

## Employment & Immigration Law

### Revisiting The Arbitration of Employment Disputes

The more-utilized system for resolving workplace disputes

By John K. Bennett

In the years since the U.S. Supreme Court's landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), employers have continued to weigh the pros and cons of utilizing predispute agreements to arbitrate employment-related disputes. More recently, employers considering the competing arguments for and against utilizing agreements to arbitrate employment disputes are able to study emerging empirical research bearing on these considerations. See, e.g., A. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" 11 *Empl. Rts. & Empl. Pol'y J.*, 405 (2007); D. Lewin, "Workplace ADR: What's New and What Matters?" *Arbitration 2007: Workplace Justice for a Changing Environment*, Proceedings of the 60th Annual Meeting of the National Academy of Arbitrators ("NAA"), 23-39 (BNA, 2008). The most recent

of this empirical research suggests that

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roughly 15 to 25 percent of employers have now adopted arbitration of employment disputes, covering nearly 25 percent of nonunionized employees. This trend, coupled with the declines in both the unionization rate and the use of labor arbitrations under collective bargaining agreements, suggests that employment arbitration is now a more-utilized system for resolving workplace disputes than labor arbitrations in the collective-bargaining context.

#### Considerations Involved

The first and foremost consideration of employers opting to enter into agreements to arbitrate employment-related disputes is an alternative to the costs and delays of litigation through the courts. This is particularly so with employers operating in jurisdictions with relatively higher levels of employment litigation, such as California (and New Jersey). During the past 15 years, there has been a tremendous increase in the filings of employment-related suits in state and federal courts.

A key advantage of arbitration as compared to litigation is the relatively expeditious time it takes to get a final disposition. The empirical data suggests that the mean time for final disposition for employment claims brought in arbitrations ranges from approximately 250 to 330 days (less than a year), while

the mean time for final disposition of claims brought in federal and/or state courts ranges from approximately 700 to 820 days (more than two years). Thus, litigation typically takes about three times longer than arbitration. The greater speed of arbitration as compared to litigation is clearly an advantage for the arbitration of employment disputes. See also S. Estreicher, "Saturns for Rickshaws; The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements," 16 *Ohio St. J. on Disp. Resol.*, 559, 560-61 (2001). The longer time periods consumed by employment litigation versus arbitration result in substantially increased costs to both parties, whose respective counsel are incurring legal fees and other costs throughout protracted litigation. Even given that in virtually all of the employer-promulgated arbitration procedures the employer pays the arbitrators' fees, the arbitration procedures still are far less costly than the litigation process.

An argument employers consider against utilizing agreements to arbitrate employment disputes is that by providing employees with dispute-resolution procedures that are faster and less costly than litigation, employees are more likely to bring claims. The data suggests that employees also are more likely to bring lower-value claims to arbitration than they would be able to bring in litigation. It has been suggested that the relatively high costs of

litigation inhibit access to the courts for lower to mid-income ranged employees, whereas arbitration is a more cost-friendly dispute resolution option for those employees. Because the use of employment arbitration as the final step of workplace dispute resolution procedures is associated with the more frequent resort to those procedures by employees, some employers view this as a negative, as there is a greater likelihood of having management's decisions disturbed (by an arbitrator).

The data also suggests that the mean amounts of damages awards in employment arbitrations generally are less than those obtained through litigation. Although in litigation there are only a relatively small number of very large verdicts (producing a highly-skewed distribution of damages awards), some employers view the danger of the litigation system as a runaway jury awarding an excessive verdict disproportionate to any actual harm suffered. Employers view trained and experienced arbitrators as less likely to award excessive damages as compared to juries in litigation.

In litigation, however, employers have the ability to appeal excessive jury verdicts, and many larger damage awards are reduced on appeal, or settled for lesser amounts pending appeal. By contrast, arbitration awards usually are final and binding on everyone, including of course the employers who have agreed to that forum.

The empirical data concerning employee win rates in employment arbitration versus litigation is difficult to define, and is somewhat inconclusive. A. Colvin, at 412-19. Outcomes vary with such factors as the type of case involved, with employee win rates being higher in contract cases and lower in discrimination cases. The win rates also depend upon whether the arbitration procedures allow for prehearing dispositive motion practice to dismiss unfounded claims, which is available in court litigation.

