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Employment Arbitration: Panel Discussion

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ARBITRATION 2012
OUTSIDE IN: HOW THE EXTERNAL
ENVIRONMENT IS SHAPING ARBITRATION

PROCEEDINGS OF THE SIXTY-FIFTH
ANNUAL MEETING
NATIONAL ACADEMY OF ARBITRATORS

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Another essential aspect of due process is fairness in arbitrator selection. Currently it is not uncommon for the employer to draw up the panel from which the grieving employee must choose the arbitrator. That obviously presents the risk of a tilted playing field right from the start. But suppose the panel consists solely of members of the NAA. Or suppose the employee can ultimately exercise a veto power, in which case the AAA designates the arbitrator. Or suppose the mandatory arbitration system is limited to interpreting and enforcing the employer's personnel handbook, not public-law claims. These are some of the issues with which our Employment Code Committee has had to wrestle.

I do not know how all these questions will ultimately be resolved. But on the basis of my past experience, I have every confidence that a committee that represents a cross-section of this Academy will find solutions that will be fairer, more sensible, and better balanced than what any one of us could come up with on our own. The Academy has always been a leader in setting standards for labor arbitration. This has not been a self-serving process; the major beneficiaries have been several generations of employers, employees, labor unions, and society at large. We should now be a leader in the burgeoning field of employment arbitration as well.

III. PANEL DISCUSSION

The rapid growth of arbitration in nonunion employment settings has provoked endless debate about its advantages and disadvantages for employers, employees, and unions. Often absent from the debate is systematic, reliable information on the extent of employment arbitration and arbitration outcomes. Professor Alexander Colvin of Cornell University has undertaken pioneering work that explores how employment arbitration is working in practice and its impact on the major players. After Professor Colvin presented his latest findings,⁶⁷ a panel of leading arbitrators and advocates discussed the implications of his results for the continuing development of employment arbitration.

⁶⁷See Part I of this chapter, "The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes."

- Moderator:** Hoyt N. Wheeler, National Academy of Arbitrators, West Columbia, SC
- Panelists:** Prof. Alexander Colvin, Cornell University, Ithaca, NY
- David Schlesinger, Nichols Kaster, PLLP, Minneapolis, MN
- Theodore J. St. Antoine, National Academy of Arbitrators, Ann Arbor, MI
- Paul J. Yechout, United Health Group, Minneapolis, MN

Hoyt Wheeler: This session deals with nonunion arbitration. The panel discussing Professor Colvin's paper consists of arbitrator Ted St. Antoine; plaintiff's lawyer David Schlesinger from Nichols Kaster; and an attorney from the employer side, Paul Yechout of United Health Care.

Paul Yechout: My firm does use arbitration agreements for all our employees as a condition of employment. Ours are basically the same deal for everyone with the same terms and conditions. We incorporate the American Arbitration Association (AAA) rules, and we've had the agreements successfully enforced in many instances. We have about 100,000 employees, and we do a lot of arbitrating all over the country.

There are three main reasons that we favor arbitration as an organization. One is the class waiver issue. Certainly, class actions have seen a dramatic uptick in recent years. I've been in-house counsel for eight years, and the growth in class actions in that time has been amazing. And you do see class waivers in arbitration agreements successfully enforced. The *Concepcion* decision⁶⁸ was, obviously, very helpful in that regard. It will be interesting to see what the courts do with applying that to employment claims. That is a tremendous benefit from an employer perspective.

Second, there is the issue of the run-away jury, which was shown in the data that was presented by Professor Colvin. We definitely like to avoid juries in California, in particular, so that is another benefit to arbitration. The data that were presented were consis-

⁶⁸AT&T Mobility v. *Concepcion*, 131 S. Ct. 1740 (2011). In April 2011, the Supreme Court ruled in *Concepcion* that corporations could write consumer contracts that blocked class-action lawsuits. To do so, a corporation need only draft a contract that (1) requires unhappy customers to settle disputes through arbitration, and (2) prohibits unhappy customers from arbitrating as a collective. David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES, May 5, 2012, at BU4.

tent with what I have seen personally as far as the result of arbitrations. Even if they are decided for the plaintiff, they tend to be a much more reasonable verdict as opposed to what you can sometimes see from a jury.

The third fact that is very important for us is confidentiality. We like to keep our employee disputes confidential. Arbitration provides us with a great advantage there.

