Realizing the Promise of Employment Arbitration

BY DAVID T. LÓPEZ

Long an established practice in a union setting, arbitration of employment disputes is increasingly being utilized in the non-union workplace. Its promise of being a faster, less expensive method of resolving conflicts on the job might not be fulfilled, however, without careful consideration and modification of its present application. How that is accomplished could have a far-reaching general effect on resolution of commercial, business, and other disputes.

Arbitration is a result of a contract, and it is intended to resolve differences among parties to the contract, and, in some instances, related third parties. Parties to an arbitration agreement agree to take their disputes to a private, neutral arbitrator instead of suing in a court of law. In most cases, the arbitral award is binding and subject to judicial review only upon extraordinary circumstances, although some parties might agree to non-binding arbitration as a means to facilitate settlement.

What makes a good contract? Defining a good contract as one between parties dealing in good faith, with due consideration for their respective interests and relative bargaining strengths, provides a guide for devising a good arbitration agreement.

Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons. That such arbitration might have attraction to employers is no reason to suppose that employees cannot find real and significant advantages also. To the extent that an arbitration agreement defines employee as well as employer rights, allows prompt disposition of disputes, and allays at least some of the disparity in ability to obtain legal counsel, an arbitration agreement can be attractive also to employees.

Suspicion and resistance of employees can result from the manner in which the arbitration agreement is presented.

Where arbitration is part of a collective bargaining agreement between an employer and a union, the other provisions of the contract provide the scope and standards for the arbitrator's consideration. When there is no union, the employer can dictate the terms of arbitration as a condition of employment, including what claims are subject to arbitration and how the arbitration will proceed.

A new employee, already having been offered and accepted employment, might be presented and asked to sign an arbitration agreement together with other documents in a stack of paperwork that might include standard forms for tax withholding, intellectual property and non-compete agreement, citizenship or immigration status, insurance, and other benefits. In other contexts, Texas law has defined as unenforceable an "adhesion contract" as one in which one party has absolutely no bargaining power or an ability to change the contract terms, *Service Corp. Int'l. v. López*, 162 W.W.3d 801, 809 (Tex. App. — Corpus Christi 2005, no. pet.). In *Hathaway v. General Mills*, 711 S.W.2d 227, 228-29 (Tex. 1986), the Texas Supreme Court held, however, that such a "take it or leave it" offer is valid to support a binding arbitration agreement on an at-will employee. The court has reasoned that since an employer has no obligation to retain in employment an at-will employee (that is, an employee without a union or personal employment contract), the employer reasonably can impose conditions, such as arbitration, on the employee's continued service. *In Re Halliburton*, 80 S.W.3d 566, 572 (Tex. 2002).

The relationship between employee and employer can be expected to be at its peak when the employee is first coming on the job. At that time, an employee would be receptive to a dispute resolution plan that on its face is fair and has advantages for both sides. If such a plan were presented separately and carefully explained by a human resources representative, there is no reason to anticipate any suspicion or resistance. In the *Halliburton* case, the Texas Supreme Court cited to *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) as listing fair and acceptable provisions of an arbitration agree-

ment: 1) a neutral arbitrator; 2) reasonable discovery; 3) resulting in a written award; 4) that can include any remedy available in court; and 5) not requiring the employee to pay either unreasonable costs or any arbitrator's fees or expenses. Some successful employment dispute resolution programs also have provided for pre-arbitration mediation, and even for a payment to the employee's attorney.

An arbitration agreement likely would be enforceable even without any special effort to gain the employee's understanding and confidence. The Federal Arbitration Act (FAA), 9 U.S.C. §1 *et. seq.*, specifically encourages arbitration and has been interpreted to allow arbitration even when an employee does not sign an agreement to arbitrate, *In Re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (2005). By taking the care to develop and carefully present the arbitration agreement to a new employee, the employer not only can avoid potentially costly litigation, but also promote a better relationship and foster improved morale with its employees.

Whether an employer should permit employees to opt out of an arbitration agreement is worth at least some consideration. The employer would have an interest in avoiding not only the delay, expense, and public exposure of litigation, but also the inconvenience, cost, and potential expansive breadth of an administrative agency investigation. Giving the employee the option to choose between an internal dispute resolution that works effectively to achieve a prompt resolution and the uncertainties of administrative agency processing, the employee would have good reason to choose the former. A challenge based on a public policy argument, such as the Policy Statement on Mandatory Binding Arbitration of the U.S. Equal Employment Opportunity Commission would not be entertained, and the likelihood of one employee's complaint inducing others could be lessened.

Although state and federal courts consistently have followed the FAA to uphold most arbitration agreements, such agreements are subject to challenge on legal and equitable grounds. A carelessly drafted document might be found not to constitute an enforceable agreement. Efforts by an employer at overreaching can render a potential agreement unenforceable. See, e.g., *In Re RLS Legal Solutions, L.L.C.*, 156 S.W.3d 160 (Tex. App. — Beaumont 2005, *no pet.*)(Pay due employee withheld to coerce signing of arbitration agreement).

How a challenge to arbitration is determined was decided by the U.S. Supreme Court last February in *Buckeye Check Cashing, Inc. v. Cardegna*, ___ U.S. ___, 126 S.Ct. 1204 (2006). Whether the arbitration clause applies is a severable issue that is determined by a court, while the validity of the contract as a whole is an issue for the arbitrator.

Since a substantial number of opinions have signaled the requirements for an enforceable arbitration agreement, continued growth in the use of arbitration of employment disputes can be anticipated. Employers, employees, counsel, and arbitral institutions, however, need to carefully consider how that potential for growth can best be realized and encouraged.

