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Introduction: Current Issues in Arbitration

Shannon E. Pinkston

SPECIAL PROJECT

Current Issues in Arbitration

Introduction

"[A]n incompetent attorney can delay a case for years, while a competent attorney can delay it for even longer."[1]

This oft-repeated joke illustrates the public perception of the delays and expense that accompany courtroom litigation. Indeed, growing frustration with crowded courts and exorbitant legal costs fuels the widespread Alternative Dispute Resolution ("ADR") movement.[2] Notwithstanding the dramatic increase in its use, ADR, defined as "procedures for settling disputes by means other than litigation,"[3] is not a novel idea. In fact, ADR was present in America as early as the seventeenth century.[4] In certain parts of colonial America, voluntary arbitration was a common way to settle disputes; judicial enforcement was largely unnecessary because of the trust inherent in a society in which survival depended on cooperation.[5] By the early 1700s, however, rapid population growth and increased

1. Lisa S. Howard, *ADR Can Cut Hours, Costs, Lawyers Say*, NAT'L UNDERWRITER, Apr. 7, 1997, at 9.

2. *See* Eric Schine & Linda Himelstein, *The Explosion in Private Justice: Demand for Civil Arbitration Fuels the Rise of an Industry*, BUS. WK., June 12, 1995, at 88.

3. BLACK'S LAW DICTIONARY 78 (6th ed. 1990). Some scholars, however, argue that ADR is an alternative not to adjudication, but to unassisted settlement negotiations between attorneys. *See* Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1996).

4. *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 445 (1984).

5. *See id.* at 448-56 (describing the use of arbitration in seventeenth-century Connecticut).

migration triggered a drastic change in the nature of dispute resolution.[6] No longer able to rely on purely voluntary arbitration, people increasingly resolved disputes in court.[7]

Years later, the Civil Rights struggles and Vietnam War protests of the 1960s and 1970s discouraged tolerance for traditional courtroom disputes, while, ironically, generating new statutory causes of action.[8] The confluence of these trends triggered the modern ADR movement.[9] Since then, the use of ADR has increased dramatically.[10] Today, ADR is used in virtually all fields, including labor and employment disputes, small civil disputes, family disputes, consumer problems, environmental complaints, prisoner grievances and international conflicts.[11]

Despite the dramatic increase in the use of ADR, critics are quick to point out ADR's shortcomings. Many critics argue that ADR is a lesser form of justice, claiming that it is almost always biased in favor of large corporations, especially those who regularly employ ADR methods.[12] Other scholars maintain that as ADR becomes more prevalent in modern society, it becomes more mainstream than alternative.[13] As ADR becomes more institutionalized, the flexibility traditionally associated with ADR, as well as the parties' ability to dictate their own terms, naturally decreases.[14] In addition, the close

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6. *See id.* at 456-60.

7. *See id.*

8. *See* Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1, 2 (1985).

9. *See id.*

10. For example, case filings with the American Arbitration Association ("AAA") increased 31% between 1985 and 1994. *See* Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, *in* PRACTISING LAW INSTITUTE, DRAFTING CORPORATE AGREEMENTS 771, 771 n.4 (1997); *see also* Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2058 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)) (discussing the rapid growth of alternative dispute resolution procedures since the mid-1970s).

11. *See* Merry, *supra* note 10, at 2058.

12. A recent AAA study indicates that in employment arbitration proceedings, the odds favoring the company are five to one when the company has ADR experience. When companies appear for the first time, however, the odds are two to one that the worker will prevail. *See* Edward Baig, *When It's Time to Do Battle With Your Company*, BUS. WK., Feb. 10, 1997, at 130, 131.

13. *See* Merry, *supra* note 10, at 2059 (explaining that as ADR expands, it becomes entangled with the courts and the legal profession).

14. *See id.* at 2068 (stating that as ADR becomes more intertwined with the legal system, "routine treatment, delay, and impersonality are likely to reemerge").

link with the legal profession and its accompanying regulations may also hamper the cost-effectiveness and efficiency of ADR.[15]

These criticisms may apply equally to all forms of ADR; however, unique concerns accompany specific methods of dispute resolution. The different forms of ADR include arbitration, mediation, and mini-trials.[16] Arbitration is adjudicatory in nature and most closely resembles litigation.[17] In arbitration proceedings, parties, pursuant to an arbitration agreement, submit their dispute for consideration by an arbitrator whom the parties have selected.[18] After hearing both sides of the dispute, the arbitrator renders a binding decision.[19] Unlike litigation, however, the decision in an arbitration is final and usually cannot be appealed, regardless of whether it was fair or consistent with well-settled legal principles.[20] This finality highlights the importance of a fair and equitable arbitration agreement, one that demonstrates precisely the intent of each party. This year's Special Project focuses on the particular legal issues surrounding the creation and interpretation of arbitration agreements. The following Notes seek to guide courts and policymakers struggling to decide these critical issues.

One issue with which courts and scholars have struggled is the enforcement of compulsory arbitration agreements in employment contracts.[21] Employers are increasingly including mandatory, binding arbitration clauses in pre-employment agreements to force employees into arbitrating statutory discrimination claims; however, the enforceability of such clauses is unclear, particularly when contained in collective bargaining agreements.[22] The first Note in this Special Project, *Compulsory Arbitration Agreements in Employment Contracts from* Gardner-Denver *to* Austin*: The Legal Uncertainty and Why Employers Should Choose Not to Use Pre-Employment Arbitration Agreements*, emphasizes the lack of judicial consistency in enforcing

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15. One study shows that while arbitration reduced the costs of litigation by about 20%, it had no significant impact on the duration of the dispute. *See* Paul Marcotte, *Avoiding Courts*, A.B.A. J., Dec. 1990, at 27.

