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Why Mandatory Arbitration May Benefit Workers

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The Newsletter of Dispute Resolution Law and Practice

EMPLOYMENT

Why Mandatory Arbitration may Benefit Workers

By Theodore J. St. Antoine

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Would employees—including union employees—be better off with mandatory arbitration, even of statutory employment claims? The answer to this important question should depend less on abstract notions about the importance of statutory claims and the sanctity of the right to a jury trial, and more on a pragmatic assessment of what is likely to be best for the great majority of workers.

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Employing this type of analysis, which would take into account an overworked, underfunded Equal Employment Opportunity Commission, backlogged court dockets and other practical problems, my view is that most employees might well be better off with mandatory arbitration, *provided* that due process guarantees are in place and statutory remedies are available.

Due Process Concerns

The importance of due process issues was addressed in the December 1994 Dunlop Commission Report on the Future of Worker-Management Relations and in the May 1995 Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, developed jointly by a task force whose members included representatives of the American Bar Association, the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association and the Society of Professionals in Dispute Resolution. Both the Dunlop Report and the Protocol contained closely parallel standards for arbitrating employment disputes, including: (1) a jointly selected arbitrator who knows the law; (2) simple, adequate discovery; (3) cost-sharing to ensure arbitrator neutrality; (4) representation by a person of the employee's choice; (5) remedies equal to those provided by law; (6) an opinion and an award, with reasons; and (7) judicial review on the law.

The Dunlop Commission and the task force diverged on the issue of mandatory arbitration of statutory claims, with the Commission taking the view that the provisions of an employment contract should not dictate how an employee's statutory claim is enforced. The task force took no position on the issue, although it agreed that mandatory arbitration agreements as a condition of employment should be knowingly made.

Judicial Precedent

Court decisions on the arbitrability of statutory claims under pre-dispute arbitration agreements have continued to evolve, applying, sometimes differently, the two leading Supreme Court cases: *Alexander v. Gardner-Denver Co.*¹ (holding that an arbitrator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing Title VII claims of racial discrimination in a discharge, because the arbitrator was authorized only to decide the contractual issue, not the statutory issue), and *Gilmer v. Interstate/Johnson Lane Corp.*² (holding that an individual stockbroker-employee was bound by a contract with the New York Stock Exchange to arbitrate an Age Discrimination in Employment Act (ADEA) claim against his employer, reasoning that the arbitrator here was authorized to handle statutory as well as contractual disputes).

[E]mployers may be unwilling to enter into post-dispute agreements to arbitrate except in the case of very large claims, since they usually prefer to wait out more "run of the mill" claims....

The *Gilmer* court emphatically endorsed arbitration as a method of finally resolving disputes, even when the agreement to arbitrate is made as a condition of employment.

In *Prudential Insurance Co. of America v. Lai*,³ the Ninth Circuit refused to enforce an arbitration agreement of the type upheld in *Gilmer*, after having concluded that the employees did not "knowingly" waive their Title VII rights and remedies. By contrast, in *Austin v. Owens Brockway Glass Container*,⁴ a divided Fourth Circuit held that a terminated employee's gender and disability discrimination suit was barred by the employee's failure to exhaust the arbitration procedures in the union contract. Similarly, in *Cole v. Burns International Security Services*,⁵ Judge Harry Edwards, writing for the D.C. Circuit, held that an employee could be required to arbitrate Title VII racial discrimination claims under a mandatory arbitration clause in an individual employment contract, provided that the procedure was fair and the employer paid all the arbitrator's fees. His decision emphasized the difference between arbitration under an individual contract, where the employee controls the presentation, and arbitration under a labor contract, where the union is in control.

