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MCLE SELF-STUDY

ARBITRATION: A BALANCING ACT

From its origins, the foundational concept of arbitration as an alternative to the traditional court system was rooted in the recognition that court proceedings tended to be lengthy, costly—and unnecessarily bogged down in formal rules and procedures. The original Federal Arbitration Act (FAA),[1] enacted in 1925, required courts to endorse consenting parties' binding contracts with provisions requiring that any future disputes between them would be resolved through this alternative venue.[2] The FAA, as well as the California Arbitration Act (CAA),[3] provide a basic framework in which parties can enter into enforceable contacts requiring an alternative dispute resolution forum in which traditional processes are streamlined, reduced, or eliminated—and the finality of outcomes is assured.[4]

However, adapting those original tenets into contemporary employment disputes involving unwaivable statutory rights has been a struggle. One example has been the push-pull dynamic between the desire for a streamlined, efficient process on the one hand, versus the need for adequate discovery on the other. This dynamic is magnified in employment arbitrations, which can present an imbalance in access to information and witnesses.[5]

INSIDE THIS ISSUE

The starting point here is the acknowledgment that arbitrations originating as a condition of employment are, and seemingly will continue to be, an ongoing reality—and attorneys on both sides of the equation benefit from thinking critically about the unique aspects of the process.

FOUNDATIONAL CONCEPTS

The fundamental aspect of employment arbitrations is that "a party does not forego the substantive rights afforded by the statute" forming the basis of a claim.[6] But, at the same time, having even a statutory claim heard in arbitration means adopting the core tenets related to efficiency and streamlined procedures.[7] That, of course, includes discovery.[8] By agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[9] However, "arbitration agreements that encompass unwaivable statutory rights must be subject to particular scrutiny."[10]

The Fair Employment and Housing Act (FEHA)[11] and California Labor Code provisions generally fall within the classification of unwaivable statutory rights, and California courts have held that "adequate discovery is indispensable for the vindication" of those claims.[12] Also, for such vindication to occur, the arbitration must meet certain minimum requirements, including adequate discovery.[13] Claimants are "at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrators and subject to limited judicial review pursuant to California Code of Civil Procedure section 1286.2."[14] There must be a balance between the desirable simplicity of arbitration with the statutory requirements in determining the appropriate discovery, "absent more specific statutory or contractual provisions."[15]

Taking a fresh perspective to the discovery process in arbitration—breaking from traditional mindsets and approaches used in court proceedings—can help achieve the dual goals of ensuring the ability to vindicate unwaivable statutory rights while achieving efficiencies not available in courts.

VACATUR

Another key tenet of arbitration is the finality of decisions.[16] Arbitrators are keenly focused on making sure their final awards are not subject to a petition to vacate. The very limited circumstances in which a final award would be vulnerable are set forth in the FAA and CAA.[17] One such circumstance is a demonstration that an arbitrator refused to hear material evidence.[18]

> ADAPTING ARBITRATION'S TENETS INTO CONTEMPORARY EMPLOYMENT DISPUTES INVOLVING UNWAIVABLE STATUTORY RIGHTS HAS BEEN A STRUGGLE.

Arbitrators generally have broad discretion to base their awards on principles of equity and justice.[19] Their decisions will not be reviewed for the validity of their reasoning, the sufficiency of the evidence supporting their award, or—generally speaking—for errors of fact or law.[20] However, that deference is restricted in no small measure when an employee's fundamental statutory or public policy rights are at stake. In those circumstances, the employee is entitled to seek the full protection of the applicable law, and the courts will exercise sufficiently searching review to ensure that the law has been correctly construed and applied.[21] The California Supreme Court has recognized that heightened judicial review may be appropriate when "granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights."[22]

Arbitrators exceed their powers when their award "would be inconsistent with the protection of a party's statutory rights."[23] An arbitration award containing a legal error that amounts to preventing presentation of evidence in support of an unwaivable statutory right can be vacated as being in excess of the arbitrator's power.[24] In such cases, a court will review the arbitrator's award to ensure that the arbitrator complied with the requirements of the relevant statute.[25] For instance, in *Pearson Dental Supplies, Inc. v. Superior Court*,[26] the California Supreme Court held the arbitrator misapplied a rule regarding the statute of limitations in a FEHA case. The arbitrator's grant of summary judgment based on that misapplication resulted in a denial of the claimant's right to present material evidence in support of an FEHA claim. The court there vacated the arbitrator's award in favor of the respondent.

