Beyond the Protocol: A Discourse on the Future of Workplace ADR

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I. INTRODUCTION

Background

Prior to 1991 any dialogue on the arbitration of employment disputes outside of collective bargaining was, for the most part, limited to the interpretation of negotiated agreements between employers and their critical and relatively high paid executives. The substantive terms of those agreements usually covered issues of compensation and other conditions of employment. The general basis for the inclusion of dispute resolution clauses was to avoid costly litigation over the terms of the agreement. The adjudication of any applicable statutory rights remained within the jurisdiction of the judicial system or statutorily created administrative agencies.

However, in 1991 the U.S. Supreme Court issued its decision in *Gilmer v. Interstate Johnson/Lane Corp.,*[1] Without discussing the underlying facts of the case, the Court in general permitted employers to require employees to waive their rights to sue to enforce statutory employment rights as a condition of employment. Rather the employee was required to submit those claims to an arbitration process exclusively designed and controlled by the employer. The Court reasoned that such pre-dispute arrangements were appropriate as long as the process did not diminish the employee's statutory rights but only substituted the arbitral forum for the judicial. This conclusion clearly implied that

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[1] 500 U.S. 20 (1991)

such procedures were acceptable as long as the same substantive and procedural due process protections were available to the employee.

Despite these "precautions" from the Court, many practitioners in the field became concerned that such "cram down" requirements would deprive employees of these protections; that employers would somehow craft procedures to limit any potential liability and deprive employees of the due processes afforded by the applicable statutes. There was also a concern that the outcomes would be rigged and that the designated arbitrators would not be qualified to make determinations requiring knowledge of the law. There are a number of cases that demonstrate that these concerns were well founded.[2]

In 1995 Arbitrator and then President of the National Academy of Arbitrators Arnold M. Zack gave a presentation to this Labor and Employment Law Section during the ABA Annual Meeting in New Orleans which was an attempt to address these concerns. The presentation was entitled "A Proposal for Arbitration of Statutory Employment Claims." As a result of that presentation, the ADR Committee of this Section proposed the creation of a task force to try to develop standards for the resolution of such disputes. The Due Process Task force included representatives from the AAA, ABA, ACLU, FMCS, NAA, NELA and SPIDR (now ACR). The representatives met over the following eight months and developed what has been known as "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" ("The Employment Protocol").

In general, the Protocol recommended certain due process safeguards covering areas such as the pre and post dispute arbitration, the right to representation, mediator or

[2] See for example *Hooters of America, Inc. v. Phillips,* 173 F.3rd 933 (4th Cir. 1999)

arbitrator qualification, arbitrator authority and the scope of review.[3] It has since been adopted by the AAA and JAMS as the standard of minimum procedural safeguards for inclusion in employment arbitration agreements which would be administered by these appointing agencies. Both agencies have as policy refused to administer arbitration procedures that do not meet these standards. The Protocol has also been followed by many employers as a model for drafting fair, ethical and enforceable arbitration agreements. It has also guided courts in their decisions of whether to enforce those agreements.[4]

In addition, the Protocol has served as a foundation for courts to articulate more detailed standards for enforceable arbitration agreements. The most significant example was in the case of *Cole v. Burns International Security Services.*[5]. In that case, Chief Justice Harry Edwards articulated five characteristics which would be necessary determine the enforceability of an arbitration procedure. According to Judge Edwards, an arbitration arrangement is enforceable if it:

> (1) Provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[6]

Since that time, there has been a significant change in the area of the arbitration of statutory rights. More employers have unilaterally promulgated arbitration arrangements as a condition of employment. A number of the issues that were initially raised at the

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[3] For a full statement of the Protocol please see the websites of the National Academy of Arbitrators, www.naarb.org, or the American Arbitration Association, www.adr.org.

[4] *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest,* 21 Ohio St. on J. Disp. Resol. 165, 178-84.

