CHAPTER 6

UNRESOLVED ISSUES IN EMPLOYMENT ADR

I. UNRESOLVED ISSUES IN EMPLOYMENT ADR

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Introduction

Ten years ago, in Atlanta, I addressed the National Academy of Arbitrators (NAA) on the subject of the arbitration of statutory disputes. At that time, I reviewed the types of statutory claims that labor arbitrators were then deciding on a regular basis and noted my personal views that once a question of law is presented for decision, we are charged with the task of "trying to get it right" and assume a number of obligations in terms of both hearing and decisional matters that transcend our role in labor arbitrations.

Employment alternative dispute resolution (ADR) includes arbitration, mediation, and a number of other processes. It encompasses not only statutory issues, but also questions of common law tort and contract claims. Further, unlike labor arbitration, employment ADR involves disputes between employers and individual employees who are represented in such proceedings by counsel, not by a labor union that may also have interests that conflict with their personal interests.

The field of employment ADR is still new to many employers, employees, neutrals, and appointing agencies. While reliable data is difficult to come by, it can safely be observed that individual employment arbitration and mediation has had significant growth in recent years. The growth in the process is almost exclusively employer-driven and aimed at reducing litigation costs and risk exposure as a result of the myriad of employment-related claims that can be asserted. The opportunity to avoid jury trials on a number of these claims, particularly claims that involve the poten-

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tial for punitive damages, is also a significant factor in the decision by a growing number of employers to promulgate these systems.

Due to the relative infancy of the field, we can expect many changes to occur over the upcoming years based on growing experience as to what works and what does not and based on changes in judicial case law, prevailing employment practices, and possibly even legislative initiatives designed to regulate or proscribe certain types of ADR systems.

This topic—unresolved issues in employment ADR—is very broad. Very little is presently resolved, uncertainty abounds, and the field is in a state of flux. New programs are being designed and implemented every day. New court decisions are being issued each day directing arbitration or declining to enforce agreements to arbitrate on various grounds and finding that arbitration decisions are final and binding on the parties or permitting other judicial or administrative actions to proceed. Very little of the discussion to date has focused on the restrictions, if any, that apply to mediation or other nonbinding ADR processes.

As the case law becomes more certain, there may well be significant structural changes in the plan design of ADR programs to ensure that they remain valid and enforceable and achieve the goals of all who participate in the process—employers, employees, their representatives, arbitrators, and the courts—in a more balanced fashion.

In the interim, however, the uncertainty as to the status of these programs, which are diverse in design, has spawned significant litigation and, in some cases, likely contributed to decisions to resolve matters rather than spend time and money litigating questions at the "front end" of the dispute concerning the appropriate forum, the selection of the decisionmaker, and the decisional process and standards.

My presentation this morning will focus on a number of areas. I will begin by noting some of the major, unresolved issues surrounding employment ADR today. I will then present a brief overview of the legal framework governing the concepts of unconscionability and waiver. I believe that these two concepts will result in limits being placed on ADR plans and indirectly trigger many changes in ADR design. As front-end issues related to the obligation to arbitrate or mediate, these concepts are likely to remain at the forefront of judicial decisions in the field over the next few years until the law becomes more settled. Next will come discussion of a number of plan design options, including issues concerning the

proper role of the arbitrators, the courts, and others as guardians of the fairness and efficiency of the process. Finally, I have created a number of hypothetical scenarios to provide a better framework for discussing these evolving and sometimes complex concepts.

Major Unresolved Issues

With respect to mandatory arbitration, there are many major unresolved issues at present:

1. What are the grounds on which the courts will enforce or decline to enforce arbitration agreements? The subissues include whether a written agreement to arbitrate or written submission to arbitrate exists and whether a valid defense at law or in equity to enforcement of that contract to arbitrate exists (for example, lack of consideration, unconscionability, waiver, and so forth). Are arbitration provisions that simply state that "all claims arising out of employment shall be subject to arbitration" but are silent regarding costs, selection of the arbitrator, arbitration procedures, arbitration remedies, and the like, sufficiently definite to be enforced? If so, who will determine those very important details?
2. To what degree do arbitration programs limit employees' substantive rights? Interesting questions exist as to what rights are substantive in nature and what rights are simply legitimate differences between the arbitral and judicial or administrative forums. For example, is the loss of the right to a jury trial procedural or substantive? Are limitations on discovery procedural or substantive? Are time limits for asserting claims under the ADR system procedural or substantive in nature?
3. To what degree are arbitration awards subject to review by the courts, including whether the parties in their contract may agree to limit or to expand the review that otherwise would be provided by the court under the Federal Arbitration Act (FAA)?
4. Why, in a number of cases to date, do employment arbitrations appear to be treated differently from other types of commercial arbitrations under the FAA? In terms of the standards of judicial review and application of those standards of review, greater review often prevails in employment cases. The treatment of employment disputes as meriting different processes

and different review may be the product of the rights involved, limitations on waiver, or other matters.

5. Why do arbitrators and appointing agencies treat employment arbitrations as different from other types of commercial arbitrations in terms of the rules and procedures, including the conduct of discovery, and the need for a written opinion accompanying the award? Whether this is the result of reaction to the court decisions to date, to the underlying process and rights themselves, or to the perceived expectations of the parties remains unclear.
6. To what degree are employment arbitration principles applied by the courts, by the parties, and by arbitrators in labor arbitrations when dealing with similar substantive issues (and vice-versa)?
7. To what degree do cost considerations affect the enforceability of arbitration provisions? Is it improper to burden the employee with significant costs as a condition of litigating the claim, and, if so, do those considerations apply equally to enforcement of contractual, noncontractual common law, and statutory rights?
8. Are arbitration agreements entered into pre-dispute viewed differently, in terms of their enforceability, from post-dispute agreements to arbitrate?
9. Are mandatory pre-dispute arbitration programs viewed differently from pre-dispute arbitration programs that permit employees to opt out? If such an "opt out" is permitted, but must be exercised before hire, will an employer's hiring records be examined to determine if there are lower rates of hire for those who opt out? Apart from concerns with respect to unconscionability, pre-dispute ADR programs implicate different considerations with respect to waiver than post-dispute programs.
10. To what degree will individual state laws apply? Will a consensus develop, or will there be significant variations in practice from state to state?
11. If the "agreed upon" arbitration procedures are deemed unconscionable, will minimum standards of acceptable arbitration procedures be supplied by the courts, by appointing agencies, by neutral arbitrators, by legislative or administrative bodies, or by others, or will a finding of insufficient arbitral procedures result simply in the entire agreement to arbitrate being declared void?