16. *See* BLACK'S LAW DICTIONARY 78 (6th ed. 1990).

17. *See Cutting the Cost of Commercial Conflict by Avoiding the Court: Alternative Dispute Resolution Gains in Popularity*, CORP. MONEY, Oct. 22, 1997, at 5 (recognizing that arbitration is similar to litigation in that the outcome binds the parties and is based on an examination of the relevant facts and laws).

18. *See* JAMES E. GRENIG, ALTERNATE DISPUTE RESOLUTION § 2.36, at 25-26 (2d ed. 1997).

19. *See id.*

20. *See* Baig, *supra* note 12, at 131.

21. *See* John-Paul Motley, Noto, *Compulsory Arbitration Agreements in Employment Contracts from* Gardner-Denver *to* Austin*: The Legal Uncertainty and Why Employers Should Choose Not to Use Pre-Employment Arbitration Agreements*, 51 Vand. L. Rev. 687, 688-89 (1998).

22. *See id.*

compulsory arbitration clauses in both individual employment agreements and collective bargaining agreements when employees bring discrimination suits under federal statutes.[23] This Note traces precedent from the Supreme Court as well as lower courts, and examines the relevant portions of the Federal Arbitration Act ("FAA"),[24] a federal statute governing arbitration issues.[25] After analyzing the legislative history of the federal discrimination statutes, such as the Americans with Disabilities Act and the Civil Rights Act of 1991, and after public rejection of mandatory arbitration of discrimination claims by government and private organizations,[26] the Note concludes that employers should eliminate mandatory arbitration clauses from pre-employment agreements.[27] The Note recognizes that employers are now taking a strategic human resources management ("SHRM") perspective, which encourages employers to treat employees as one of their strongest competitive advantages.[28] The Note further concludes that employers should not rely on legal precedent regarding arbitration clauses but should decide to use only post-employment, voluntary arbitration agreements—a practice that would emphasize the benefits of arbitration and more closely follow the policy behind federal antidiscrimination statutes.[29]

The remaining two Notes in this Special Project focus on the tensions between the FAA and state laws governing arbitration agreements. The Supreme Court has interpreted the FAA as establishing a broad national policy encouraging arbitration.[30] State laws that are inconsistent with this policy are in danger of being invalidated as a result of FAA preemption.[31] One Note, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, focuses on the different approaches taken by federal

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23. *See id.* at 693-702.

24. The relevant portions of the FAA are found in ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1994)).

25. *See* Motley, *supra* note 21, at 691-93.

26. *See id.* at 708.

27. *See id.* at 716-19.

28. *See id.*

29. *See id.*

30. *See* David F. Sawrie, Note, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 Vand. L. Rev. 721, 725-76, (1998); James Zimmerman, Note, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 Vand. L. Rev. 759, 762 (1998).

31. *See* Zimmerman *supra* note 30, at 763.

courts and the Alabama Supreme Court regarding whether non-signatories to arbitration agreements may, nonetheless, be bound by such agreements.[32] Federal courts, consistent with interpreting the FAA as encouraging the use of arbitration, have applied a doctrine of equitable estoppel to bind non-signatories to arbitration clauses in contracts.[33] The Alabama Supreme Court, which in the past had expressed unwavering hostility to arbitration agreements,[34] has developed a derivative version of the equitable estoppel analysis that potentially narrows the scope of the federal doctrine.[35] This Note studies extensively the analyses employed by both federal courts and Alabama courts and concludes that the state estoppel analysis is an appropriate retrenchment of an expansive federal policy favoring arbitration.[36]

Finally, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?* focuses on the validity of forum-selection clauses in the arbitration provisions of contracts, particularly in franchise agreements.[37] When negotiating a contract, a party with superior bargaining power may employ a forum-selection clause to designate a remote, unfamiliar forum and erect a barrier to arbitration, thns shielding the superior party from liability.[38] Many state laws are designed to remedy this problem by invalidating forum-selection clauses providing for out-of-state litigation or arbitration.[39] These state laws are in danger of being invalidated, however, because of FAA preemption.[40] This Note analyzes the scope of FAA preemptive power and argues that state laws invalidating out-of-state forum-selection clauses do not specifically disfavor arbitration clauses and, thus, do not undermine the FAA's policy of encouraging arbitration.[41] The Note concludes that these state laws are outside the scope of the FAA and should be allowed to invalidate arbitration agreements calling for out-of-state forums.[42]

As these three Notes demonstrate, the increased use of ADR, particularly arbitration, gives rise to pressing legal issues that the

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32. *See* Sawrie, *supra* note 30, at 723.
33. *See id.* at 733-37.
34. *See id.* at 741.
35. *See id.* at 752-56.
36. *See id.* at 756-58.
37. *See* Zimmerman, *supra* note 30, at 760-61.
38. *See id.* at 760.
39. *See id.* at 773.
40. *See id.* at 779.
41. *See id.* at 779-84
42. *See id.* at 784.

courts and Congress have yet to settle. The goal should be to eliminate, or at least alleviate, some of the problems associated with arbitration and to ensure that arbitration remains a cost-effective, efficient, and fair way to resolve a dispute.

Shannon Evans Pinkston
Special Project Editor