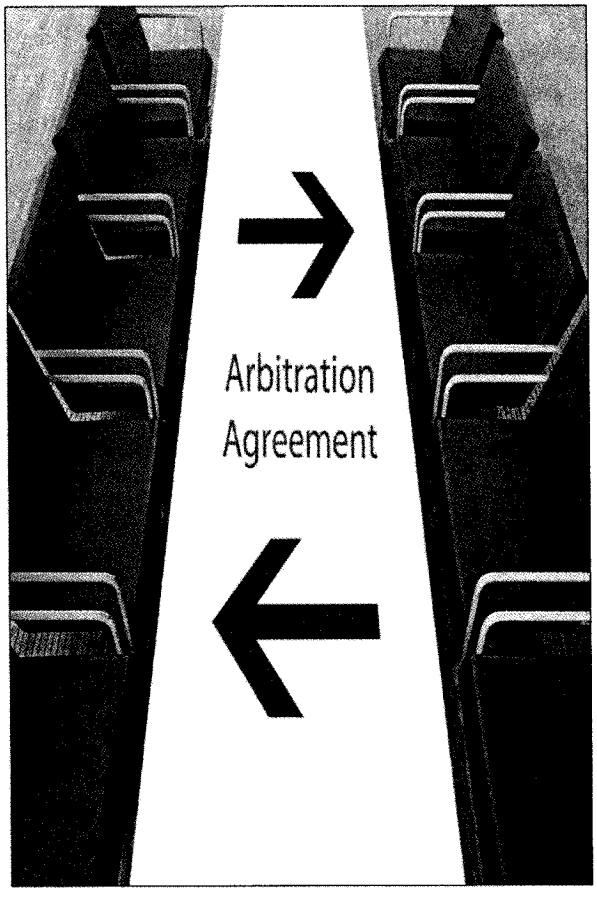
A Primer on Predispute Employment Arbitration Agreements

by Carlos A. González

As a fundamental institution in American society, the workplace is regulated by a great many laws governing the relationship between employees and employers. These laws can give rise to expensive and vexing litigation. For fiscal year 2013, the Equal Employment Opportunity Commission (EEOC) reported that more than 90,000 private sector workplace discrimination charges were filed. In 2012, the number of discrimination charges was almost 100,000. In addition to the tens of thousands of cases alleging violation of the nation's civil rights laws, thousands of other employment related cases are filed annually. These other employment matters include cases under the Fair Labor Standards Act, Family and Medical Leave Act, Employment Retirement Income Security Act and employment contract disputes.



In an effort to shorten the time for resolution and curb the rising cost of employment-related litigation, employers and employees are turning in increasing numbers to alternative dispute resolution methods, and in particular to binding arbitration.[1] While the widespread use of binding arbitration is somewhat new to the non-unionized workforce, arbitration has been a staple in collective bargaining agreements for decades. Pursuant to these agreements, issues of discrimination, discipline, failure to promote and demotion have been submitted to arbitrators for final resolution.

Employment Dispute Arbitration is Favored

The U.S. Congress and the General Assembly of Georgia have long endorsed arbitration as a means of resolving disputes. Both federal and state courts have held that the right to engage in arbitration is a matter of strong public policy.[2] Consequently, the federal and state courts of Georgia have not hesitated to enforce predispute employment arbitration agreements,[3] including agreements that require the arbitration of federal and state statutory claims.[4]

Many employers are insisting upon acceptance of predispute mandatory arbitration provisions in employment contracts and as a condition of at-will employment. The practice is not without controversy. An effort is underway in Congress to amend the Federal Arbitration Act (FAA) through the adoption of the Arbitration Fairness Act of 2013.[5] If enacted, the Arbitration Fairness Act of 2013 would restrict the ability of federal courts to enforce predispute arbitration agreements if such agreements require the arbitration of employment disputes.[6] Until such time as Congress acts,[7] however, state and federal courts will continue to enforce predispute employment arbitration provisions unless such provisions are otherwise unenforceable under federal[8] or state[9] law.