12. If minimum standards of acceptable arbitration procedures are supplied by the courts, the appointing agencies, the arbitrators, or others, what will those standards be?
13. What ethical standards govern the decision by NAA members and other established neutrals to participate or not to participate in specific employment ADR procedures? Are professional neutrals held to different standards from those to which "arbitrators," who function principally as advocates in the field, are held? Are attorney-arbitrators held to different standards of conduct from those to which nonattorney arbitrators are held?
14. To what degree do standards contained in the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provide valid benchmarks for defining proper arbitrator conduct and behavior with respect to employment cases?
15. To what degree should standards governing discovery be modeled on federal or state rules or practices and on judicial or arbitral procedures? Issues also exist regarding the source and limits of arbitral powers to direct discovery. Is the power to conduct reasonable discovery implicit in the FAA, or is the authority to direct discovery a product of state law regarding arbitration? Is reasonable discovery an integral part of any fair adjudication procedure with respect to subject matters that otherwise could have been asserted in court? Are limitations on discovery imposed by the ADR plan waivers of substantive rights or legitimate differences in process between the arbitral and judicial forums? What about limitations imposed by the arbitrator based on the facts of the case?
16. What are the appropriate remedies available to arbitrators for noncompliance with arbitral directives? By agreeing to arbitrate, have the parties vested in the arbitrator the full range of authority and power with respect to the subject matter in dispute that a court could exercise relative to those parties and the substance of that dispute?
17. Regarding the use of tripartite arbitration panels—whether consisting of three neutrals or consisting of one neutral and two party-appointed members—and the standards that should govern the conduct of party-appointed arbitrators, should arbitral practices follow the commercial model or the labor model?
18. Should the practice of arbitration or mediation be deemed the practice of law? If attorney neutrals engage in arbitration

or mediation, do all of the various canons then apply? Do arbitrators have the obligation or authority to enforce the canons?

19. Do standards with respect to arbitral immunity in labor matters apply to arbitral service in employment disputes? Are there any obligations to maintain or certify the record if the matter is appealed?
20. Is the arbitrator obligated to issue a written opinion? What should be the form and content of any written opinion? Is the opinion or the award being reviewed? What is the source of the obligation discussed in several cases to provide a written opinion in employment cases—a requirement that is not present in other types of FAA arbitrations?
21. Is the arbitration process a public one like the judicial forum, or is it inherently a private one? Will the key as to privacy depend on the provisions of the ADR plan itself and, if so, should privacy language be specifically included in the arbitration agreement? Do arbitrators have the authority to issue protective orders or otherwise ensure that the arbitration process remains private? What is the status of such protective orders prior to their being judicially enforced or vacated? Can or should arbitrators restrict the presence of persons at the hearings who do not have a legitimate interest in being present?
22. Are class claims precluded from arbitration per se, and, if not, how are they to be arbitrated?
23. Do arbitrators have the power to join parties, particularly if claims are being asserted not simply against the employer, but also against supervisors, managers, and/or co-workers? What standards apply to joinder? Must the parties joined have a voice in the selection of the decisionmaker? If joinder occurs, how is responsibility for arbitral fees to be allocated? Are any limitations on arbitral process and remedy contained in the arbitration program or agreement to arbitrate applicable to joined parties as well?
24. What effect will arbitral opinions and awards in employment matters be given by other tribunals? What are the effects of prior arbitral rulings, administrative determinations, and judicial rulings in employment arbitrations?
25. Regarding summary judgment, do grants of such dispositive motions improperly deprive parties of substantive rights, given the limited scope of review of arbitration awards?

26. How should arbitrators handle the special problems associated with unrepresented parties, particularly in cases where legal rights are being asserted?
27. What is the scope of arbitral authority to decide issues of procedural arbitrability, such as timeliness? Should the presumption of procedural arbitrability applicable in labor cases be applied in employment matters?
28. Do employees who are asserting Title VII claims still need to file timely charges with the Equal Employment Opportunity Commission (EEOC) and / or state deferral agencies in order to preserve their right to assert such claims in arbitration? Stated differently, is the filing of a timely charge jurisdictional with respect to the ability to assert a Title VII claim in arbitration?
29. Does the ADR procedure divest adjudicatory administrative agencies (for example, the National Labor Relations Board, unemployment compensation commissions, workers' compensation commissions) of the ability to hear claims and issue relief personal to the particular employee?
30. To what extent can interim or equitable arbitral relief be granted, and is such relief enforceable? This is of particular significance in cases involving claims of violations of covenants not to compete and theft of trade secrets or other proprietary information. Procedures may even need to be included to ensure that issues that need prompt preliminary determination proceed on an expedited basis. If this includes, however, designating a particular arbitrator to be available to address such preliminary matters (e.g., temporary restraining orders), the entire process is in danger of being declared unconscionable and invalid due to a lack of choice on the part of the employee with respect the selection of the neutral.
31. What authority exists for the arbitrator to force parties to obey interim orders entered into in connection with procedural or substantive issues?
32. To what extent does providing employees with the opportunity to "opt out" when the agreement to arbitrate is first imposed change the focus from unconscionability to issues of knowing and intelligent waiver?
33. What procedures will be used to select arbitrators in employment cases? (The cases to date suggest that incorporation of

the AAA Rules or similar procedures do not necessarily eliminate grounds for challenge to the impartiality of the arbitrator or to the fairness of the process.)

34. Are the Federal Rules of Civil Procedure and the Federal Rules of Evidence typically incorporated by reference, or do arbitration agreements specifically state that they do not apply? If incorporated by reference, will errors in applying these rules lead to judicial reexamination of the facts on an appeal or motion to confirm an arbitration award? If there is no transcript, how will rulings made by the arbitrator during the hearing be established, and, if stated not to apply, will the procedures for such cases be unpredictable and vary enormously depending on the preferences of individual arbitrators?