Employees also may consider the human resources implications of adopting predispute agreements to arbitrate

employment disputes. While employees view favorably the availability of arbitration as an alternative to litigation to resolve employment disputes, some surveys suggest that most employees would prefer to have the choice of resorting to court or arbitration. Employees do have greater comfort levels with arbitration procedures having higher due process protections.

#### **Recent Developments in the Judicial Enforcement**

New Jersey courts continue to grant employers' motions to dismiss actions and enforce the parties' agreements to arbitrate under employer-promulgated programs. The leading New Jersey case remains *Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002), later proceeding, 2006 WL 1450586 (App. Div. 2006). There, the Supreme Court of New Jersey held that an arbitration agreement in the employment application, by which employees must agree, as a condition of employment, to waive their right to a jury trial and submit all their employment-related disputes to arbitration through the AAA, was a valid and enforceable contract to arbitrate.

The court held that the employer's "consideration of plaintiff's application, its extension of an offer and the commencement of employment, and thereafter the provision of compensation and on-going employment constituted sufficient consideration to support the parties' agreement to arbitrate their disputes." The court further held that the arbitration agreement in the employment application "should not be invalidated as a contract of adhesion." The court held that the scope of the agreement included the arbitration of New Jersey statutory discrimination claims, so long as their substantive remedies would be available in the arbitral forum. The court recognized: "The essential point is that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

arbitral rather than a judicial forum.'" (Quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

While provisions making the costs of the arbitration procedure prohibitively expensive for employees may render an agreement substantively unconscionable, see *Cole v. Burns Int'l Security Services*, 105 F. 3d 1465 (D.C. Cir. 1997), the court can sever that provision as invalid and enforce the remaining valid provisions of the agreement. *Contorno*, 2008 WL 1944825 (finding that employer shall bear costs of arbitration).

#### **Actual Arbitration Proceedings**

In order for an agreement to arbitrate employment disputes pursuant to employer-promulgated programs to be judicially enforced (as not substantively unconscionable) and to be accepted as fair by employees, its procedures should provide for the highest levels of due process. See R. Bales, "Beyond the Protocol: Recent Trends in Employment Arbitration," 11 *Empl. Rts. & Empl. Pol'y J.* 301, 330-39 (2007). The AAA's Employment Rules and Mediation Procedures may serve as useful guidelines for such due process provisions in an employer-promulgated program, although they are not necessarily required by the courts in order to enforce an employer's program. Employers may look to the AAA's rules as a resource in developing fair and effective procedures for the arbitration of their employment-related disputes, enabling them to have their disputes decided by a neutral person with special expertise and training in the employment field, without the expenses and delays inherent in litigation.

The arbitration procedures should: (1) balance the parties' need for prehearing discovery and case management with the expedited, cost-efficient nature of arbitration; (2) incorporate appropriate prehearing motion practice, including for summary judgment; and (3) provide for a fair hearing before a well-qualified

employment arbitrator mutually selected by both parties. J. Drucker, "The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions," 11 *Empl. Rts. & Empl. Pol'y J.* 345, 354 (2007).

As to discovery, arbitrators "should draw the line between balancing employees' need for information to develop their cases, against the laudable goal of preventing arbitral discovery from morphing into the expensive and time-consuming discovery permitted by the federal and state rules of civil procedure." R. Bales, *supra*, at 333-34.

As to dispositive motions, the AAA's rules provide that the arbitrator may grant any remedy or relief that he or she deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been brought in court. See *Empl. Dispute Rule 34(d)*. Arbitrators' well-established interpretation of this rule is that since courts are empowered to grant summary judgment, arbitrators are similarly authorized.

Finally, as to the qualifications of employment arbitrators, the AAA and the NAA offer and encourage high lev-

els of training in employment arbitration, both in the substantive law and "to upgrade sensitivity to due process fairness." A. Zack, "The Due Process Protocol: Getting There and Getting Over It," 11 *Empl. Rts. & Empl. Pol'y J.* 257, 265-66 (2007). Such training makes the subject-matter expertise of employment arbitrators greater than what fairly can be expected of jurors in trials of employment cases, even with the best of instructions. This special expertise of highly-trained career neutrals adds to the overall high level of fairness in the employment arbitration process. ■