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Employment Law

HIGHLIGHTS

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Employment Arbitration: Fair And Effective Program Design

By Darin T. Allen

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As the use of arbitration and other employment dispute resolution methods continues to grow in the United States, attention must be paid to designing and implementing dispute resolution programs that are fair, accessible, and cost-effective for employees. Contrary to the concerns of critics, mandatory employment arbitration programs will not lead to the death of the civil justice system, especially where employment arbitration programs avoid unconscionable procedural and substantive limitations. By designing employment dispute resolution policies that include detailed and easily understood terms, fair discovery procedures and costs, and the same remedies that would be available in court, employers provide meaningful access to efficient justice for employees.

Legal Overview Of Employment Arbitration

The modern debate over the use and form of employment arbitration stems from a series of United States Supreme Court cases discussing employment arbitration. A renewed interest in mandatory arbitration emerged from *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 11 S. Ct. 1647 (1991). In *Gilmer*, the Supreme Court held that a securities representative could be compelled to arbitrate his Age Discrimination in Employment Act (ADEA) claim. The case was significant because the securities representative was required to sign an agreement with the New York Stock Exchange stating that he would arbitrate disputes with his employer. The *Gilmer* decision sparked debate among employment attorneys and scholars because the Supreme Court did not decide whether employment arbitration agreements were "contracts of employment" excluded from coverage under the Federal Arbitration Act (FAA).

The contracts of employment issue that was left open in *Gilmer* was decided a decade later by the United States Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302 (2001). In *Circuit City*, the Supreme Court determined that the FAA covers all contracts of employment, except for transportation workers such as seamen or railroad workers, and that the FAA may be used to compel arbitration of employment claims. Even though *Circuit City* focused on state law claims, the Supreme Court previously determined that federal ADEA claims were arbitrable under the FAA.

Following *Gilmer* and *Circuit City*, scholars predicted that employers would embrace mandatory employment arbitration as the premier solution to expensive and time-consuming litigation. As many employers implemented arbitration policies, the courts stepped up to monitor employment arbitration to uphold the rights of employees.

In *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002), the Supreme Court held that, because the EEOC is not a party to an arbitration agreement, the EEOC is not bound by its terms. Given the important role that the EEOC plays in protecting the public interest, the EEOC can decide what resources to commit to recovering relief for a specific victim or pursue other remedies available to the EEOC under the federal statute.

Most federal and state courts currently accept the use of arbitration to resolve conflicts as long as the dispute resolution process is fair to employees. To be fair, employment arbitration must provide employees with proper notice, limit costs so that employees can obtain redress for grievances, allow for adequate discovery and representation by counsel, and make available the same types of relief employees could receive in court.

Guiding Principles For Employment Arbitration Programs

When designing and implementing an effective employment arbitration program, it is important to provide employees with a meaningful opportunity to resolve claims in a fair, accessible, and cost-effective manner. This means that employment dispute resolution policies must account for the wide

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range of remedies available to employees, and options such as negotiation, peer review, ombuds, and mediation should be considered as initial internal methods for resolving disputes. Where internal dispute resolution processes do not resolve conflicts, external mediation may be helpful. Employment arbitration programs will be most effective in ultimately resolving conflicts when the employees and employer agree on the process and trust the arbitration procedures.

Employment Arbitration Program Design Considerations

In drafting an employment arbitration agreement, the dispute resolution process must not be so one-sided to be judged unconscionable. Courts generally consider an arbitration agreement unconscionable if its terms are too unreasonable and detrimental to the interests of a contracting party. If an employment arbitration agreement would shock the conscience of a reasonable person, it is likely unconscionable. In examining unconscionability, a court will review both the procedural and substantive aspects of the arbitration agreement.

The procedural aspect of the arbitration agreement involves the details surrounding the formation of the agreement, including an assessment of the relative bargaining power of the parties and which party drafted the agreement. As the Supreme Court noted in *Gilmer*, mere inequality of bargaining power is not a sufficient reason to hold an arbitration agreement unenforceable. However, it is significant to note that Gilmer was experienced in business, so employers attempting to design and implement arbitration programs with employees who are not familiar with arbitration should exercise care to secure consent, and should not coerce employees into arbitration.