So there are some definite advantages to arbitration from an employer perspective that I see. Increasingly, we've had to carve out certain claims that cannot be arbitrated—like Title VII claims, for example. With the amendment to the Senate Appropriations Bill of last year, submitted by our own Senator, Al Franken, we now have to carve out Title VII claims and torts arising out of sexual harassment claims. With that, I'm actually doing a lot more litigation now than I have been over the past several years. So, I'm going to have a little bit more of an apple-to-apples comparison going forward as opposed to comparing it to the litigation I saw in my past as a litigator. We do still favor arbitration, particularly in California, where everyone typically pleads Fair Employment and Housing Act claims rather than Title VII claims, and we are still arbitrating regularly in California.

There are some other reasons that are advanced for arbitration that don't always hold true. One argument is that it's less expensive than litigation. That has not necessarily been my experience. To some extent it depends on opposing counsel and how they approach it and how many discovery disputes are involved, but I've had cases that have been just as expensive as litigation matters that I've handled previously.

Arbitration is typically intended to be faster than litigation, but I've had cases that have actually been much slower in recent times. This may be due to the increased flexibility when the parties can just ask the arbitrator for rescheduling and extensions; arbitrators tend to be more flexible than a court. This is good in many respects, frankly, from the employer's perspective. We're not necessarily as anxious to get to resolution as quickly as the plaintiff probably is. As a result, you don't necessarily wrap up more quickly or proceed more quickly than litigation matters.

Probably my biggest beef with arbitration is that arbitrators don't often grant summary judgment. When I was in private practice I did a lot of summary judgment motions and was generally successful. So, if you do have something that really does seem to be a solid summary judgment case, arbitration can be frustrating.

I like the summary judgment process. So that's something that I think is a downside to arbitration.

With regard to the split-the-baby data, I thought the data that were presented are very interesting. I have seen split-the-baby instances more often when you have multiple claims. I've seen arbitrators almost bend over backwards to try and award one claim while denying others. Certainly when there are multiple claims, one is stronger and more valid than another, so you would expect to see some decision-splitting there. But I don't see splitting the baby with regard to a single claim or with regard to awarding partial damages as often as I see a partial plaintiff verdict or a partial defense verdict on multiple claims.

Another issue that was raised is the representation by counsel. You said three-quarters of arbitrations involve plaintiffs who are represented. I do find in arbitration it is very, very simple for plaintiffs to file a claim. We require them to pay a \$25 fee and submit a pretty cursory demand; then we will take it up if it states a legal claim. Obviously, that's much simpler for a plaintiff to do than to go into court as a pro se plaintiff. I've had some pro se arbitrations that have gone on for quite some time where we've gone through the arbitration, and then they've appealed to district court and to appellate courts, so it can go on for quite some time. When they have competent counsel, while that certainly raises the attorneys' fees element to the case, it can be a bit more streamlined. Certainly the arbitrator, like a judge, is going to give deference to a pro se litigant and give him or her every opportunity to make the case. I do find that I have more pro se arbitrations than I've had in court actions, and that can be a bit of a challenge.

With arbitrators, another issue that you see is that quality varies from arbitrator to arbitrator. Also, you talked about repeat business. We do have certain areas of the country where we arbitrate quite frequently, and we do wind up using some arbitrators repeatedly. In those cases where we have been successful, we are likely to use that arbitrator again. But even if we get an adverse decision, I find if it's well reasoned and the arbitrator has managed the process well, that certainly is something I respect and I would go back to that person. So we really do look for a fair and impartial and objective arbitrator more than someone who's just going to give us what we want every time.

You noted that employee win rates tend to be lower in arbitration. We certainly have experienced a lot of success with arbitration. I would take an arbitrator over a California jury any day.

We also have great success in resolving our cases there through a settlement and not actually going to arbitration. I do find that with arbitration, and I think this is the intent, that we go to the full hearing much more often than we would have gone to trial. That's probably because of the summary judgment issue, but also because of the streamlining of the process. The intent is that you're just going to present your evidence and get a decision. So, my experience is that we've definitely gone to the hearing stage much more often than in other cases.

Theodore St. Antoine: The figures on the coverage of employment arbitration are puzzling. I regard Alex Colvin as this country's foremost empirical expert on employment arbitration. Alex has come up with the estimate in his paper that mandatory arbitration agreements cover one-quarter to one-third of the entire nonunion labor force. It's intriguing that we have difficulty finding reported cases that support such a breadth of coverage. The AAA, which is probably the primary designating agency, handled slightly fewer than 1,700 employment arbitrations in 2011.⁶⁹ Now, of course, there will be many ad hoc arrangements that are worked out between employers and employees for which we don't have figures. But the AAA's caseload still does seem to raise some real question about the one-quarter to one-third estimate.