WHICH RULES APPLY?

The rules of any particular arbitration proceeding primarily are a creature of contract. If an arbitration contract contemplates fulsome discovery via incorporation of the California Code of Civil Procedure or Federal Rules of Civil Procedure, then the arbitrator will enforce those rules to the extent not otherwise agreed by the parties.

But many, if not most, arbitration agreements do not include such wholesale incorporation of traditional discovery rules. Arbitration contracts can run the gamut from listing specific discovery devices available—such as document requests and interrogatories, but not requests for admission, or provide simply for incorporating the arbitration provider's rules for employment arbitrations.[27]

At the outset of every arbitration, each party should examine the contract carefully to understand which rules will apply and evaluate what, if any, impact those discovery provisions will have on the ability to present material evidence to the arbitrator.

Parties should also pay special attention to the issue of third party discovery. Neither the FAA nor the CAA provides arbitrators with authority—absent specific contractual terms—to order third party discovery in employment cases.[28] Both sides of employment cases frequently need such discovery to prepare adequately for hearing. Claimants may need depositions of third party witnesses. Respondents may need subpoenas for medical records. If the applicable arbitration contract does not address third party discovery, the parties will need to agree to modify it and present the modification to the arbitrator.

PRE-ARBITRATION DEMANDS

Oftentimes parties have substantive communication prior to filing the demand for arbitration. Those communications provide an opportunity to examine the arbitration contract and evaluate whether the discovery provisions within it will allow for sufficient discovery, or whether there will be a need for additional or different types of discovery. Because the process is a creature of contract, the parties may agree to modify the original arbitration agreement, including its discovery procedures. Parties should discuss what they reasonably anticipate being necessary to be prepared for a final arbitration hearing and make proposals for modifying the arbitration contract's discovery provisions, if deemed necessary.

One setting in which these discussions take place is where the employee has filed a complaint in court and the employer has filed, or intends to file, a motion to enforce the parties' arbitration contract. This can provide an opportunity for the parties to have good faith discussions that lead to modifying the contract's discovery provisions, resulting in a stipulation to stay the court proceeding and submit the claims to arbitration without the need for a ruling on a motion to compel. As noted, if third party discovery is foreseeable, these discussions are an opportune time to work through the issue and present the arbitrator with a stipulated modification to the arbitration contract.

ARBITRATION MANAGEMENT CONFERENCE

The first meeting with the arbitrator—often referred to as an arbitration management conference (AMC)—is an important event. At the AMC, the parties get a sense of how the arbitrator views the process, in general, and the provisions of that case's arbitration contract, in particular.

It also is where the first scheduling order for the case is discussed. That first scheduling order will recite not just the dates and deadlines for the case, but also generally describe the applicable rules of discovery—including the manner of deciding disputes. The parties should not take this conference lightly. Counsel would be wise to ensure that the person who appears at that AMC is fully versed in the claims, defenses, and anticipated discovery and is fully prepared to articulate a rational basis for either expanding or limiting it.

The key to a meaningful AMC is demonstrating flexibility and a rational view of the case. It does neither party any good to hold an extreme position. A claimant who asserts that the *only* way to vindicate a client's rights is with wholesale incorporation of formal discovery procedures is likely to run afoul of an arbitrator's attempts to streamline the process. A respondent who asserts that the *only* way to meet the tenets of arbitration is to include hard limits on discovery, including depositions, is likely to contravene an arbitrator's efforts to ensure the process is fair and provides the claimant with full opportunity to present material evidence at the final hearing.