Employers concerned about procedural unconscionability can consider offering employees an opportunity to opt out of the obligation to arbitrate by submitting a form or checking a box. Courts have held that the availability of meaningful opt out procedures eliminates the adhesive nature of employment contracts. *See Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002). These methods significantly reduce the risk of an employment contract arbitration agreement being invalidated due to procedural unconscionability.

Substantive unconscionability concerns the fairness of the employment arbitration agreement terms. In particular, substantive evaluation involves a review of arbitration costs, the types of relief available to the parties, procedural limitations, and mutuality. An additional consideration, the ability to bring class action claims, is beyond the scope of this article.

Arbitration Costs. A key issue in drafting enforceable arbitration agreements is to allocate costs in a way that does not make arbitration prohibitively expensive for any of the parties seeking to file a claim. To proceed with arbitration, it is necessary to pay certain costs, including filing fees, potential administrative costs, and arbitrator fees. To avoid problems with substantive unconscionability, the arbitration agreement should provide a fair method for sharing costs between the employer and employee. In fact, many employers agree to pay all of the employee's arbitration costs to ensure that an aggrieved employee has access to the arbitral forum. As long as the employee has a meaningful opportunity to vindicate his or her statutory rights, the chances of the arbitration agreement being deemed unenforceable are considerably reduced.

Types of Relief Available. Substantive evaluation of the relief available in arbitration focuses on the type and amount of damages and on injunctive relief. Federal and state courts usually agree that arbitration regarding statutory claims must make available to the parties the same remedies that would be available in court.

One way to ensure that an arbitration agreement provides for all available remedies is to conduct arbitration using the rules of an experienced neutral administrator. For example, National Arbitration Forum (NAF) *Code of Procedure* Rule 20(d) states that "an Arbitrator shall follow the applicable *substantive law* and may grant any legal, equitable or other remedy or relief *provided by law* in deciding a Claim, Response or Request properly submitted by a Party under this Code." (emphasis added). By carefully selecting a reputable arbitration administrator and specifying the rules to be followed, parties to an arbitration proceeding can take advantage of all available remedies.

Employers are advised to clearly inform employees that an arbitration agreement does not prevent an employee from filing a complaint with a state or federal government agency. An arbitration agreement that prevents employees from filing complaints with the EEOC, the National Labor Relations Board (NLRB), or other agencies responsible for protecting statutory rights and serving the public interest may be subject to legal challenge.

Procedural Limitations. The speed of claim resolution and reduced legal costs are major advantages of arbitration over litigation. When designing an arbitration program, it is important to be candid with employees about the potential for reduced discovery and the less formal nature of arbitration. As the Supreme Court noted in *Gilmer*, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354 (1985)).

To help employees understand the qualifications and responsibilities of the arbitrator, and to better grasp the nuances of the arbitration process, it is helpful to state at the outset what the arbitration agreement covers, including which employees are covered by the arbitration agreement and the nature of the claims to be arbitrated. In addition, the arbitration process should allow the parties to obtain basic information that is needed to present a claim. An arbitrator can resolve any disputes regarding discovery.

Mutuality. Challenges regarding the mutuality of an employment arbitration agreement usually arise where a weaker party – commonly the employee – is forced to arbitrate all claims, while the stronger party has the option of going to court. While most courts will enforce an arbitration agreement as long as both parties agree to be bound by the arbitration agreement, the better practice is to require both parties to present their claims in arbitration. Given that mutuality can be destroyed by a unilateral reservation of rights to change rules and procedures, employers seeking to implement arbitration programs should give advance notice to employees and work cooperatively any time a change to the arbitration agreement is contemplated.

Conclusion

An employment arbitration agreement that is detailed and clear and that is procedurally and substantively fair to all parties benefits both employees and employers. When drafting and implementing an employment arbitration agreement, it is important to advise employees concerning the nature and scope of the agreement, provide for the same relief and remedies that would be available in court, and allocate fee responsibility to give employees access to arbitration and an effective means to solve disputes.

