EMPLOYMENT ARBITRATION

Advanced Dispute Resolution for a Global Economy

"Our litigation system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

Warren Burger
Chief Justice
United States Supreme Court

American business today is faced with meeting the challenges of a global economy in the new Millenium. Our competition is no longer just located in Miami, but in Moscow, Manila and Malaysia. The techniques of prior years are no longer sufficient for successfully dealing with the problems foisted upon your clients by a plethora of often ambiguous legislation. Intelligent business people have long recognized that a diverse workforce affording every employee the opportunity to progress as far as their talents permit is more than part of the American tradition. It has always been and will continue to be an absolutely essential part of our profitability and success. Discrimination today is not just wrong, it is economic suicide in a global economy.

Contemporary reality is that well meaning people who have never had to pay taxes or meet a payroll have hobbled businesses in ways unknown to our international competitors. If your clients are to succeed in the global economy then they and you must be more innovative, more creative and far more imaginative than previously in dealing with the challenges posed by international competition. It is imperative that such imagination and creativity also extend to navigating our own legal system. The use of mandatory employment arbitration should now constitute an integral part of your clients strategy for personal and global success.

Today everyone knows the serious and numerous defects of the court system. Those legitimate criticisms are regularly articulated in the halls of Congress, the Texas Legislature, the chambers of our Courts, in "exposes" in the news media and frequently even in your own offices when consulting with clients. A few of the most notorious and best known problems of our legal system are its' delay, expense and loss of privacy. As former Chief Justice Burger noted " The notion that most people want black-robed judges, well dressed lawyers and pine paneled courtrooms as a setting to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible." Arbitration effectively and efficiently provides that relief.

Arbitration offers numerous advantages to both employees and employers. It has many of the benefits as mediation, but with the difference that an Arbitration Tribunal will make a final and binding decision. The best known advantages of arbitration are those of: **Speed.** Arbitration is usually completed in a period of months. Sophisticated Rules, such as those of the National Association for Dispute Resolution or the Center for Public Resources, are designed to conclude a case within 180 days, whenever possible. If the Arbitrators decide that any party is entitled to a monetary award, an injunction or any other legal or equitable relief, it will obtained faster in arbitration, than in Court. **Reduced Cost.** A recent study found that arbitration was approximately **20.4%** less expensive than litigating the same cases. **Expert Decision Makers.** Arbitrators specialize in resolving employment

disputes. They are far less likely than a jury to decide a case based on bias, prejudice or antipathy toward a particular party or statute. **A Full and Fair Hearing.** Arbitrators always listen to the case and not dismiss claims on technical legal grounds without giving the parties a hearing. **Privacy.** Arbitrations are conducted with only the parties and counsel present. There is no public record. **Complete Relief.** Arbitration Tribunals are designed and empowered to provide the same legal and equitable relief available in a Federal Court. Arbitration does not waive the substantive rights of any party. It only changes the place where those rights will be asserted.

The Federal Arbitration Act, Title 9 U.S.C. 1 et seq., is the primary, and by far the most important, statute governing the use of arbitration in the United States and the jurisprudence interpreting it are the foundation of all employment arbitration, not governed by a collective bargaining agreement. The United States Supreme Court began in the 1980s to interpret the Federal Arbitration Act expansively and began to rigorously enforce virtually all agreements to arbitrate, without regard to any restrictive provisions of state law. Today the Federal Arbitration Act has been interpreted by the Supreme Courts of the United States and the State of Texas as essentially establishing an almost completely federal standard for arbitration. The Courts' interpretation of "commerce" has been repeatedly interpreted as demonstrating Congress' intent to ensure that the Federal Arbitration Act reaches to the fullest extent of its' authority under the Commerce Clause. The key to understanding both Courts reasoning is that they view the public policy of the United States to be not merely in favor of, but affirmatively supportive of the expanded use of arbitration in all fields, including employment.

The 1991 Landmark Events.

Employment law in the United States was irrevocably changed in 1991 by two significant events, the passage of the 1991 Civil Rights Act and the United States Supreme Court decision in Gilmer vs. Interstate/Johnson Lane Corporation 111 S. Ct. 1647 (1991). While Congress created new employee rights, at the same time it expressly recognized and encouraged the use of arbitration as a method of determining those rights. Shortly thereafter the Supreme Court provided an explanation of the wide availability of arbitration for resolving disputes in the non-union employment arena.

The Gilmer case began the entire process of the use of final and binding arbitration for the resolution of employment disputes, outside of a collective bargaining agreement. The United States Supreme Court, expressly held that, by agreement, claims under the A.D.E.A. could be subjected to compulsory arbitration under the Federal Arbitration Act. The contentions of the parties in this case were highly significant, because of the way the Supreme Court disposed of the numerous objections to arbitration advanced by the plaintiff. This decision provides a critical insight into the Supreme Court's analysis of disputes concerning the effect of arbitration agreements. It is essential reading for everyone in the employment arbitration field.

Significantly, the Supreme Court began its analysis of this case with a review of the history and purpose of the Federal Arbitration Act noting that the intent of that statute was to "reverse the long-standing judicial hostility to arbitration agreements... and to place arbitration agreements on the same footing as other contracts. This Supreme Court decision requiring the arbitration of a federal statutory right firmly established the ability of all employers to establish mandatory enforceable arbitration programs. In recognizing the standard for arbitrability to be that of the "liberal federal policy favoring arbitration", the Court gave all of the parties to the employment relationship the unquestioned opportunity to resolve all of their disputes privately through arbitration. The views of the Court in Gilmer have been widely accepted and expanded in numerous subsequent cases by all of the Circuit Courts of Appeals, except unsurprisingly, the perennial renegades of the Ninth Circuit.