Traditionally, arbitration has been encouraged as a means for faster, less costly resolution of disputes. Whether or not such characterization is true, however, is subject to dispute. A well-known employment litigator and commentator, Michael P. Maslanka, opined in the March 2006 edition of the *Texas Employment Law Letter* that arbitration can be just as expensive as trial of an employment discrimination case. Arbitration of cases in which employees are challenging their discharge have extended for more than one year, making them of questionable utility to the employee who needs a regular paycheck.

Employers and employees have the first opportunity to address these related problems. The parties to an arbitration agreement must have full realization of what their contract entails. Arbitration is not necessarily the same as a suit in court. Arbitration, to be effectively used, must lead to a speedy resolution. That can involve forgoing all depositions, strictly limiting discovery, avoiding most motions, and setting a firm time for the arbitration hearing. Those items can be addressed by choosing an arbitral institution that provides for them in its rules or by including clauses addressing those concerns in the arbitration agreement.

If the agreement has had at least some bilateral participation, a challenge to arbitrability might be avoided. Once the arbitration has commenced, the parties should affirmatively try to avoid the temptation of any delaying tactic that might be deceptively advantageous.

Counsel, who might be accustomed to an all-out paper war in court, can aid the process by the early voluntary disclosure required, but often given scant consideration, in court proceedings. They can immediately attend to preparation and use specific and limited discovery, not boilerplate. In the arbitration hearing, affidavits can be substituted for direct examination, time limits imposed for each side's presentation, and the preparation of a transcript discouraged.

A good arbitrator must quickly establish firm control over the proceedings and assure that deadlines are met, postponements avoided, discovery accomplished without obstruction, and a hearing held as scheduled. Arbitral institutions must provide their arbitrators with the discretion to control and move the proceedings, and should defend the arbitrator's rulings denying unmerited postponement requests. Denial of postponement being one of the few possible grounds for

reversal of an award, there is an often unwarranted allowance of such delay.

Strict adherence of timelines allows arbitrators to utilize their time more effectively and can result in savings on the fees and expenses of the arbitrator. Effective use of arbitration that increases the number of arbitrations being administered by an organization will reduce the relative cost per case and, over time, will permit arbitral institutions to have administrative fees that do not deter the use of arbitration. There already are provisions by some institutions to allow expedited and less costly proceedings; the development and improvement of those rules is essential.

Large corporations that have implemented comprehensive dispute resolution programs, including mediation and arbitration, have reported substantial savings even where the program provides that the employer will pay the costs of arbitration and some of the employees' attorney's fees. Arbitration agreements that seek to impose a significant amount of the costs of the arbitration on the employee have been subject to challenge. Guidelines suggested for the splitting of the arbitration costs have included limiting the employee's share to an amount equal to court filing fees or to the employee's pay for one day.

Employers count the privacy and confidentiality of arbitration as an advantage, avoiding potentially unfavorable reports in the news media and limiting any impact on the workforce. Such confidentiality has a perhaps unintended consequence. While in union arbitration, with full support of federal law, there has developed a comprehensive set of precedents akin to a common law of the union workplace, the only guidance to arbitrators in non-union arbitrations comes from court precedent with respect to statutory and some tort claims.

Employees in Texas, as mentioned, serve at will. They are free to leave their employment at any time, and they can be discharged with or without good cause. Employers provide in employee handbooks for probationary periods and often list reasons that will support discipline of the employee, up to and including discharge. On recommendation of their counsel, however, employers often include a statement in the handbook that the statements therein are not intended to constitute a contract and are subject to being changed or abandoned by the employer at any time.

There are good reasons for an employer that is adopting or maintaining a mandatory arbitration program to reconsider the benefit of depriving handbook provisions of any potential for enforcement by the employee. The United States is one of a very small number of industrialized countries that continues to follow the employment at will concept. Although in some countries protection of an individual's employment has reached arguably unreasonable levels, the limits on such protection in an internal program would be subject to the employer's control. Employment at will does permit an employee to discharge an employee without having to provide any explanation or justification, except perhaps in the context of unemployment insurance. Many times, however, an employee believing to have been unjustly discharged will resort to filing charges with the Equal Employment Opportunity Commission, or other agencies, or as we know from the now-common phrase, "Going Postal," to more extreme actions.

An employer can provide in its employee handbook that, following a probationary period, an employee can expect to continue to be employed, absent good cause or a genuine financial exigency, and make discharge subject to the dispute resolution process. Certainly, the employer can contemplate what might be undesirable consequences, such as an increase in challenges to discharge actions. There are countervailing benefits, including more careful vetting of probationary employees, increased care by supervisors in documenting and improving employee conduct, discouraging disruptive anonymous complaints, and avoidance of complaints to state and federal administrative agencies.

Together with a reporting system that allows publication of arbitral reasoning on discharge cases, while perhaps maintaining confidential the names of the parties, arbitration of claims of wrongful discharge could foster an application and further development in the non-union workplace of concepts included in the "common law" established by labor arbitrators. A provision could be made to require a binding election on an employee between challenging discharge for cause or for a discriminatory motive.

Arbitral institutions in Texas have identified a large and diverse cadre of highly experienced and well-trained arbitrators for employment cases. Employers want to avoid the expense and delay of court proceedings. Employees are as anxious to avoid delay, and they crave an opportunity to be heard that to them might be as valuable as any relief a court could give. Employment arbitration can and should continue to grow, but its rate of growth and development is greatly dependent on the due care and consideration of the parties and their counsel.

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