With respect to mediation, the unresolved issues include the following:

1. What are the applicable standards of ethical behavior?
2. When should mediation be used? Should it be used before discovery and its resultant cost commences, or at some later point when all parties have additional relevant information that may bear on the question of whether to settle or litigate, as well as the question of the appropriate terms of a fair settlement?
3. How will costs be shared? If mediation is required and adds a significant layer of cost, will courts require exhaustion of mediation before an employee is able to pursue substantive claims either in arbitration or in the courts? Is the issue in such cases a defense to the agreement to mediate, or is the question one of exhaustion of remedies? Are agreements to mediate even covered by the FAA, because they are not agreements to arbitrate?
4. Must mediators be attorneys licensed to practice in the particular jurisdiction in which the mediation is proceeding?
5. Are mediators in one case precluded from serving as mediators or arbitrators in other cases involving the same parties or the same advocates?
6. Must both parties have a voice in selecting the mediator?
7. Are the ground rules for the conduct of the mediation fair?
8. What should be the role of the mediator in cases involving pro se complainants?

Defenses to Enforcing the Agreement to Arbitrate

Prior to discussing plan design and the hypotheticals and embarking on a more in-depth discussion of unresolved issues, a brief overview of the current law with respect to employment ADR appears appropriate. Because this paper is designed to highlight certain potential areas for further discussion, rather than serve as a survey of the present case law, few case citations have been included.

The Agreement to Arbitrate

The FAA is the principal basis for requiring that agreements to arbitrate individual employment disputes be enforced. The traditional hostility on the part of state and federal courts to arbitration has shifted in recent years to a strong judicial endorsement of arbitration. The starting point for enforcement of agreements to arbitrate is the question of what constitutes an agreement to arbitrate particular claims. The weight of judicial authority to date has interpreted agreements to arbitrate broadly. Oral pronouncements that arbitration procedures constitute a condition of employment, coupled with continued employment thereafter, have been found to be sufficient to evidence an agreement to arbitrate.

Many agreements to arbitrate have been the product of unilateral action on the part of employers and have been found to constitute contracts of adhesion that have been enforced notwithstanding the lack of arm's-length negotiations and equality of bargaining power. Without more, the fact that an "agreement" to arbitrate has been imposed prior to the existence of the dispute and made a condition of employment has been found insufficient to invalidate the agreement to arbitrate. Similarly, the subject matter of the agreement to arbitrate has generally been applied broadly in favor of arbitration. Statutory claims, as well as contractual claims and common law claims, have all been found subject to the obligation to arbitrate.

Consideration

Arguments that the agreement to arbitrate lacks consideration have typically been rejected. Valid legal consideration is found to exist by virtue of an extension of an offer of employment or by provision of continued employment. In the case of applicants, consideration can be found in the employer's review of the appli-

cation. Where the agreement to arbitrate imposes mutual promises to arbitrate claims, the promise on the part of the employer to arbitrate has been found to constitute adequate consideration of the promise of the employee to arbitrate, and vice-versa.

Unconscionability, Public Policy, and Fraud

Although the courts have been relatively quick to find the existence of a binding contractual agreement to arbitrate, Section 2 of the FAA provides that "such grounds as exist at law or in equity for the revocation of any contract" provide a defense to the obligation to arbitrate. Recent cases have addressed claims that Section 2 of the FAA precludes enforcement of agreements to arbitrate with respect to the following, among others:

1. *Claims of unconscionability.* Pre-dispute arbitration agreements that lack "opt out" provisions frequently have been characterized as contracts of adhesion, and claims of unconscionability have been upheld on grounds that arbitration procedures or substantive standards have been inadequate.
2. *Claims that the contract to arbitrate violates public policy.* These have included refusals to enforce contracts that purport to require arbitration of certain statutory claims on the basis that the underlying statute did not contemplate pre-dispute arbitration or that the particular ADR procedure constituted an improper waiver of certain statutory claims.
3. *Claims that the agreement to arbitrate was procured by fraud or duress.*

Procedural Arbitrability and Related Questions

There is little question that, unless the parties have agreed otherwise, issues of substantive arbitrability are reserved for the courts. Issues of procedural arbitrability are likely questions for the arbitrator, but recent cases cast some doubt on the scope of this principle.

The U.S. Supreme Court, in its series of decisions over the past 20 years in the area of commercial and employment arbitration, has repeatedly characterized the change from the courts to arbitration as a change in forum only and as a change that does not waive or modify statutory rights. Implicit in this approach is a finding that the right to a jury trial is not a substantive right—none of the Supreme Court cases has squarely addressed the question of whether the FAA, as applied, unconstitutionally deprives

individuals of the right to a jury trial. Whether individual dispute resolution processes merely incorporate procedures that are appropriately part of the arbitration process, or whether they constitute an impermissible waiver of statutory rights, is often a fact-specific inquiry. Further, whereas many pre-dispute waivers of certain statutory rights may well be invalid, the same restrictions do not necessarily apply with respect to knowing and intelligent post-dispute waivers of statutory rights. Additionally, in a given case, the pre-employment agreement to arbitrate may not be a contract of adhesion, but may have been hammered out through arm's-length negotiation (for example, in the case of certain executive employment agreements). If employees are given the opportunity to "opt out" of the ADR procedure, even if that opt-out period occurs at the time of hire, that fact may well be sufficient to remove it from treatment as a contract of adhesion and may lower the standards imposed by the courts based on the theory of unconscionability.

