Employers and Employees Square Off over Mandatory Arbitration:

By David A. Hoffman and Phyllis N. Segal

Little did Saint Clair Adams know five years ago, when he applied for a sales job at Circuit City, that his application would touch off a battle over workers' rights that would reach the U.S. Supreme Court, resulting in one of the Court's major decisions of this past year.

Saint Clair's job application said, very simply: any dispute with his employer would be resolved through binding arbitration -- and not in a court. However, in 1997, Saint Clair sued Circuit City, claiming that his store managers discriminated against him because of his sexual orientation.

A California court dismissed Saint Clair's case and sent him to arbitration – a decision that the Supreme Court upheld, thus dispelling the last remaining doubts that employers can, in fact, require their employees to submit disputes to arbitrators instead of the courts.

At first blush, one might think there is nothing surprising in such a decision. After all, arbitration is used virtually without exception in unionized workplaces to decide cases involving job termination or discipline issues.

So why the big ruckus over requiring arbitration to resolve non-union disputes? Why the intensely fought litigation, with civil rights groups and the U.S. Chamber of Commerce filing opposing briefs on the issue? Why the 5-4 split on the Supreme Court, along familiar liberal vs. conservative lines?

- **Fairness, cost issues**

For one thing, the stakes are much higher in the non-union workplace, because that is where 90% of American workers are employed.

Second, unlike union workers, the rest of the workforce has no one in place to take their side in designing fair arbitration requirements, or to represent them in an arbitration hearing. Experienced union representatives, shop stewards and union lawyers give unionized employees a built-in advocacy team. Non-union workers have to fend for themselves or dig into their pockets to hire counsel.

Third, employee advocates contend that by forcing employees to present their claims in the private arena of arbitration, the employer is less exposed to public scrutiny, and the employee is deprived of both a jury of peers and meaningful judicial review.

Finally, critics argue that arbitration agreements between employers and non-union employees are inherently unfair because of unequal bargaining power, the severely limited pre-hearing discovery available in arbitration, and the fact that an employer is more likely than an individual employee to offer "repeat business" to an arbitrator.

Employee advocates are not alone in opposing mandatory arbitration. Other critics include public agencies charged with enforcing employment laws (such as the Equal Employment Opportunity Commission) and professional neutrals (such as the National Academy of Arbitrators).

- **Employers' perspective**

But from the employers' standpoint, there is nothing inherently unfair about arbitration. Indeed, studies have shown that employment arbitrators are even-handed in their decisions, even in those cases where the employer is paying the arbitration fees.

Many employers favor arbitration because it is usually faster and cheaper than litigation. Employers contend that an employee who hires a lawyer for an arbitration is not disadvantaged, since counsel would ordinarily be needed if the case was filed in court. And limited discovery and judicial review -- i.e., no depositions and rare reversals of arbitration decisions -- affect both sides equally.

Employers also point out that employees can choose workplaces where arbitration is not required, and that there are advantages for both sides when their cases are heard in the conference-room setting of an arbitration -- such as the privacy and informality of the process.

Not surprisingly, many employers view *Circuit City* as an important victory, while employee advocates see it as unfortunate proof of the law of unintended consequences: as employment rights have expanded -- with anti-discrimination laws, workplace safety regulations, and statutes providing family and medical leave -- companies have begun looking to arbitration as a tool for limiting their exposure to protracted litigation and large jury awards.

- **The "civil rights issue of the new millenium"?**

One employee advocate, attorney Cliff Palefsky, describes mandatory arbitration as "the civil rights issue of the new millenium because no civil rights law has any meaning if you can't go to court to enforce it." Several members of Congress have introduced bills to ban mandatory arbitration in the workplace.

At this point, however, with only a small (albeit growing) number of employers adopting mandatory arbitration, it is not clear whether the U.S. is on the verge of a major shift towards requiring arbitration of employment disputes.

For some companies, the right to require arbitration is of little or no interest. They are rejecting mandatory arbitration because they do not believe the benefits outweigh the potential risks, such as making it easier for employees to file claims, arousing employee anger about losing the right to go to court, and foregoing judicial review of arbitration decisions that the employer considers erroneous.

Most employers have taken a wait-and-see attitude, letting the courts wrestle with thorny subsidiary issues, such as who pays for workplace arbitrations and what kind of due process rules must be implemented. In one of the Supreme Court's decisions this term, involving consumer arbitration, the Court unanimously declared that forcing consumers to shoulder unduly burdensome costs for arbitration could be grounds for rejecting arbitration and allowing consumers to go directly to court. At least two appellate courts have applied this same principle to workplace disputes.

Meanwhile, many employers and private arbitration forums have adopted a "Due Process Protocol" for arbitration, drafted by employer and employee representatives and professional neutrals. The Protocol gives employees the right to counsel of their choice, secures all of the remedies available in court, and requires the use of knowledgeable, impartial arbitrators.

- **Alternatives to arbitration**

Perhaps the most promising response to the debate over mandatory arbitration has been increased attention to other dispute resolution methods. Mediation, for example, creates an opportunity for employer and employee to talk directly to each other about the dispute and shape their own solution – instead of having one imposed by an arbitrator or judge.

Mediation sessions are usually less polarizing than either an arbitration hearing or a courtroom trial – a difference that can be especially important if the employment relationship continues after the dispute is resolved. Mediation also expands the range of possible solutions beyond the remedies that an arbitrator or court can direct – e.g., an apology, outplacement services, or even a negotiated consulting agreement. While it is true that employees may still need a lawyer if a mediated dispute is substantial, some employers are willing to provide modest stipends for representation in mediation, so long as the employee bears some of the cost of the process.

Other alternatives include giving employees the right to present disputes to panels of peers and supervisors in the workplace, for non-binding consideration of their case and then, if necessary, to an outside mediator. Such alternatives have the virtue of giving both sides a full and fair opportunity to be heard, while at the same time keeping cost and formality to a minimum. Some companies also have added voluntary non-binding arbitration as an alternative. For example, at Polaroid. an employee who chooses to arbitrate a discipline or discharge claim and loses can still go to court. The fact that no Polaroid employee has ever taken this step suggests that the arbitration process is accepted as fair.

Human resource managers, employment lawyers, and dispute resolution professionals are working to design, with employee involvement, dispute resolution systems incorporating alternatives such as these, while the courts hammer out the contours of the legal terrain on which these systems will stand.

In the end, we may find that employees at Circuit City and elsewhere are no longer battling with their employers over whether a dispute goes to arbitration or the courts, but instead are sitting down with managers to create better ways to resolve workplace disputes -- by agreement rather than adjudication. For Saint Clair Adams and Circuit City, such a meeting might well have avoided years of costly litigation over the threshold question of whether an arbitrator or jury would decide Saint Clair's claim.

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