Full disclosure. This panel is supposedly the voice of experience. In my case it's the voice of *vicarious* experience. I think I have handled a total of half-a-dozen employment arbitrations in my entire career. And interestingly, in the last decade or so, there has been increasing employer resistance to employment arbitration in the State of Michigan.

At a Bar Association meeting that I attended a few months ago, a top-notch management attorney stated that he was no longer advising his clients to use mandatory arbitration systems. He had three reasons. Number one, the employees win too often. Number two, he wants summary judgment and arbitrators are hesitant to grant it. And number three, when he loses, he wants the full right of appeal and the courts will not provide that for arbitration. I thought this one prominent lawyer might be speaking just for himself. But at a break in the meeting, I could not find any of my

⁶⁹E-mail from Frank Rossi, AAA chief financial officer, to author (Apr. 25, 2012) (on file with the author). In contrast, the AAA handled nearly 10,200 traditional union-management labor arbitrations in 2011.

friends among the management advocates who were still advising clients to establish mandatory arbitration systems.

Last week I decided on a bit more of a scientific poll. I sent a survey off to 24 of the peer-designated “superlawyers” in Michigan who specialize in labor and employment law for management. Ultimately, I got responses from 17, which I think is pretty good in the very short time I gave them. One lawyer doesn’t have any clients with employment arbitration systems. The range, however, is between 5 percent and 75 percent of their clients that have arbitration plans for nonunion employees. The median is right about 15 percent. So generally, about 15 percent of the clients of this broad group of management “superlawyers” do have arbitration plans for nonunion employees. That would hardly appear a ringing endorsement of the process.

If I have any thesis here this morning, my thesis would be that at its best, employment arbitration, mandatory or otherwise, is a win-win situation for both employers and employees. Now, my own particular interest is in the rank-and-file, low-income employee. And in this regard I would point to the number of studies indicating that rank-and-file employees do just about as well in employer-promulgated arbitration systems as they do in court, or even better. It is true, however, that when they do win in court, they receive larger awards.

One comparison I have rarely seen is between employer-established plans and traditional union-management collectively bargained arbitration plans. For about a decade, I had the honor of being on the panel of one of the oldest, most prestigious union-management arbitration systems in the country. Simply to satisfy my own curiosity, and perhaps now for your enlightenment, I did a little survey of the last 200 discharge cases handled by that panel when I was on it. We arbitrators acted individually for the most part but had a chair to ensure consistency in our decisions. Out of those 200 discharges we ruled on, the employees won some substantial relief only 23 percent of the time. And that would be in what could be called a “gold standard” for labor-management arbitration. Alex has just informed us that in a set of employer-promulgated plans—not ones individually negotiated, for example, with mid- or high-level executives, but in programs set up unilaterally by employers—employee claimants won 25 percent of the time. Well, I certainly don’t hold that my one small sample offers anything conclusive. But I do think it’s highly indicative that in a gold-standard union-management arbitration plan, the product

of collective bargaining, the employees did not do any better. In fact, they fared a little less well than in the employer-promulgated plans that Alex studied.

Even more important, in terms of the employees' interest, is accessibility to a reasonable forum for a vindication of their rights. There are several reputable studies that indicate that employees with a modest financial claim—one study said with an annual income less than \$60,000—were ordinarily not going to be able to get a lawyer to take their cases to court.⁷⁰

Right now, the National Workrights Institute (NWI) run by Lew Maltby, with which I have been collaborating together with Dave Lipsky of Cornell and Tom Stipanovich of Pepperdine, has a very significant study under way. We are trying to find out the experience not only of the upscale firms, which have their pick of plaintiffs, but also of the less demanding lawyers down lower in the pecking order. To what extent are they taking on clients who have valid legal claims but not enough dollars at stake to make their representation worthwhile for a lawyer? The NWI's preliminary figures suggest that at least 60 percent of the plaintiffs who have legal claims are not able to find a lawyer to represent them. That's a very preliminary figure and I think it's quite conservative.

From the employer's perspective, I agree with Paul that arbitration should ideally be faster, cheaper, and simpler than litigation. Paul's figures on arbitration costs are far higher than anything in my experience—personal *or* vicarious. I'd say some of the blame is on arbitrators who let discovery get out of hand, and some of the blame is on parties who insist on unnecessary transcripts and overlong briefs. But for management, a sure advantage of arbitration is having a professional as decision maker rather than an emotionally aroused jury.