Some Predictions

1. As new and more creative dispute resolution systems are designed, there are likely to be significant additional developments in the law regarding unconscionability and waiver.
2. In the new calculus of unconscionability and waiver, *post-dispute* agreements to arbitrate will stand significantly greater chance at being enforced by the courts. *Pre-dispute* agreements to arbitrate that do not preclude the right to file suit or that contain opt-out provisions are similarly likely to receive more hospitable treatment in the courts in regard to questions of waiver or unconscionability. This flows logically from the fact that unconscionability is a concept that is grounded in contracts of adhesion. Typically courts will not delve into their views as to the fairness of agreements that are reached without fraud or duress and that represent the arm's-length bargain of negotiating parties. Alternatively, if claimants retain the right to pursue statutory claims in court, any limitations contained in the arbitration procedures relative to damages or costs, for example, may not be significant in terms of the public policy of preventing improper waivers of employees' statutory rights.
3. Alternative dispute resolution systems will likely undergo changes and adapt as employers and parties become more sophisticated in the requirements of law. With regard to those procedures that are most effective in terms of administration of a workable ADR system, the most significant change in the near term is that

these systems will empower arbitrators to apply existing law with respect to unconscionability and waiver. The systems will do this by including severability provisions and broad scope arbitration language, thereby changing the forum of such disputes from the courts to arbitration. Whether this will result in the proverbial fox guarding the hen house may depend on whether bona fide neutral arbitrators are used to resolve these disputes. The arbitrators themselves, however, under this scenario will become principal guardians of the fairness and integrity of the arbitration process.

Unconscionability

One of the lead cases involving the concept of unconscionability is the decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services* (24 Cal. 4th 83 (Cal. 2000)). In *Armendariz*, the court engaged in an extensive discussion of the principle that contracts to arbitrate employment claims, including statutory claims of violation of state and federal antidiscrimination statutes, are enforceable under the FAA. The court declined to follow a decision of the Ninth Circuit that interpreted the 1991 Civil Rights Act as precluding pre-dispute contracts to arbitrate from being enforceable. The *Armendariz* court reviewed the law that had developed in California regarding unconscionability, as well as the case law under the FAA concerning minimum standards of fairness.

The *Armendariz* court also discussed extensively the opinion authored by Judge Harry T. Edwards in *Cole v. Burns International Security Services* (105 F.3d 1465 (D.C. Cir. 1997)), which held that for pre-dispute agreements to arbitrate statutory employment claims to be enforceable, the following must be present:

1. The procedure must provide for neutral arbitrators. This has been recognized in other cases to include an obligation that both parties have a voice in selection of the arbitrator or arbitrators.
2. The procedure must provide for adequate discovery. This does not mean that arbitration must function exactly as a court would relative to discovery. The test is one of sufficiency to allow the employee to vindicate his or her statutory rights in a fair process, balanced by the differences in the arbitral and judicial forums and the cost-saving objectives of arbitration. The cost savings

found in the limited and less formal nature of discovery in arbitration can be substantial when compared with the costs of discovery in litigation. Discovery may be provided by explicit discussion in the arbitration procedure or by incorporation of some outside source of discovery, such as the American Arbitration Association National Employment Rules or federal or state statutes or rules of procedure.

3. A written award must be issued by the arbitrator, accompanied by an opinion setting forth the legal and factual bases for the award. This differs from many commercial arbitrations, but stems from at least three concerns: that the appropriate legal decisional standards are used; that appropriate judicial review of the award may occur; and that the parties have appropriate faith in the integrity and ability of the arbitration process generally, and the arbitrator specifically, to address the often complex and contentious issues presented for ruling, especially given the quasi-public nature of many of the statutory rights that may be asserted.
4. The arbitration procedure must allow for the full types and scope of relief that would otherwise be available in court. To date, many of the court decisions that decline to enforce contracts to arbitration have relied on this factor. In essence, if the arbitration procedure fails to allow for the entry of the same type and amount of relief that would be recoverable if the matter were being litigated in court, the procedure often operates as an invalid waiver of statutory rights.
5. The arbitration procedure cannot require employees to pay unreasonable costs or arbitration fees as a condition of access to the arbitration forum. Such costs create an impediment to the use of the arbitration process, thereby effectively serving as an improper waiver of employees' legal rights. If employees are precluded from having their claims adjudicated in the arbitral forum and in the courts, then the procedure, viewed as a whole, is both a waiver contrary to public policy and an unconscionable contract of adhesion. Under *Green Tree Financial Corporation-Alabama v. Randolph* (531 U.S. 79 (2000)), however, it is likely that any finding of unconscionability on the basis of imposition of fees and costs will require adequate record development of the specific costs in the particular case. Whether the standard as to what constitutes excessive or prohibitive fees is objective or subjective (taking into account, for example, the net worth of the plaintiff) is not clear; nor is it clear whether the amount of

fees will be viewed as an absolute barrier or will be determined in relation to the amount in dispute. If the comparison is between the out-of-pocket costs to the plaintiff of proceeding in arbitration versus proceeding in court, it is unclear whether the entire out-of-pocket costs of proceeding in each forum will be considered or only those costs related to court fees and arbitration fees and expenses. Will expert testimony be needed to address the question of projected arbitration fees and expenses for the particular case?

The FAA itself is silent with respect to these minimum standards. These standards appear to have been crafted by the courts to balance the policy in favor of arbitration with the policies of ensuring that substantive rights are not improperly waived. Some courts have focused on the particularly significant rights being determined, such as the rights to remain free from invidious discrimination with respect to employment matters. However, there appears to be no reason to treat Title VII rights differently from the right to be made whole for contractual violations, for tortious conduct (e.g., defamation or battery), or for violations of other statutory rights.

Other Factors in the Unconscionability Analysis

A number of courts have focused on several other factors in the unconscionability analysis, including whether the arbitration process is symmetrical—in other words, whether the employer is bound to arbitrate any claims that it has against the employee under the same procedures. The *Armendariz* court declined to use this as a test, but noted that the burden rests with the employer to establish reasonable justification for the lack of symmetry. The unconscionability concept was found to limit the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself. Other factors in the unconscionability analysis are whether the employee is capable of opting out of the arbitration process and proceeding instead in the courts and whether the employer retains the right to amend (or eliminate) the ADR process without the agreement of the employee.

The offer by an employer to waive the offensive portions of the arbitration agreement will not likely save that agreement from the scope of Section 2 of the FAA because unconscionability is determined as of the date that the agreement is made.