Limitations on the Arbitration of Employment Disputes

While arbitration of employment disputes is becoming more common, crafting binding arbitration agreements between employers and employees is not without challenges. Courts have not hesitated to invalidate arbitration agreements when courts find that the agreements are one-sided and unfair. Biased selection procedures for choosing arbitrators and inconvenient arbitration forums have been grounds for invalidating arbitration provisions.[10] Courts have also invalidated arbitration schemes that defeat a statute's remedial purpose, such as limiting the scope of the relief that would be otherwise available under a statute in court.[11]

Arbitration programs that are essentially unaffordable to employ-

ees have also been subject to judicial criticism. In *American Express Co. v. Italian Colors Restaurant*, the U.S. Supreme Court acknowledged its earlier dicta that a successful challenge to an arbitration agreement might be made if the "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable."[12] The Court places the burden to show the likelihood of incurring excessive fees on the party seeking to invalidate the agreement.[13]

Employment Arbitration Agreements Must be Properly Structured

Since arbitration agreements are contracts, it is essential that the elements of valid contract formation exist if employer and employee are to be bound to the arbitral forum. Consequently, there must be offer, acceptance and consideration evident in the agreement to arbitrate. Binding contract formation is simple in the context of individually negotiated employment agreements. The requirement becomes more complicated when dealing with employees who work without the existence of an employment contract.

Georgia strictly adheres to the at-will employment doctrine, and it is well settled that the "at-will" arrangement does not create a contractual right to continued employment. Employers whose workforce consists of at-will employees are wary of efforts that might create a legally enforceable interest in continued employment. The law has evolved, however, so that employers and employees can contractually agree to an alternative dispute resolution plan without creating a contract for continued employment.

The terms of such a plan can be set forth in an employee handbook, manual or by other separate documents. The law recognizes that doing so creates binding obligations within the scope of the at-will doctrine since the arbitration plan represents an offer by the employer to be mutually bound with the employee to the terms of the plan.[14]

In whatever manner presented, the employer should condition continued employment or an offer of employment on acceptance of the arbitration provision.[15] The mutual promise to submit employment disputes to arbitration is sufficient consideration to support contract formation.[16] The District Court in *Caley v. Gulfstream Aerospace Corp.*, found the following employer-drafted language constituted a binding agreement to submit employment claims to arbitration.

> The submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed acceptance of the DRP [Dispute Resolution Policy] . . . . The mutual obligations set forth in this DRP shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship. . . .[17]

Once the elements of contract formation are in place, federal and state laws support the right to arbitrate. The FAA[18] pre-empts state laws that undermine the enforcement of private arbitration agreements.[19] In drafting predispute agreements to arbitrate, attorneys should be careful to recite that the agreement is to be governed by the FAA and, where appropriate, by state law. These recitations may avoid or blunt potential challenges based on unique features in a particular state's arbitration code. In Georgia, for example, the Georgia Arbitration Code contains a provision requiring an employer and an employee to initial any provision in an arbitration agreement that relates to the terms and conditions of employment.[20] If such provisions are not initialed, those provisions are unenforceable under the Georgia Arbitration Code.[21] The FAA would almost certainly pre-empt an effort to invalidate an arbitration agreement solely on a failure to initial, provided that the agreement was otherwise covered by the FAA.[22]

A predispute employment arbitration agreement must also include provisions ensuring that the cost of arbitrating is affordable to the employee. A good measure is that the cost of arbitrating—including the arbitrator's fees and administrative assessments—should not exceed the amount the employee would have to pay to file a suit in court. For example, the American Arbitration Association's (AAA) rules help to ensure accessibility by limiting the amount to be paid by an employee filing a demand for arbitration pursuant to an employer-sponsored arbitration plan. In cases before a single arbitrator, an employee's costs are capped at a nonrefundable filing fee of $200 unless the arbitration plan provides that the employee pays less.[23] The same $200 cap applies in cases in which three or more arbitrators are required. Another restraint on costs is that under the AAA rules all expenses of the arbitrator and any AAA administrative expenses are borne by the employer.

The shifting of costs to the employer addresses the concern that the expenses of arbitration might be an impediment to the resolution of disputes between employees and employers. Moreover, an arbitrator under the AAA rules may award costs and attorneys' fees in those cases in which the underlying statute provides for such an award and the employee is otherwise entitled to costs and attorneys' fees under the law.[24] Therefore, from the employee's perspective, the cost of proceeding in arbitration is equivalent to or less than the cost of initiating litigation against the employer in court. This is particularly true in cases where a prevailing

employee is entitled to an award of attorneys' fees.