[5] 105 F.3rd 1465 (D.C. Cir 1997)

[6] *Id.* At 1482.

time the Protocol was drafted have never been resolved. Moreover, recent decision s of the various judicial jurisdictions have created more questions concerning whether certain agreements are unenforceable and have in some cases have shifted the responsibility of determining the fairness and enforceability of these agreements to the arbitrators themselves. These continuing issues have caused one to wonder whether the Protocol is relevant or whether it needs to be restructured. To answer this question, Arbitrator Zack the facilitator of the initial Protocol has expressed:

> "So much for how we got to the Due Process Protocol, an accident of history, and to my point of view as good as we could have done. I don't think it can be reopened. I don't think it needs to be. It is the province of the courts to assure that such one sided agreements do not deprive citizens of their statutory rights and protections. The NAA and even all the institutions which were party to the Protocol have never been called upon by the employment law community to establish standards, or to monitor the field of employment arbitration. We are largely labor management institutions seeking to protect "our" arbitration from being tarred by unfair and one sided procedures in the employment arbitration field. The Task Force was [a] few of us from a bunch of organizations which endorsed collective bargaining and negotiated arbitration procedures who sought to negotiate and reach an agreement consistent with their respective ideals to set standards of fairness in employment arbitration despite what some of us viewed as the courts effort to lighten its dockets by turning back the New Deal definition of employees engaged in interstate commerce and by equating individual employee power with that of the cooperation in creating such agreements to arbitrate. But it is as it is and I suggest that it may be time to get over it."

Nevertheless, Arbitrator Zack's conclusion raised the clear question; twelve years after the drafting of the Protocol, what is the future of due process in workplace dispute resolution?

The Conference

In order to attempt to address this question the National Academy of Arbitrators sponsored a conference on April 13 – 14, 2007 which was hosted by the Institute of Law and the Workplace, Chicago-Kent College of Law. A number of prominent arbitrators

and professors submitted papers. Arbitrators John Kagel and Arnold Zack provided a historical look at due process in the workplace and the genesis of the Due Process Protocol. Professor Richard A. Bales provided a paper discussing recent trends in employment arbitration. Arbitrator Jacquelin Drucker presented a paper providing perspectives and reflections on the impact of the Protocol in practice. Arbitrator Walter Gershenfeld discussed the role of organized labor in employment arbitration. Professor Martin Malin delivered a paper entitled "Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation." Finally, Professor Alex Colvin presented the initial phases of empirical research he and Arbitrator Hoyt Wheeler are performing on due process issues in employment arbitration. In addition to the papers presented, practitioners representing employers, employees and unions were invited to serve as discussants. The Honorable Rebecca Pallmeyer of the U.S. District Court of the Northern District of Illinois also presented her views from the bench.

The purpose of this brief presentation is not to summarize in detail the papers or the comments made by the attendees or the discussants. The papers themselves will be published this late winter in the Employee Rights and Employment Policy Journal. Rather this is intended to describe some of the issues raised during the conference and some of the proposed solutions. You are encouraged to read the papers once they are published and hopefully become involved in the discussion on the future of due process in employment arbitration.

II. Issues Raised

Despite the efforts of the Protocol Task Force, there have always been a number of outstanding issues that the organizations involved in its crafting could not reach a

consensus on a resolution. According to Professor Bales, those issues fall into five general categories: Contract Formation, Barrier-to-Access Issues, Process Issues, Remedies Issues and Judicial Review. Clearly one of the most contentious areas continues to concern the fairness of an arbitration clause which is part of what employee advocates describe as a contract of adhesion. According to those advocates, such agreements are inherently unfair because the individual employee is forced to waive his or her right to enforce ones' statutory rights in court in order to secure employment.

The nature of these provisions are not balanced because in many cases there is little notice that an employee who takes a job actually knows what he or she is giving up as far as statutory protections. Indeed no one contemplates suing their employer on the day that they are hired. Thus there cannot be any real informed consent on the part of the employee. Moreover unlike negotiated agreements, the employer may unilaterally modify the agreement without notice or consent. They also create non reciprocal obligations on the employee without any commensurate consideration.