Additionally, when the courts determine that there are defects ab initio that would provide grounds for refusing to enforce the agreement to arbitrate, some courts have simply dismissed the suit to compel arbitration (or rejected the defense to jurisdiction on the basis of the claimed agreement to arbitrate). Other courts, however, have determined that it is appropriate to reform the agreement to arbitrate judicially by removing the offending parts of the arbitration agreement. If the defects are deemed pervasive, courts are unlikely to attempt to save the agreement to arbitrate via reformation.

Severability as a Remedy for Unconscionability

The severability concept provides courts with the discretion to sever or restrict unconscionable clauses to avoid unconscionable results. When the agreement to arbitrate is permeated with unconscionability, however, courts typically decline to enforce the agreement at all. Severability is often elected when necessary to prevent parties from gaining undeserved benefits or suffering undeserved detriment from voiding the entire agreement. Examples of this might be where there has been full or partial performance of the contract. So long as the severance would not result in condoning an illegal scheme and so long as the interests of justice would be furthered by severance, courts have often embraced the concept.

If the agreement to arbitrate contains a severability provision, the arbitrator has the same discretion as is enjoyed by the courts to sever or restrict unconscionable clauses. Viewed somewhat differently, is the arbitration process a purely private one reflective of the "intent" of the parties, with the courts the sole guardians of unconscionability, or do arbitrators enjoy the authority to interpret the agreement to arbitrate in a lawful manner? If severability and unconscionability depend on a disputed view as to the substance of the agreement to arbitrate, is not interpretation of the arbitration agreement itself one of the functions entrusted to the arbitrator? Further, do not arbitrators have the inherent authority to ensure that, once invoked, arbitration proceeds on a fair and appropriate basis? Is the issue one of substantive arbitrability—a question reserved for the courts—or is the issue one of interpretation of the agreement to arbitrate in accord with the requirements of law—a question arguably within the authority of the arbitrator? Does it matter if the arbitration agreement itself contains a severability provision or states that disputes regarding arbitrability are to be decided by the arbitrator?

Minimum Due Process Requirements

The Due Process Protocol, developed and adopted by the American Bar Association, the NAA, the AAA, the Federal Mediation and Conciliation Service, the National Mediation Board, and other organizations, sets forth what are deemed to be general minimum due process requirements applicable in the case of the arbitration of statutory claims. The case law regarding unconscionability has not, to date, determined whether an arbitration procedure that is so unconscionable that it will not be enforced with respect to statutory claims may be deemed valid with respect to the enforcement of contractual claims. From a purely analytical perspective, it would seem that unconscionability as a defense to contract enforcement should be the same whether applied to statutory, common law, or contractual claims, particularly because unconscionability should be determined by the circumstances present at the time of contract formation. There are admittedly significant differences, however, with respect to the arbitration of statutory and contractual claims to the extent that the particular defect in the arbitration procedure implicates considerations of waiver and conflict with public policy.

The Due Process Protocol does not purport to distinguish between pre-dispute and post-dispute contracts. As previously noted, however, one would expect greater acceptance and less judicial scrutiny of procedures in the case of post-dispute agreements to arbitrate. The Due Process Protocol also takes a different approach toward the sharing of arbitration costs than do many of the judicial decisions to date on the matter. The Due Process Protocol expresses a preference for shared costs based on the perception or assumption that there is bias if one party (the employer) pays the full costs of the arbitration. The courts, however, have been concerned principally with removing impediments to access with respect to the ADR procedure and therefore decline to enforce arbitration agreements that impose excessive costs or fees on the employee. Some systems leave to the end of the process the task of allocating fees and vest arbitrators with discretion with respect to that task. Whether such an approach will pass muster as an enforceable agreement to arbitrate is unclear at present. The potential problem is that some employees will decline to use the arbitration process simply because, in addition to responsibility for their attorneys' fees and costs, the possibility exists for them to also be responsible for a portion or even the entire amount of the fees and costs of the arbitration process.

Plan Design Questions

The terms of the agreement to arbitrate are central to its enforceability. Good plan design is critical if the ADR process is to resolve employment disputes fairly and efficiently. Poor plan design may lead to costly litigation over enforcement of the agreement to arbitrate and may result in a finding that the ADR process is unenforceable. It is beyond the scope of this paper to establish a checklist or blueprint for the comprehensive design of an employment arbitration or mediation system; it may be helpful, however, to list the major substantive issues inherent in any design of many such plans:

1. Is the agreement mandatory, or is there an ability to opt out? If the ability to opt out is granted, when may it be exercised—at any time prior to the dispute, on application or hire, or at some other defined interval? If an opt-out feature is offered, should there be any period for consultation with counsel?
2. What issues are subject to the agreement to arbitrate, and what specific exclusions should be made to the commitment to arbitrate? Will collateral issues or claims be covered by the agreement to arbitrate? Should the agreement include a commitment to arbitrate "all disputes arising from employment," or should it be limited to claims of contractual violation, violation of statute, or common law claims arising from employment with certain exclusions (for example, appeals of claim denials regarding ERISA benefits that are covered by a plan claims procedure, claims for unemployment compensation and workers' compensation benefits, and so forth)?
3. Should the agreement to arbitrate be bilateral; in other words, should it bind the employer to arbitrate claims against the employee as well? Should others be included in the agreement to arbitrate (co-workers, supervisors, and independent contractors or other agents of the employer) and, if so, do these individuals need to assent in writing to the arbitration agreement?
4. Who should pay for the ADR process?
5. Should the ADR provisions attempt to describe or limit relief in any way?
6. Should the ADR provisions contain time limits on their invocation? If so, should such time limits be uniform, or should

they mirror the applicable periods for initiating claims in judicial or administrative forums?

