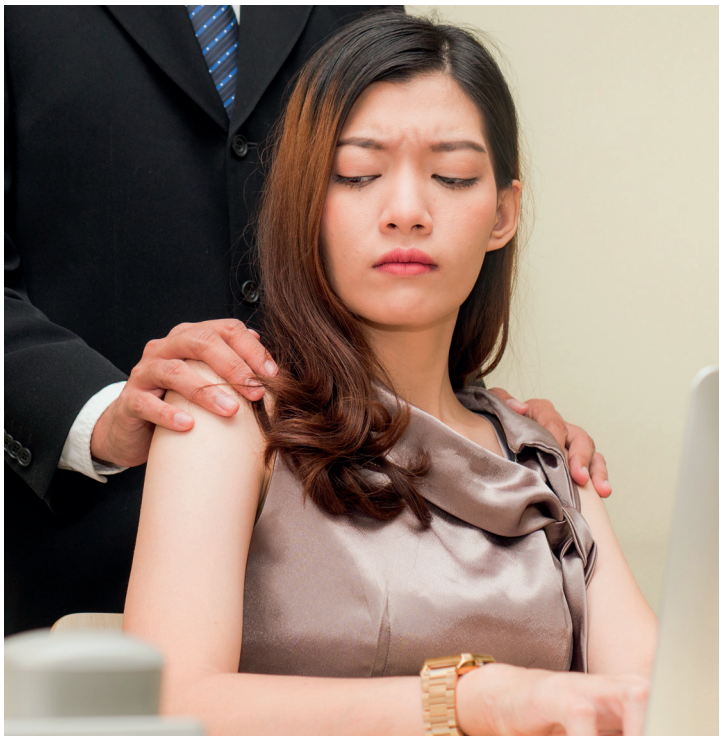
For Steven A Certilman C.Arb, banning all arbitration for workplace sexual harassment claims is a step too far

Workplace disputes have long been a fixture of the arbitration landscape. In recent months, however, the subject has been brought into dramatic focus as celebrities and the #MeToo and #TimesUp movement have courageously driven instances of hurtful and insidious conduct into the spotlight. It's a given that everyone should feel secure in their workplace. Not a given, however, is the political response to the problem as its magnitude becomes starkly clear.

As the scale of odious conduct becomes evident, ideas naturally percolate on how to put a stop to sexual harassment in the workplace. Among the suggestions in the US has been to ban mandatory, or even consensual, arbitration of claims, and that any financial settlement made on such claims should not be a tax deductible business expense for the company paying it if the claim was subject to arbitration. While I would find the latter to be a fine solution if it applied to all methods of dispute resolution, I believe that an outright ban on even voluntary arbitration for sexual harassment claims is unwise and unnecessary.

At least two characteristics of sexual harassment civil claims – affecting both sides – merit consideration and a cautious approach.

First, many claimants may feel more comfortable testifying to the facts and circumstances of the offending conduct and undergoing cross-examination in an informal and relatively private arbitration hearing room than they would in a public courtroom. The ability to have these cases heard in a closed setting may actually remove a barrier for many who are aggrieved.



ABOUT THE AUTHOR
Steven A Certilman C.Arb is a US attorney, arbitrator and mediator with more than 35 years' experience in legal problem solving across a wide range of commercial businesses and legal subject areas, and a former Chairman of the CIArb Board of Trustees.

Next, I suggest we consider that not all companies in which an individual has engaged in inappropriate conduct are themselves guilty of fostering a permissive environment towards such conduct. Forcing companies to be bathed in this negative light based solely on the conduct of an employee does little to promote justice and may unfairly taint a company's reputation. When someone is accused of any form of sexual misconduct, the mere allegation can have a damaging reputational effect. Having in mind considerations of due process and natural justice, such damaging effect should take hold only after substantiation of the claim. Mandating civil cases be heard in a public forum impairs the accused's right to the presumption of innocence without correspondingly improving justice for the victim.

Finally, the trend towards requiring the resolution of private claims in court imposes a financial burden on the state in an era when most governments face substantial budget deficits and, at least in the US, are diverting resources out of the court system. A law that drives more cases to the court system seems ill-considered when an effective private resolution system is readily available.

While the arbitral process may initially withhold an allegation of sexual harassment from the public, I trust and believe that our legislators, if they choose, can take a more surgical approach to making public proven cases of sexual harassment and offering financial incentives to companies which deter offensive and oppressive behaviour. While an approach to dealing with settlements is more challenging, it is not made easier by forcing all sexual harassment claims into the courts.

Many claimants may feel more comfortable testifying in a relatively private hearing room