Even though the court in *Gilmer* apparently viewed the arbitration process as an alternative but equally effective means for an employee to pursue statutory employment rights, there continues to be controversy concerning the enforceability of agreements which limit certain substantive rights that would be available in court. For example, certain agreements provide for a limitation period to submit a claim which is less than what is provided by statute. Some agreements do not provide for the shifting of costs and fees. Others forbid employees from bringing claims in the form of a class action which is something available to plaintiffs in court. There are also agreements that limit the forum in which an employee may prosecute his or her claim. For example, a company

headquartered in California but has employees in Hawaii may require that all arbitrations occur in California. This presents a unique hardship to the employee who seeks press a statutory cause of action.

These issues in particular raised several specific and indeed emotional reactions from the discussants and some conference participants. For example Michael Leech, an employee advocate asserted that many of these employer-promulgated plans deny the arbitrator his or her ability to shift a successful Plaintiff's attorneys' fees and that the courts are upholding these plans. Thus the purposeful result has been to "dismantle" and otherwise weaken the effectiveness of discrimination laws. Arbitrator Barry Winograd raised the question: "Doesn't a ban against class actions violate Section 7's right of concerted activity and the Constitution's rights to petition one's government and, the freedom of association?"

From the employer's point of view however, many of these claims would not ever be litigated because, according to employer counsel Jay Waks, plaintiffs would not be able to find counsel represent them. The arbitration process would provide an effective alternative forum for the employee.

The practical challenges presented in the arbitration process were specifically addressed by Arbitrator Drucker from the prospective of the practitioner. For example, even though these procedures were intended to serve as a simple alternative to the time and expense of litigation, arbitrators are still faced with employer counsel who continues to engage in complicated and protracted motion practice and overzealous discovery. Many practitioners contend that arbitration was not intended to be viewed as "litigation lite" in order to increase efficiency and limit cost. Yet when the process is treated in this

manner the cost can become prohibitive to the employee. The use of motion practice is of particular concern because it does not allow the employee's claim is not fully heard and considered.

The employment arbitration process also usually allows employees to bring their claim without counsel if they so choose. This presents particular problems for the arbitrator as well as opposing counsel who are interested in preserving the integrity of the process. Should the arbitrator attempt to assist the *pro se* claimant in order to lend some balance to the hearing?" Indeed, for the employer these process challenges have on occasion served to negate any expected savings in litigation costs. As a result, some employers have begun to rethink the value of such clauses. In this regard, Counsel Richard Ross reminded employers that they were destined to be disappointed if they implement an employment arbitration process as an alternative to litigation. Rather employers should concentrate their efforts on systems designed to resolve workplace disputes even before arbitration even becomes a possibility.

The enforceability of arbitration clauses on the basis of the standards articulated by *Gilmer* and *Cole* have also become at issue. According to Professor and Arbitrator Martin Malin, the U.S. Supreme Court's decision in *Green Tree Financial Corp. v. Randolph*,[7] a consumer arbitration case, and subsequent decisions from the Courts of Appeals have served as a basis for courts to stop policing the enforceability of arbitration agreements. According to Professor Malin, courts have recently either denied challenges to flawed agreements by placing substantial burdens on plaintiffs to who seek to show their unfairness or they have shifted the responsibility to determine the enforceability of the agreement to the arbitrator.

[7] 531 U.S. 79 (2000)

According to Professor Malin, the latter point raises a significant concern. Recent decisions according to Professor Malin have shifted the responsibility of the interpretation of public law subject to judicial precedent from the courts to the arbitrators. The rationale for these conclusions are based on an unwise and perhaps misguided application of the grounds underlying the concept of the arbitrability of collective bargaining agreements to employment arbitration. Even though agencies such as the AAA and JAMS have taken the responsibility of training and thereby certifying the arbitrators on their rosters, Professor Malin contends that: [t]hey cannot prevent arbitration under flawed agreements as long as there is money to be made servicing such flawed arbitration systems, there will be providers willing to render those services. There are no arbitrator licensing bodies to require that arbitrators refrain from servicing procedurally unjust arbitration systems."