7. What state laws should be stated to govern the arbitration agreement?
8. What provisions should be included with respect to severability and adherence to law? Should the arbitrator be empowered to address questions of procedural arbitrability, substantive arbitrability, severability, or claims of conflict with law?
9. How should the arbitrator be selected? Is it important that a professional neutral be chosen to preside over and decide such claims, and, if so, how is competence to be determined with respect to the subject matter of the dispute?
10. Should specific language regarding privacy and confidentiality be included in the arbitration agreement? Does the inclusion of such language affect the authority of arbitrators to issue protective orders and the like?
11. If the arbitration agreement is silent regarding details, does the FAA vest an arbitrator with the full panoply of judicial authority as it relates to the parties and the subject matter of their arbitration?
12. Should specific arbitration and mediation procedures be included in the agreement to use the ADR procedures, and, if yes, should the agreement specifically make the Federal Rules of Civil Procedure and the Federal Rules of Evidence applicable or not applicable? Should transcripts be either banned or required (balancing cost, privacy, and the potential for appeal, as well as potential collateral proceedings)? Should a written opinion be required, and, if so, should the agreement note the level of detail expected, or leave that matter to the discretion of the arbitrator?
13. Should the agreement set forth specifics regarding discovery, including both obligations and limitations? Should any such limitations (for example, limits or bans on depositions) be capable of modification if deemed necessary by the arbitrator in the interest of justice (or some similar standard)? Should the agreement to arbitrate include provisions concerning the process for addressing pre-hearing motions, exchanges of witness lists, locations of the hearings, and the like, or should it leave such details to the discretion of the arbitrator if the parties cannot agree?
14. Should the agreement specifically empower the arbitrator to enter interim or equitable relief, and, if so, should provisions

also be included for interlocutory enforcement of such interim orders? The ability to grant temporary or interim injunctive relief is particularly significant in covenants not to compete, business records, and trade secret disputes.
15. Should the agreement incorporate any particular set of standards of ethics that govern the conduct of arbitrators?
16. Should the agreement provide for a single neutral or for a tripartite board of arbitrators? If the latter, who will pay for the party-appointed arbitrators?
17. Should the ADR program provide for mandatory mediation?
18. Should the ADR program include specific written provisions regarding the confidentiality of mediation communications?
19. When should mediation be scheduled? How should the mediator be selected, and who should pay?
20. In the case of larger employers, should a separate individual or office administer the ADR program, outside of the authority of human resources personnel?
21. If these or other matters are to be addressed by incorporation of an existing system, how well do the AAA's Employment Rules, those of JAMS/Endispute, or other organizations address these and other relevant concerns?

The Hypotheticals

A series of hypothetical scenarios may provide a better framework for exploration and discussion of selected principles. For purposes of these hypotheticals, a fair ADR procedure is presumed to be one that contains appropriate due process protections and comports with the law regarding substantive and procedural unconscionability (except as modified specifically in each hypothetical). Assume further that the ADR procedure purports to vest the arbitrator with jurisdiction to determine arbitrability and further includes a severability provision.

Most of the hypotheticals represent scenarios that one can easily envision occurring in the present or the near future. Other hypotheticals present scenarios that are less likely to occur in the near future but provide an interesting frame of reference for discussion of the issues inherent in ADR design and enforcement of a promise to arbitrate an employment dispute.

Hypothetical 1

The employer offers employees, upon hire and as a condition of employment, a choice to (1) receive a salary of $50,000 per year and retain full rights to pursue legal and administrative actions; (2) receive a salary of $55,000 per year (110 percent of the salary payable if all legal rights are retained), but receive the right to arbitrate all legal claims (paid in full by the employer) without restrictions on remedy; (3) receive a salary of $60,000 per year (120 percent of the salary payable if all legal rights are retained), but receive the right to use a fair ADR procedure (costs shared equally by each party) that waives the right to punitive damages, limits compensatory, non-wage-related damages to $50,000, and limits reasonable attorneys' fees to $20,000, but otherwise comports with the substantive and procedural law regarding unconscionability; or (4) receive a salary of $65,000 per year (130 percent of the salary payable if all legal rights are retained) and receive the right to use a fair ADR procedure that is paid for equally by the employer and employee, but that waives the right to punitive damages, the right to compensatory, non-wage-related damages, discovery, the right to a written opinion, and the right to receive attorneys' fees.

If the employer supports the differentials in pay based on actuarial analysis or differences in cost of business insurance, would such a mechanism be enforceable?

Does unconscionability analysis apply to options 2, 3, and 4, given the fact that employees had the option of choosing option 1?

Are options 3 and 4 improper pre-dispute waivers, or are they enforceable?

If options 3 and 4 are deemed either unconscionable, despite their voluntary nature, or contrary to public policy as inappropriate waivers of legal rights, are employees who challenge those options obligated, as a condition precedent to any judicial challenge of those options, to refund the "excess" salary received (either with or without accrued interest)? Must the employee return the "excess" salary received as a condition precedent to attempting to assert claims, without any limitations, in arbitration?

If not refunded, is the "excess" salary received entitled to be offset against any recovery by the employee?

Will Older Workers Benefit Protection Act (OWBPA) standards regarding waivers of rights under the Age Discrimination in Em-

ployment Act (ADEA) be applied when determining whether, as a condition of pursuing suit, the employee must restore the "status quo ante" and return the excess salaries collected over his or her tenure?

If this mechanism is appropriate, how does one determine whether the "market" value of the job is the $50,000 figure (in which case certain rights have been purchased through excess salary payments) or whether the market value of the job is the $65,000 figure (in which case employees are arguably being penalized for retention of their statutory and other legal rights)?

Would it matter if the agreement to arbitrate related to a highly paid executive with an individually negotiated employment agreement (or even an attorney at a law firm) instead of an across-the-board policy applied to all employees?

If the election occurs as of the date of the employment application, may the plaintiff obtain hiring records to discover whether employees who opt for the lower salary are rejected in disproportionate numbers?

Can an NAA member serve as arbitrator under this system?

Hypothetical 2

An employer has a fair ADR procedure in place as a condition of employment. After termination, the employer offers employees the following choices:

- the ability to use the fair ADR procedure to address any claims arising out of the termination, with no severance payments and no restrictions on relief that may be granted by the arbitrator;
- payment of 90 days of pay in exchange for waiving the right to punitive damages, limiting compensatory, non-wage-related damages to $50,000, and limiting reasonable attorneys' fees to $20,000 (assume that the ADR procedure otherwise comports with the substantive and procedural law regarding unconscionability); and
- payment of 180 days of pay in exchange for waiving entirely the right to punitive damages, waiving the right to compensatory, non-wage-related damages, and attorneys' fees, but otherwise allowing employees to arbitrate claims under a fair ADR procedure.