Significantly, the same Congress in the obscure Section 1207 of Public Law 102-166, another and far less known section of the 1991 Civil Rights Act, specifically required the exclusive use of an arbitration procedure for all employment claims against the United States Senate, its members or their Offices. In the same law granting jury trials in Title VII cases, juries were eliminated in the Senate process. Certainly Congress would never enact a law depriving ordinary citizens, such as your clients, of the obvious benefits of a procedure specifically designed for the United States Senate. With proper planning, the Federal Arbitration Act provides every attorney the ability to provide their clients the same benefits of arbitration available to a United States Senator. Unsurprisingly, the EEOC has been noticeably silent about that particular procedure. Quo animo? Res ipsa loquitor.

THE TEXAS SUPREME COURT CASES.

The Texas Supreme Court in Prudential Securities Inc. et al v. Marshall, 909 S.W.2nd 896, since amplified in EZ Pawn v. Mancias, 934 S.W. 2d 87, reiterated the Court's long-standing policy of favoring the use of arbitration. The Court stated yet again that the "arbitration of disputes is strongly favored under federal and state law." Indeed, the policy in favor of enforcing arbitration agreements is so compelling that a (Texas) Court should not deny arbitration *"unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue."* Critically, the Court stated that when a party asserts a right to arbitration under the Federal Arbitration Act, the question of whether a dispute is subject to arbitration must be determined under federal law. Genesco v. T. Kakiuchi & Co. 815 F.2d. 840, at 845. and that "A party who is erroneously denied the right to arbitration has no adequate remedy at law because the fundamental purpose of arbitration--to provide a rapid, less expensive alternative to traditional litigation--would be defeated." Consequently, the Courts of the State of Texas are required to follow federal law and jurisprudence when determining the arbitrable nature of claims subject to arbitration under the Federal Arbitration Act, or be subject to mandamus to correct any misapplication of that statute.

The Texas Supreme Court specifically found that there is nothing *per se* unconscionable about arbitration agreements and that even "assuming that unequal bargaining power between (an employer and an employee) exists does not establish grounds for defeating an agreement to arbitrate under the Federal Arbitration Act. citing Gilmer, at 1655-56." Finally, the Court also disposed of plaintiff's contention that the Texas General Arbitration Act prevails over the Federal Arbitration Act and that therefore his suit, which alleges personal injuries suffered because of his wrongful discharge, was exempt from arbitration. See Tex. Civ. Prac. & Rem. Code Section 171.001(c) (personal injury suits exempt from Texas Act except upon counsel's advice and upon written agreement). The Court found that "Here the agreement refers to both the Texas Act and the FAA. This is not uncommon. In such cases, we have held that the FAA prevails." [The FAA contains no such provisions hostile to the arbitration of personal injury claims and a plethora of cases have enforced the arbitration of tort claims.] Consequently, once the employer established a valid arbitration agreement under the FAA, the employee had the burden to defeat it. Since he was unable to convince the court he could overcome the strong presumption favoring arbitration under the FAA, arbitration was mandated.

Despite the continuous national trend of the jurisprudence toward enforcing arbitration agreements, some cases remind us that this is still an area for continued caution. Ill planned and "cute" agreements have been stricken. Aside from the perennially hostile and openly anti-arbitration Ninth Circuit, two other courts, the U. S. Eleventh Circuit and the Fourteenth Court of Appeals in Houston have also recently spoken. In Paladino v. Avnet Computer Technologies, Inc (No. 96-2341) the Eleventh Circuit affirmed a district courts decision refusing to compel arbitration. The Court found that where the employer tried to restrict the arbitrators by only permitting them to "award damages for breach of

contract", it was seeking to evade its obligations under Title VII. The Court perceived the restriction as a subterfuge to effect an impermissible waiver of the employee's Title VII remedies. If that employer had not attempted to get "cute", it appears that it could have successfully required the arbitration of this matter.

In Tenet Healthcare, Inc. v. Cooper, _S.W. _ the arbitration provisions were contained only in an employee handbook provision. Unfortunately, the handbook itself stated that it was not a contract. Tenet's attempts to distinguish the arbitration procedure as a separate mutual bilateral agreement were unsuccessful. The Court of Appeals essentially based its' decision on the point of a purported "lack of consideration" for the arbitration agreement. This decision blatantly ignores the extensive federal jurisprudence requiring attacks on the contract as a whole to be determined by a the arbitrators and the fact that a bilateral agreement to arbitrate has long been accepted as consideration. This case is now being reviewed by the Texas Supreme Court and writs may have been issued by the time this article is published. This case again points out the benefits of having independent arbitration agreements. It further confirms the advisability of requiring all issues of arbitrability exclusively be determined by the arbitrators.

Drafting Guidelines

Every attorney seeking to draft arbitration agreements should be mindful of both the federal and state jurisprudence and statutory requirements. Arbitration agreements should be independent contracts defining as broadly as possible all of the claims, differences, controversies and disputes subject to arbitration. It should clearly trigger the Federal Arbitration Act and provide that all issues of arbitrability be exclusively decided by the arbitrators. A mechanism for the selection of competent neutral arbitrators should be stated along with any applicable Rules and administrative organization. Finally, an entry of judgment clause is essential. If multiparty issues are anticipated, special provisions will be necessary and should be drawn with the utmost care.

Since all employment attorneys will increasingly be faced with arbitration issues, this area is one for continued education. A short article like this can only introduce the advantages of employment arbitration and many points of arbitration can not be effectively addressed, but upon request a more comprehensive 57 page treatise is available from the author.