Both adequate discovery and efficient processes can be achieved when the parties each take a rational, reasoned approach to the case, considering the particular claims and defenses as well as other case-specific factors such as number of witnesses involved, relevant time scope, and likely volume of relevant documentary discovery. The parties should then be able to articulate these case-specific factors to the arbitrator when advocating for their positions on scope of discovery.

> THERE MUST BE A BALANCE BETWEEN DESIRABLE SIMPLICITY AND APPROPRIATE DISCOVERY.

A claimant should be prepared to demonstrate a commitment to seeking efficiencies where available. For instance, a claimant should evaluate where certain discovery devices can be eliminated.

- Are requests for admission really going to be valuable?
- Can interrogatories be limited in number, at least as an initial matter, allowing for revisiting the question later if necessary?
- Can special interrogatories be eliminated altogether, in favor of form interrogatories, or vice versa?
- Can there be an initial limit on the number of depositions?
- Do you anticipate a number of short-duration witness depositions? If so, can you propose limiting depositions by overall time—such as X number of total deposition hours—as opposed to number of depositions?
- Can you agree to take more than one short deposition in a single day?

A respondent should be prepared to demonstrate a commitment to ensuring reasonable access to relevant information. The employment rules used by some of the larger arbitration providers have requirements for initial disclosures.[29] Approaching those initial disclosures in good faith, engaging in diligent searches, and providing substantial information can go a long way to demonstrating a commitment to providing informal access to relevant information while achieving efficiencies of avoiding formal document requests and responses.

THE IMPACT OF 'GOOD CAUSE'

The California Supreme Court's command to arbitrators to balance the "desirable simplicity" of arbitration with the requirements of the FEHA or the California Labor Code in determining the appropriate discovery typically manifests in the concept of "good cause" for expanded or additional discovery.[30] Arbitrators will communicate their starting point as seeking to achieve efficiencies wherever possible. But that effort will yield where a party can articulate good cause for what might be considered expanded or additional discovery.

> IT DOES NEITHER PARTY ANY GOOD TO HOLD AN EXTREME POSITION.

The arbitrator will always be thinking about the final hearing and ensuring the parties have had full opportunity to submit material evidence in support of their claims or defenses. Again, being able to articulate good cause means demonstrating a rational approach to the particular case based on the particular claims, defenses, and discovery to that point in the case. Simply stating "because I need it" is unlikely to sway the arbitrator in favor of authorizing additional discovery. Similarly, plainly reciting "arbitration is supposed to be efficient and streamlined" is unlikely to convince an arbitrator to reject a request for additional discovery.

DISCOVERY DISPUTE RESOLUTION

Efficient resolution of discovery disputes is one of the hallmarks of modern employment arbitrations. They present an opportunity to take advantage of the arbitration forum and break from traditional court practices.

However, it can take months to have a discovery dispute heard in court. Even with the increased use of informal discovery conferences in some courts, the procedure can get bogged down in process, time-sucking wait times, and clogged calendars. Arbitrators often see the discovery dispute process as a place where significant efficiencies can be achieved. Most arbitrators can be available for informal discovery dispute resolution, often through email communications, without the need for formal notice or motion practice. What typically takes weeks, if not months, to resolve in court, can take only a matter of days to resolve in arbitration.

Parties should make sure the process is addressed at the AMC, seek assurances from the arbitrator regarding availability, and understand detailed protocols for contacting the arbitrator, whether directly or via case administrator, to take full advantage of these efficiencies. They might consider adopting the AAA Direct Communication protocols, for example. Committing to such procedures also goes a long way toward demonstrating to the arbitrator that a party is committed to achieving efficiencies.

In court, parties are often required by rule or by statutory time limits to file voluminous motions—either as omnibus motions or a series of simultaneously filed motions, depending on the venue—seeking resolution of all disputes arising from multiple contemporaneously-served discovery devices. Those motions can prove cumbersome for both litigants and the courts, and also run the risk of burying important issues within a web of other more peripheral ones.

WHAT TYPICALLY TAKES WEEKS, IF NOT MONTHS, TO RESOLVE IN COURT, CAN TAKE ONLY A MATTER OF DAYS IN ARBITRATION.