Are these options enforceable? If an employee elects option 2 or 3 and takes payment, must the employee return the pay as a condition precedent to challenging the limitations on relief?

Is the challenge with respect to the limitations on relief an arbitrable issue?

If option 2 or 3 has been selected, may an NAA member serve as arbitrator under this arrangement?

Will the OWBPA standards be the benchmark against which valid releases will be measured even for non-ADEA claims?

Hypothetical 3

After termination, an employer offers an employee the option for mediation (one day, fully paid for by the employer) and if, at the end of the day, the matter is not resolved, then the mediator is to become the arbitrator and must pick one of the two final settlement positions of the parties as the award, without accompanying opinion. The allegations include claims of both violation of a written contract of employment and claims of unlawful discrimination in violation of state, federal, and common law claims.

Is such an agreement enforceable?

Can an NAA member serve as arbitrator under this arrangement?

Assume that the arbitrator determines that the employer violated the employee's rights and that the proper measure of damages is $100,000, but the final positions of the parties are $30,000 (employer) and $175,000 (employee). What should be the arbitrator's award?

If agreed to prior to the dispute arising, would such an arrangement be enforceable?

Hypothetical 4

An employment ADR procedure imposed as a condition of employment contains deadlines for filing a claim. The time deadlines are (1) 1 week, (2) 6 months, (3) 1 year, or (4) the same time period or periods that would apply if the claim were being asserted in court.

Should these time periods be enforceable? If not, why not?

Who should determine if the time limits were met or should be modified or stricken—the courts or the arbitrator?

Does it matter if the rights being asserted are contractual or statutory in nature?

Hypothetical 5

An employee asserts a claim for improper termination and for sexual harassment against both her employer and against several supervisors, managers, and co-workers. There is a pre-dispute fair ADR procedure in effect.

Will the ADR procedure include the claims lodged against supervisors and managers? Against co-workers?

Will the ADR procedure include the claims against the employer to the extent based on respondeat superior, but exclude the underlying tort claims against the managers and co-workers (which may proceed independently in the courts)?

If the ADR procedure expressly notes coverage for such matters, do the supervisors, managers, and co-workers need to separately assent to arbitration, since they were not parties to the initial agreement to arbitrate?

Who needs to assent to the selection of the arbitrator, and may the claims against different defendants be joined for hearing in a single proceeding?

If the claims are not arbitrable and proceed in court, what weight (if any) will the findings in the arbitration proceeding be given? Will the judicial findings, if entered first, be given collateral estoppel effect or be admissible in arbitration?

Hypothetical 6

An employer has promulgated as a condition of employment a fair ADR procedure that encompasses statutory claims.

Must employees who wish to assert Title VII claims also file charges in a timely manner with the Equal Employment Opportunity Commission and/or a local state deferral agency?

If the employee files a charge with the local state deferral agency, should the employer decline to respond?

Would the filing of the charge be deemed a breach of the ADR agreement?

Are there differences between charges filed with adjudicatory and nonadjudicatory administrative agencies?

Hypothetical 7

An employer with a fair ADR procedure grants year-end bonuses, but requires that, in exchange for receiving those bonuses, employees must sign releases for all employment-related claims that may have occurred up to that point in time. Employees are free to decline the bonuses and not to sign the annual releases.

Will such releases be given effect in arbitration? If not, will employees be required, as a condition of maintaining a claim in the courts or in arbitration for actions taken in those earlier periods, to refund their previously received bonuses?

Hypothetical 8

An employee attempts to assert class claims in an arbitration arising under a fair pre-dispute ADR procedure.

Should those claims be cognizable?

What standards should be applied with respect to determining if a class action may proceed?

Does it matter if the ADR procedure is silent or has provisions with respect to class claims?

What effect does the pendency of an individual claim in arbitration have on the ability of the employee to serve as a class representative?

If a class claim is resolved on the basis that individual issues will proceed to arbitration, what weight (if any) should earlier arbitrations have on subsequent arbitrations with respect to procedural and substantive issues?

Hypothetical 9

An employer places a fair ADR system into effect at the time of hire. The system states that it covers not only matters relating to termination of employment, but all claims arising out of employment.

Are claims concerning workers' compensation, unemployment compensation, denials of health insurance claims, or claims for disability retirement arbitrable?

Does it matter if the employer is self-insured with respect to these claims?

Should the benefit plan claims procedures be used instead for such claims?

Would appeals of claims denials then be appealed to arbitration or to the courts?

Would the same scope of review applicable in judicial actions under ERISA be applicable in arbitration?

Hypothetical 10

An arbitrator is selected under an ADR system in which the arbitrator has served previously. The arbitrator discloses that prior relationship to both parties.

If the employee objects, should the arbitral recusal occur?

If there is no objection, should the arbitrator disclose the prior opinions or awards to the employee or to the employee's counsel even absent a request to do so?

Must disclosure occur if the arbitrator has performed neutral work for the law firm representing either party at any point in the past?

Do different standards apply in California or other jurisdictions based upon local statutes or rules?

Do principles of preemption apply to arbitrations in certain types of arbitration cases?

If objection is made based on such prior service, should the arbitral recusal occur?

Hypothetical 11

Pursuant to a fair ADR procedure, a claim is asserted. The employee elects to proceed pro se. The employee files no discovery and seeks no information prior to the hearing.

Should the arbitrator advise the employee of the right to engage in discovery and explain the mechanism for engaging in discovery?

Should the arbitrator suggest to the employee that he or she would be better off with legal representation?

Should the arbitrator force the employee to attempt to characterize in legal terms the claims being asserted?

Should the arbitrator disregard clear statutory or contractual violations that are supported by the record evidence but are neither identified nor argued by the pro se employee?

If the arbitrator is unwilling to assist the pro se employee on the grounds that it would be improper to serve as a de facto advocate, should the arbitrator rely on jurisdictional or other defenses that

are presented on the record but never cited or relied on by the employer?