Let me conclude with what I think is the greatest issue here, and that is ensuring due process in mandatory arbitration systems. In a letter to then-Senator Russ Feingold in 2009, the NAA spelled out the basic requirements.⁷¹ There must be a representative of

⁷⁰Elizabeth Hill, *Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 11, 13 (May–July 2003); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) DISP. RESOL. J. 44, 46 (Nov. 2003–Jan. 2004).

⁷¹On October 13, 2009, Academy President William H. Holley, Jr., wrote then-Senator Russ Feingold, who had introduced the Arbitration Fairness Act (AFA), setting forth the Academy's position. A general press release followed on December 8, 2009. A copy of the press release, including the Feingold letter and its attachments, is on file with the Executive Secretary-Treasurer of the NAA.

the employee's choosing; the same time limits for filing claims as provided by applicable law; appropriate but not excessive discovery; class actions when necessary to vindicate the right involved; a convenient location and time for the hearing; a neutral arbitrator jointly agreed upon by the employer and employee; full arbitrator disclosure; payment of the arbitrator's fees and expenses by the employer, except for a modest filing fee akin to that in federal district court; all remedies available under the law; and, finally, a written award with findings of fact and conclusions of law.

I firmly believe that the Academy can make a very significant contribution in this area. Although we were born in the world of collective bargaining, much that we learned there can be translated into the field of employment arbitration. No other group can bring to the task a greater sense of integrity or a greater capacity for the necessary judgments than the NAA.

David Schlesinger: I have had several experiences in employment arbitration. My plan is to talk about those experiences to the extent I can and, through that discussion, comment and respond to some of the points that have already been raised.

The first experience was an arbitration that I worked on representing the employee. It started with whistleblower and reprisal claims, statutory employment claims on behalf of a very high-level financial sales person.

At the arbitration, we were having some trouble establishing liability on the statutory discrimination claims, which is not unusual. The figures that Professor Colvin showed us indicate that it's not unusual. But it became clear throughout the course of the arbitration that at a certain point the employer had considered paying our client a severance, and that severance was a significant one. It was based upon a commission, which our client hadn't technically earned under the commission agreement, but he had basically done the work to bring in a substantial amount of money. When we found that out in the arbitration, we made a motion to amend the pleadings, our statement of claims, to conform with the evidence, and we were allowed to do that. We won that claim; we lost the statutory claim.

This example is an interesting one for a number of reasons. One, I don't think we would have been able in court to amend our pleadings as easily as we were able to in arbitration. The arbitration panel saw it as the fair thing to do. Clearly, our guy had earned his money. Although he may not have had a legal entitlement to it under his contract, he did the work and he should be

paid for it. I think a judge in a similar situation might have due process concerns that would have made it much harder for us to make that amendment.

On the other hand, though, it's really hard on employees to establish statutory discrimination claims in arbitration. Several of my experiences have shown us that. I think there are two reasons why that is. One, you don't have the discovery you need too frequently. Discovery is important in a statutory employment discrimination claim. You want to be able to get inside the mind of the decision maker. It's hard to do that without depositions or electronic discovery as are traditionally available to you in court. So for that reason, on a discrimination claim, almost every time I'd rather be in court. I think the reason that higher-level employees with employment contracts do better in arbitration is because it's easier to prove those claims without a lot of discovery.

Moreover, in employment discrimination claims, it's really important to be able to appeal. The main employment discrimination claims have only been around since 1968, and those claims were amended in 1991. The law is still being developed. In some areas the law is sort of a morass. It's really important to be able to appeal a decision for either side and have a meaningful appeal, a *de novo* review if necessary.

The second experience I'd like to discuss is a similar case. We had a whistleblower claim on behalf of a very highly compensated employee. It became clear in the arbitration that there was a substantial amount of deferred compensation that was not technically vested, but that he had earned, and he was awarded it. Again, I don't think that would have happened in court.

Now the question that comes up is, is this splitting the baby? I don't think it was. Arbitrators were concerned about basic fairness. That's not something I think we could have received in court.

The third experience I'd like to briefly discuss is another case in which we represented an employee in a breach of contract claim. It was a very straightforward breach of contract claim. We would have won the claim no matter where we were, but the problem for us was that the arbitration agreement was not an employer-promulgated plan. It was an individually negotiated employment agreement, but it's just as much an adhesion contract as a standard employer-promulgated plan. In other words, our client didn't really bargain at arm's length. As a result of the fact that it was regarded as an individually negotiated plan, he had to split the costs, and that cut into his award significantly.