Even though he admits "that self-regulation by the arbitration community will never be a complete substitute for judicial policing" the use of guidelines created by the agencies as well as organizations such as the National Academy of Arbitrators can help to fill the gap. For example the NAA's Guidelines for Employment Arbitration recognize that an arbitrator has, "[t]he power to withdraw from a case in the face of policies, rules or procedures that are manifestly unfair or contrary to fundamental due process can carry considerable moral suasion."[8] Professor Malin not only advocates that arbitrators refuse to serve under flawed procedures that fail to follow due process and protect statutory rights. He maintains that neutrals must be more assertive and "insist that employers excise such provisions from their agreements." According to Professor Malin, since the courts are abdicating the right to interpret the enforceability of these agreements, they

[8] See www.naarb.org/due-process/html

could not be viewed as exceeding their authority if they modify the agreement to comply with appropriate fairness standards.

III. Conclusion

The initial question posed by the conveners of this conference concerned whether there was a need to develop another standard similar to the protocol to address the current issues facing the adjudication of statutory rights through the arbitration process. There was clearly no consensus on whether such an action would resolve these problems. Indeed Arbitrator Zack noted that many of these issues existed when the Protocol was initially drafted. Rather he contended as stated above that the real intent of the Protocol was to protect the integrity of labor arbitration. He views the Protocol as "an accident of history" and does not think that the matter can be reopened. More succinctly he states that "I do not think it needs to be."

However, there appeared to be a sense of the conference that significantly more training was needed to equip arbitrators to be able to meet the burdens imposed by the courts after *Green Tree Financial* and individual arbitrators should be assertive in making sure that the procedures are fair. Many of the discussants, at least those who are experienced neutrals and who represent employees strongly assert that the appointing agencies like AAA and JAMS as well as the NAA as the established organization of neutrals needs to take an assertive leadership role in setting standards and training fair and impartial decision makers who will police the fairness of these dispute resolution processes and to insure that they meet the intent articulated by the Supreme Court in *Gilmer*. Indeed, some have advocated that unions take a more active role in representing otherwise *pro-se* claimants in employment arbitration. According to Arbitrator Walter

Gershenfeld, this would not only provide resources of experienced advocates to those who otherwise would not have access to effective representation but would also serve the union's interest as an organizing tool.

Since it is apparent that the Court has deferred the interpretation and application of the public law to the privately selected and privately accountable arbitrator, the neutral community, especially those members with experience with labor must take a more active role in preserving the integrity of the process. In addition, to address the issues presented by *pro se* claimants, it is suggested that the agencies and organizations do more to educate the public about arbitration and the effect of the arbitration agreement on their statutory rights as employees.

Why is this so important? The empirical studies indicate that, depending on your location, there have not been a significantly large number active arbitrations of statutory claims. However, there are more employees covered by employer promulgated and imposed arbitration procedures than workers covered by the grievance and arbitration procedures of collective bargaining agreements. Moreover, the data also indicates that even though employees are signing these agreements and waiving their right to enforce their statutory rights in court, very few have a rudimentary knowledge of the arbitration process.

Finally, it must be noted that the cases that have influenced the pattern of deferring issues concerning the validity of arbitration agreements have originated in the consumer rights area. Herein is an interesting paradox. Arbitrator Zack stated that the Protocol was initially developed in 1995 to protect the integrity of labor arbitration. Now given the influence of recent court decisions in the consumer rights area on employment

arbitration, it may be necessary for labor, management, employee advocates and the neutral community to take steps to maintain the integrity of not only labor but employment arbitration as well. So for Arbitrator Zack and others trying to insure the fairness of arbitration in the workplace they may not want to revisit the Protocol in an attempt to draft new standards to protect the integrity of the process, but they may find themselves in the shoes of Michael Corleone when he says "I try to get out, but they keep pulling me back in."