May the employer be represented by a non-attorney in employment arbitrations (or an individual who, while an attorney, is not admitted to practice in the particular jurisdiction in which the arbitration is taking place)?

Should or must the arbitrator make inquiry into the status of the representatives?

Hypothetical 12

Suppose a claim of unlawful discrimination is being mediated. The mediator comes to learn that the employee is willing to decline reinstatement and execute a release for a one-time payment of $100,000, and the employer is willing to resolve the matter on the basis of no reinstatement, a release, and a one-time payment of $125,000. What are the mediator's obligations in terms of assisting the parties to resolve the matter at the $100,000 figure, the $125,000 figure, or some other figure?

Is the mediator's personal view as to the merits of the claim a legitimate factor to be considered in deciding where to nudge the parties?

Hypothetical 13

On the first day of hearing, the plaintiff is accompanied not only by counsel but by local representatives of the NAACP and by several local journalists.

If the ADR procedures are silent on the subject, what restrictions, if any, exist on the attendance of others at the arbitration hearing?

Is the process a confidential one, similar to labor arbitrations?

Hypothetical 14

During the course of examination or argument, one of the attorneys repeatedly makes personally derogatory comments at witnesses, opposing counsel, and the arbitrator. Instructions to refrain from such conduct have little or no effect on the errant representative.

What sanctions may arbitrators utilize with respect to recalcitrant parties or advocates or advocates who act unprofessionally or unethically during the course of employment arbitrations?

Hypothetical 15

An arbitrator speaks to the representatives for both parties jointly "off the record" and suggests that they might both benefit from resolving the matter rather than from receiving a decision.

May the arbitrator offer or suggest that he or she also mediate the matter?

May the arbitrator attempt to "arm twist" one or both parties to settle on particular grounds (e.g., suggesting that they will never obtain one or more items being sought in the arbitration)?

What are the limitations, if any, on arbitral discretion to attempt to persuade parties to settle?

What are the limitations, if any, on issuing consent or stipulated awards in employment cases? Should consent awards be reviewed as settlements of the parties if challenged or as arbitration decisions under the FAA?

Hypothetical 16

The agreed-upon arbitration procedures provide for a three-member arbitration panel consisting of two party-appointed arbitrators and a neutral chairman.

One party-appointed arbitrator is a partner of the attorney for the employee. The other party-appointed arbitrator was previously employed by the employer as in-house counsel. Prior to the matter being docketed in arbitration, both individuals became aware of the underlying facts and settlement positions of the parties but played no active role in the decisions being challenged in arbitration.

May the two party-appointed arbitrators ethically serve on the case? Should the neutral chairman raise any question about their service if neither party does so despite full knowledge of the relationships?

What standards govern the actions of party-appointed arbitrators following appointment? Are they expected to be neutral and refrain from discussion with the representatives of the parties who appointed them? Does it matter if the ex parte discussions are initiated at the behest of the neutral member of the panel?

Are discussions among the panel members cloaked with any recognized privilege?

Does the doctrine of arbitral immunity extend to panel deliberations?

Hypothetical 17

An employee is terminated for theft. The employee files a claim under an ADR process asserting improper termination in violation of a just cause provision in an employment agreement or policy handbook, discrimination, and defamation. The employer wishes to counterclaim for the value of the items allegedly stolen.

Is that counterclaim arbitrable?

Is it waived if not asserted in arbitration?

Conclusion

The employment ADR process has far more unresolved than resolved issues. The process is in its infancy, and, while uncertainty reigns today, one can expect ADR processes to evolve along many different lines. The evolution will reflect the diversity of interests and judgments among those parties promulgating or negotiating such procedures.

I predict that the next major area of development will focus on questions of plan design and the concepts of unconscionability and waiver. I anticipate that arbitrators will assume significantly more active roles in the procedures under which arbitration occurs, both generally and through application of the unconscionability and severability concepts. They will attempt, where feasible and appropriate, to save the process from being declared invalid, while simultaneously ensuring that employees receive a fair adjudication of their claims.

If the process is to function as a fair method of adjudicating employment disputes, arbitrators must "step up to the plate" and ensure that the process allows these claims to be decided fairly and accurately. Arbitrators will need to be more proactive than in labor arbitration cases with respect to case management and developing the substantive factual record, and they will have to conduct more legal research to ensure that they are deciding the dispute correctly and on the basis of the proper standards.

The traditional arbitral wisdom is that "the process belongs to the parties" and that "the arbitrator merely presides over it." This "wisdom" has limited application when the process itself is flawed and has been imposed by a much stronger party on a much weaker one, rather than as a result of arm's-length negotiation between parties of relatively equal bargaining power who have a continuing relationship with one another. The traditional wisdom is threat-

ened further because the claims being adjudicated involve issues of public law and policy rather than matters of purely private agreement.

Assuming that legislation is not enacted that will halt the trend toward adoption of these systems, one can expect norms to develop in the design of these ADR systems that will better balance the legitimate interests of employers and employees, the courts, the appointing agencies, and the legitimate interests of arbitrators to preside only in situations that are fair and regular and that achieve the valid goals of an ADR system. This will be the kind of system that enlists the services of expert arbitrators who can adjudicate employment disputes competently in a flexible, cost-effective, relatively prompt, and relatively informal forum.

II. UNRESOLVED ARBITRATION ISSUES IN THE NONUNION SETTING

HARRIET E. COOPERMAN*

Mandatory binding arbitration of employment disputes in a nonunion setting has faced challenges on many fronts, usually fed by misplaced employee fears that such a forum is more advantageous to the employer. This paper outlines how courts have addressed these arguments, the issues on which courts disagree or remain unresolved, and the issues an employer must consider in order to draft an acceptable arbitration agreement.

Background on Mandatory Binding Arbitration

Mandatory binding arbitration, as a term and condition of employment, requires that all disputes arising out of the employee's employment or the termination of employment be resolved through arbitration. Arbitration has been hailed as a welcome vehicle for the reduction and cost of litigation, the alleviation of unmanageable backlogs in the courts, and the general enhancement of

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