With those rules or statutory requirements eliminated, a party can seek more limited or focused resolution of disputes. Instead of bringing an omnibus motion to compel further responses to interrogatories, requests for production of documents, and requests for admission all at the same time, a party can submit a limited request based on a single device. Or parties can pursue motions that focus on a particular issue.

Either could be brought without prejudice to bringing other disputes or on different issues arising from the same set of discovery requests or responses to the arbitrator at a different time. Quick resolution of that particular, narrowly-framed issue can provide the parties with significant information going forward. It can be incorporated into further meet and confer that leads to informal resolution of other issues. Finally, a focused ruling can provide insight into the arbitrator's approach to determining an important issue in the case and also can assist with other informal resolution or focusing of further discovery.

ENDNOTES

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1. 9 U.S.C. §§ 1-16.
2. The FAA's purpose was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 24 (1991); *see also Armendariz v. Foundation Health Psych. Serv., Inc.*, 24 Cal. 4th 83 (2000).
3. 9 Cal. Code Civ. Proc. §§ 1280-1294.4.
4. *See Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10 (1992).
5. *Kinney v. United HealthCare Serv., Inc.*, 70 Cal. App. 4th 1322 at 1332 (1999).
6. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).
7. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 at 334 ("The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings").
8. *Mercuro v. Superior Court*, 96 Cal. App. 4th 167 at 184 (2002).
9. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 at 628 (1985)); *see also Armendariz*, 24 Cal. 4th at 106, note 11.
10. *Armendariz*, 24 Cal. 4th at 100; see also, Cal. Civ. Code §§ 1668 & 1513.
11. Cal. Gov't Code §§ 12900-12996.
12. *Armendariz*, 24 Cal. 4th at 100, 104; *Mercuro*, 96 Cal. App. 4th at 179-80.
13. *Armendariz*, 24 Cal. 4th at 90-91.
14. *Id.* at 106.
15. *Id.* at 106, note 11.
16. *Moncharsh*, 3 Cal. 4th at 8-10.
17. 9 U.S.C. § 10; Cal. Code Civ. Proc. § 1286.2.
18. 9 U.S.C. § 10(a)(3) ("where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy"); Cal. Code Civ. Proc. § 1286.2(a)(5) ("The rights of the party were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy').
19. *Moncharsh*, 3 Cal. 4th at 10-11.
20. *Id.*

21. *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal. 4th 665 (2010).

22. *Moncharsh*, 3 Cal. 4th at 32.

23. *Pearson Dental Supplies*, 48 Cal. 4th at 676 (citing *Moncharsh*, 3 Cal. 4th at 32).

24. *Id.* at 680; *see also Board of Educ.* v. *Round Valley Teachers Ass'n.*, 13 Cal. 4th 269 at 272 (1996).

25. *Pearson Dental*, 48 Cal. 4th at 679 (citing *Armendariz*, 24 Cal. 4th at 106-07).

26. *Id.* at 680.

27. *See e.g.*, JAMS Employment Arbitration Rules & Procedures 17; AAA Employment Rules, Rule 9; AAA Initial Discovery Protocols for Employment Arbitration Cases; ADR Services, Inc. Arbitration Rules, Rule 21.

28. *McConnell v. Advantest America, Inc.*, 92 Cal. App. 4th 596, 607 (2023); *Aixtron, Inc. v. Veeco Instruments, Inc.*, 52 Cal. App. 4th 360 (2020); Cal. Code Civ. Proc. §§ 1282.6(a), 1283.05; 9 U.S.C. § 7. However, this restriction is on the arbitrator's ability to order third party *discovery*; it does not apply the ability to issue subpoenas for third parties to appear at hearing—including for the purpose of producing documents.

29. *See e.g.*, AAA Initial Discovery Protocols for Employment Arbitration Cases; JAMS Employment Arbitration Rules & Procedures, Rule 17; ADR Services, Inc. Arbitration Rules, Rule 21.

30. *See Armendariz*, 24 Cal. 4th 83 at 106, note 11.