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tries, as was promised. And they did not totally insulate the countries from reversals of capital flows.

Looking back, as early as 1996, we concluded at the Bank that during the period of the early '90s not enough attention was placed on building strong institutions to anchor continued long-term growth. The Bank has ever since actively promoted institutional development along with pro-market policies. Also, the initial emphasis was too much on "deregulation" of the formerly highly intervened financial systems and on opening of the capital accounts, without enough emphasis on prudent regulation and supervision. This mistake was associated with the Mexican crisis of 1994. Latin America has learned that lesson, and there has been a major effort since on improving financial institutions and the strength (if not the depth) of the financial sector, with the support of the Bank. Finally, the critical importance of efficient social policies and social safety nets was not acknowledged initially to the extent it should have been. There were significant increases in social expenditures and coverage of education and health during the 90s, but the quality of service delivery did not increase much. Only recently have there been important efforts to establish safety nets to protect the poor from macro-economic and other risks.

Editor: Would you give us an overview of some of the region's principal economies today?

Perry: Overall the region is doing very well now. Growth last year was at an average of around 6 percent, which is the highest in the last 25 years. Most countries experienced growth over four per cent last year. This year everyone was expecting a significant slowdown, but these estimates had to be revised upwards because of the continuing strong growth in many countries. Current estimates are about 4.5 per cent. We are living a growth period similar to the one we had in the beginning of the 1990s, but with some important advantages.

First, this time growth has been led by the strong performance of exports, which have seen significant increases, and have led to trade and current account surpluses and large accumulations of international reserves. This has been the consequence of a very positive global environment and good policies in the countries concerned. In the early '90s, growth was supported by large short-term capital inflows that led to large current account deficits and major financial vulnerabilities.

To be sure, the situation varies from country to country. We expect Chile to have the highest continued growth because it has the strongest macro- and micro-economic fundamentals in place. The Chileans enjoy very good monetary, exchange rate and fiscal policies and low public debt. They also have continued to improve the efficiency of their financial markets and micro-economic policies. Most other countries have also made important improvements in their macro-economic policies and financial markets and are enjoying sound growth. Brazil has made significant progress in its fiscal management, for example. Argentina, Uruguay, and Venezuela, which experienced profound crises, have made a strong comeback and are approaching the level of production they had prior to the crisis. Some of these countries, however, need further fiscal consolidation and improvements in their investment climate and micro-economic policies.

In summary, I think the region's future looks very bright if countries take advantage of present good times to further reduce macro-economic vulnerabilities and push the micro-economic reforms that would guarantee sustained long-term growth.

Partners Notes

Kirkpatrick Adds Corporate Finance Lawyers

The New York office of Kirkpatrick & Lockhart Nicholson Graham LLP (K&LNG) recently welcomed Willie E. Dennis and Robert S. Matlin to its corporate finance practice. Both Mr. Dennis and Mr. Matlin come to the firm from Thelen Reid & Priest LLP.

Mr. Dennis and Mr. Matlin focus their practice on private equity, venture capital, corporate, securities, and mergers and acquisitions. Their clients include entrepreneurs, public and private corporations and private equity, hedge and venture capital funds.

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The Miami office of K&LNG recently welcomed William P. McCaughan as a partner in its real estate practice. Mr. McCaughan comes to the firm from Duane Morris LLP and focuses his practice on real estate and real estate finance in both transactional and litigation matters.

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SPECIAL SECTION
Latin America

The World Bank: A Cautious Optimism On The Region

*The Editor interviews **Guillermo Perry**, Chief Economist, Latin America and the Caribbean, The World Bank.*

Editor: Dr. Perry, would you tell our readers something about your professional background and experience?

Perry: My career has combined public service with academic work. In Colombia, I held the positions of Minister of Finance, Minister of Mines and Energy, Head of the National Tax Department, and Deputy Director of the Planning Department. In addition, I also served as a member of the Constitutional Assembly that drafted Colombia's new constitution in 1991 and as a member of the Senate for a brief period.