So one of the things I think our problem is going to be in the future is challenging the characterization of these plans. A lot of times we are seeing more and more plans that are individually negotiated. But with the employment environment the way it is, even if you're a high-level employee with ostensibly some bargaining power, it's very unlikely that you really went back and forth on the terms of your employment, even if it's an individually negotiated plan. So the cost really hurt us in that situation.

We also had a case in which we had a breach of contract claim. We also had some equitable claims, and the respondent had some counterclaims. Thankfully there were no damages on the counterclaims. The strategy the defense counsel was going to use was to try to develop attorneys' fees and costs through the course of the arbitration that they could use as damages. The arbitrator correctly identified that and set forth a discovery plan for us that was going to make it really hard for the defendant to develop these damages. As a result of that, the case resolved really quickly. So in that instance, an arbitration was much more efficient than court. There are some magistrate judges in federal court who can help you with something like that. But arbitration allows the parties to choose a sophisticated arbitrator who might be able to help the parties identify the real issues quickly, and help them resolve the case efficiently. But more often than not, what happens is it takes eight months or a year to get to arbitration. You get an award. You have fewer appeal rights. So that was sort of the exception in our case.

The last experience I'd like to discuss is a case that my firm handled, *Mork v. Loram Maintenance of Way, Inc.*⁷² The case started as a Fair Labor Standards Act (FLSA) collective action. We filed it in federal court in Minneapolis. The case was a very straightforward wage claim on behalf of one. The way you start these collective actions is you file a claim on behalf of one person, and then others can join. Apparently our client had signed an arbitration agreement about 10 years ago. He had forgotten about it. The defendant made a motion to compel arbitration. In addition, the defendant argued that the judge should make a determination that the parties had not agreed to a collective or class mechanism in arbitration. So our client had to pursue his claims individually. We agreed that the claim should be in arbitration, but

⁷²844 F. Supp. 2d 950 (D. Minn. 2012).

we challenged the defendant on the issue of whether the agreement allowed for collective or class actions, and we won in front of Judge Davis.

The essence of the reasoning is that the parties had agreed to use AAA's procedures then in effect, and the AAA procedures allowed for class or collective discovery in an employment case, so we were able to use those. So we filed a claim in arbitration. The defendant had a clause in its arbitration agreement that said that the plaintiff waives his entitlements of punitive damages, which is inconsistent with the basic procedural right that an employee has in AAA arbitration. AAA said, "You need to take this out of your agreement or we won't arbitrate this case or any other cases with you, defendant." The defendant said, "No." AAA kicked the case out and has refused to negotiate with the defendant. That is the kind of thing that needs to occur in order to guarantee some basic procedural protections for employees who would never otherwise be able to pursue these claims individually, just because financially it wouldn't work.

The defendant then wanted to use somebody other than AAA, but because AAA was specified in the agreement, we filed a motion to allow us to proceed in federal court, and we were able to resolve the case. So this is a story about how important the procedural protections that employees have in AAA are.

Homer La Rue: Professor Colvin, in your comparison of NAA arbitrators, female and male, I noticed you did not compare on the basis of race. Is that because the pool is insignificant?

Alexander Colvin: The reason we didn't include that is because the pool is small. Also, we couldn't identify race with names. But that's a very interesting question. One of the things I would actually love to have is some requirement that arbitrator information has to be put online, just because it would be very interesting and useful for the parties as well as for researchers. Then we can look at the diversity of the pool, for example. I think the diversity of the pool of arbitrators is really important. There are some questions around employment arbitration that could be examined: What the composition looks like, race and gender and professional background; and what proportion are former management-side versus employee-side attorneys. I think that is important to get information online.

Hoyt Wheeler: In an earlier study, my colleagues and I found that most employment attorneys were management attorneys, which is a possible source of bias.

This session analyzed employment arbitration from the perspectives of academic research, an employer attorney, an arbitrator, and an employee attorney. It seems to me that the most interesting points that they made included the following: The employer attorney saw as advantages the avoidance of class action claims, avoiding the dangers of run-away juries, and respecting confidentiality, but as a disadvantage the lack of summary judgments. The arbitrator's comments reported that win rates in employment arbitration did not differ greatly from those in one labor arbitration system with which he was familiar, and he made the crucial point that employees often have difficulty finding a lawyer to pursue statutory claims in court. The employee attorney cited examples where arbitrators had focused more upon achieving a fair result than might have been the case in a court of law. He also argued that statutory discrimination claims are difficult to pursue in arbitration because of the limits on discovery in an arbitral forum and the lack of a right to appeal. As one would expect from top-flight practitioners, they provided insightful, fair, honest, and objective accounts of their experiences and views on the employment arbitration process.