Judge Posner, writing for the Third Circuit in *Pryner v. Tractor Supply Co.*,⁶ similarly distinguished arbitration clauses in union contracts, holding that suits by former union employees alleging claims under Title VII, the ADEA and the Americans With Disabilities Act, should not be stayed because of the arbitration provisions in the collective bargaining agreements. He reasoned that *Gardner-Denver* controlled in the union context. Most recently, in *Gibson v. Neighborhood Health Clinics*,⁷ the Seventh Circuit held that a former employee did not have to arbitrate Title VII and ADEA claims against the employer since there was no consideration to support the employee's promise to arbitrate. The court expressly declined to decide whether an employee's knowing and voluntary consent is a prerequisite to arbitrate statutory claims.

Administrative Agency Action

Separate from the court activity, the EEOC has recently declared its opposition to mandatory binding arbitration as a condition of employment. The National Academy of Arbitrators also has recently denounced mandatory arbitration agreements imposed as a condition of employment that require a waiver of access to the courts or an administrative forum. (But the Academy added that in view of existing law,

its members could serve as arbitrators in such cases, provided that they observe certain guidelines as to the fairness of the proceeding.)

These principled concerns, however meritorious, do not take into account some practical problems that may make pre-dispute arbitration agreements the only real answer for most employees. For example, testimony presented to the Dunlop Commission indicated that employers may be unwilling to enter into post-dispute agreements to arbitrate except in the case of very large claims, since they usually prefer to wait out more "run of the mill" claims, assuming most of them will go nowhere.

Another issue is the difficulty of obtaining legal representation. Many lawyers will not invest their time in statutory-discrimination court suits. My informal survey indicated that experienced lawyers accept only about one out of every 100 potential discrimination claimants. The EEOC workload and the court backlog present other practical problems that must be considered. Before the EEOC began classifying cases in order of priority (and tossed out many charges after only a brief investigation), its backlog had soared past 100,000 cases. Given these realities, mandatory arbitration of statutory claims under arbitration agreements imposed as a condition of employment, if accompanied by appropriate due process features, should not be automatically rejected without further empirical study of the actual effects on employee claimants. ■

Endnotes

1. 415 U.S. 36 (1974).
2. 500 U.S. 20 (1991).
3. 42 F.3d 1299 (9th Cir. 1994).
4. 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).
5. 105 F.3d 1465 (D.C. Cir. 1997).
6. 109 F.3d 354 (7th Cir. 1997).
7. No. 96-2652, 1997 WL 474419 (7th Cir. Aug. 21, 1997). ▲

This article is adapted from the author's keynote address presented at the annual meeting of the American Bar Association, Section of Labor and Employment Law, on Aug. 4, 1997, at the Grand Hyatt Hotel in San Francisco.

table it intends to follow. Although it may be modified later, the schedule is intended to commit the tribunal "morally" to a schedule from the outset.

- Requiring the tribunal, upon the closing of the proceedings, to indicate to the secretariat of the ICC Court when it expects to submit a draft award for scrutiny by that court.

The changes...are designed to encourage greater expedition of the process.

Some of the other key changes also reduce delay and bring the rules into alignment with current practice. For example, in multiparty cases a new provision gives the ICC Court the power to appoint the tribunal if the parties cannot agree on a method of appointment. There is a similar provision in the American Arbitration Association International Arbitration Rules and the rules of the World Intellectual Property Organization.

Another rule permits the ICC Court to authorize fewer than all of the arbitrators to complete an arbitration when, after the close of proceedings, an arbitrator has died or otherwise been removed from the panel. In deciding this issue, the ICC Court will be required to take account of relevant provisions of applicable law, such as laws prohibiting arbitrations to be conducted by an even number of arbitrators.

The revised rules also add provisions relating to such subjects as the arbitrator's authority to order interim measures, the confidentiality of proceedings, the assertion of new claims, and the correction or interpretation

of the award.

The new ICC rules will apply to arbitrations commenced on or after Jan. 1, 1998, although parties who have included an ICC clause in their contracts prior to that date may choose to be subject to the old rules in the event an arbitration arises after that date. If the parties cannot agree, it will be up to the ICC to decide how these disagreements should be resolved. ■