On the academic side, I was head of the two main research centers on development issues in Colombia: Fedesarrollo and El CEDE (Centro De Estudios Sobre Desarrollo Economico) of the Universidad de los Andes, where I was also a professor. I was also a member of the faculty at the Universidad Nacionál de Colombia. I have published many books and articles on development, fiscal, trade and energy issues. I was also engaged in consulting work with the Harvard Institute for International Development, The World Bank and IDB.

Editor: How did you come to The World Bank?

Perry: I was Minister of Finance in Colombia in 1996, when the President was accused of receiving illegal campaign contributions. I resigned my post when I became concerned that these allegations might be true. Jim Wolfensohn then invited me to join the Bank as Chief Economist for the region. I had always had a very high opinion of the Bank's intellectual capacity and I was very glad to become part of the organization.

Editor: Can you summarize for us the mission of the Bank? Is there a particular mission with respect to Latin America and the Caribbean?

Perry: The mission of the Bank is to help countries reduce poverty. In order to reduce poverty, economic growth is essential, but we recognize that that alone is not sufficient. It is necessary to have an equitable distribution of growth, so that poverty reduction can take place as fast as possible. The Bank works both on issues related to economic growth and towards empowering the poor through human capital, access to education and health services, access to infrastructure, access to credit, to land, and so on. There is a clear recognition that poverty is more than an issue of low incomes.

Editor: You have become one of the Bank's principal spokesmen on the economic prospects of Latin America and the Caribbean. Much has changed over the past ten years or so. For starters, can you tell us about the market reforms of the 1990s? What went wrong?

Perry: The results of the reforms were positive, but somewhat disappointing, which is not the same thing as saying they were wrong. We should remember what prompted the pro market reforms. During the 1980s most of the Latin American countries entered the worst period in their economic history, and the reforms were implemented at that critical juncture. In the 1970s there was great access to international credit. Many Latin American countries abused that access, which left them in a very vulnerable position. When the United States Federal Reserve sharply increased interest rates in the early 80s, capital flows reversed and the governments were not able not pay their debts, with a few exceptions. The so called "debt crisis" resulted in negative growth for most of these countries. Countries thereupon implemented stabilization programs that constituted the obvious response to a situation that should not be permitted to occur again. Unfortunately, some macroeconomic vulnerabilities remained that led to the Mexican crisis of 1994 and that to which Argentina and Uruguay were subject in 2000/01, after the Russian crisis of 1998. Today Latin America's economies are more resilient and better able to weather external shocks. While there is room for improvement, macroeconomic policies today are managed in a responsible manner.

The second reason why the 1980s were so bad had to do with over reliance on a model of trade protectionism and generalized government intervention to provide subsidies to the manufacturing sector. That model produced significant growth during the 1950s and 1960s, in the golden decades of the world economy, although not as much as the growth in countries that followed more open trade policies, such as East Asia and the southern European countries. This model of Import Substitution began to flounder in the early 1980s, a time of very low productivity growth in Latin America. This was indicative of the obvious limitation of a protectionist model where growth is dependent solely on domestic markets. The pro-market reforms were an adequate response to these problems.

The outcomes of the reforms were not bad at all in the early years. From 1990 to 1998 Latin America grew at about 3.5 per cent a year, equivalent to 1.7 per cent per capita, which was slightly above the rate of growth of the rest of the world. During this period, productivity and investment were increasing rapidly in the region. Unfortunately, the Russian crisis came in 1998, and the following year saw a significant retrenchment of capital flows into the region. The most vulnerable countries, Ecuador, Venezuela, and Brazil, experienced currency crises, and Argentina began a protracted recession and then could not maintain its currency peg and fell into a major contraction. Argentina carried neighbor Uruguay with it.

Today the region is again growing well. Indeed, last year's growth of around 6 per cent (4.5 per cent per capita) was the best in 25 years, and this year we are going to see substantial growth as well (around 4 per cent).

In summary, it is not correct to say that the reforms failed, but it is true that they did not meet the expectations that we had at the beginning of the 1990s. They did result in additional growth, but not enough to put the region at the same level of growth as the East Asian coun-

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