The predispute arbitration agreement should also be as specific as possible in designating the types of employment disputes subject to arbitration. Accordingly, the agreement should enumerate the state and federal statutory claims and common law actions that are subject to the arbitration clause and those that are not. The agreement should also make it clear that the arbitrator is authorized to award the full range of remedies available under the enumerated laws and statutes. Attempting to foreclose or limit the relief otherwise available to protect against unlawful employment practice has drawn the scrutiny of courts and led to arbitration clauses being invalidated.[25]

Predispute arbitration agreements should include a forum-selection provision that specifies the geographic location where the arbitration is to occur. In an employer-sponsored arbitration plan, the agreement should require the arbitration to be held within a reasonable distance of the workplace. Courts have found that requiring an employee to arbitration in a geographically distant and inconvenient location creates an undue burden on the employee. Certain courts have ruled that an inconvenient forum has the practical effect of depriving the employee of participating in the process.[26]

Conclusion

Arbitration is becoming widely recognized as a valid method for resolving employment disputes. As the use of arbitration grows, so too will the variety of agreements that authorize its use. Whatever form such agreements take, attorneys preparing such predispute employment arbitration agreements must ensure that the arbitration forum is procedurally and substantively fair. Several factors are indicative of a fair and well-drafted arbitration agreement. First, since arbitration is a matter of contract, the agreement to arbitrate must satisfy the requirements of contract formation. Second, the agreement should specify that it is to be interpreted pursuant to the FAA and where appropriate state law. Third, the cost to arbitrate for the employee must not be excessive so that the cost operates as a *de facto* impediment to arbitration. Fourth, the provision should itemize the type of the employment disputes subject to arbitration and if employment claims based on federal or state statutory provisions are to be arbitrated, then the agreement should recite that the range of remedial relief available under the statute in court is available in arbitration. And fifth, predispute arbitration clauses should include a forum-selection provision making clear that the arbitration is to occur in reasonable proximity to the place of employment. If these five conditions are satisfied, then the arbitral forum can be an efficient, fair and economical method of dispute resolution.

Carlos A. González works extensively as an arbitrator and special master. Since 1993, he has served federal courts around the country as a special master managing complex commercial and institutional reform cases. In 2006, González was appointed as a permanent arbitrator to a collective bargaining agreement. A 1989 graduate of Vanderbilt University Law School, González also holds degrees from Yale University and Florida State University. In 1993, González established the González Law Group whose primary focus is federal civil litigation.

Endnotes

1. In 2008, the National Employment Lawyers Association estimated that roughly a fifth of the nonunion workforce is covered by mandatory arbitration provisions. Stephanie Mencimer, *Have You Signed Away Your Right to Sue?*, MOTHER JONES, (last visited June 25, 2014, 10:04 AM), http://www.motherjones.com/politics/2008/03/have-you-signed-away-your-right-sue.
2. *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (the FAA evinces "a liberal federal policy favoring arbitration agreements"); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002)("arbitration agreements to resolve disputes between parties have now received near universal approval"); Order Homes, LLC v. Iverson, 685 S.E.2d 304, 307 (Ga. Ct. App. 2009)("In enacting the [Georgia Arbitration Code], the General Assembly established 'a clear public policy in favor of arbitration.'").
3. *See Weeks.*, 291 F.3d at 1314 (noting that "the Supreme Court in *Circuit City* [*Stores, Inc. v. Adams*, 532 U.S. 105 (2001)] held that the FAA was applicable to all contracts of employment except those contracts involving transportation workers"); Caley v. Gulfstream Aerospace Corp., 333 F. Supp. 2d 1367 (N.D. Ga. 2004) *aff'd* 428 F.3d 1359 (11th Cir. 2005) (compelling arbitration of employment claims); Wedemeyer v. Gulfstream Aerospace Corp., 749 S.E.2d 241 (Ga. Ct. App. 2013)(discussing the enforceability of an arbitration agreement in the context of the employment relationship).
4. Circuit City Stores, 532 U.S. at 123 ("arbitration agreements can be enforced . . . without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law. . . "); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991)(ADEA claims arbitrable); Caley, 333 F. Supp. 2d at 1379 (arbitration of ADEA, FLSA, ERISA, and Title VII claims permissible); *see also* Section 118 of the Civil Rights Act of 1991, which amends Title VII and provides that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and 42 U.S.C. §§ 1981a and 1988]" The

Civil Rights Act of 1991, Pub. L. 102–166, §118, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). *But see* E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002) (holding that an agreement to arbitrate employment disputes does not bar the E.E.O.C. from suing an employer for monetary and injunctive relief on behalf of an aggrieved employee).

5. The Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013).
6. *Id.* at § 402(a). The act would also restrict the arbitrability of consumer, civil rights, and antitrust disputes. *Id.* It further requires that the validity and enforceability of an agreement to arbitrate be determined by a court, not by an arbitrator. *Id.* at § 402(b)(1).
7. In 2010, Congress banned certain predispute agreements to arbitrate sexual harassment claims under Title VII or in tort. The Department of Defense Appropriations Act, 2010 applies to contractors whose business with the Department of Defense exceeds $1 million. Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009). Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits predispute arbitration agreements from being applied to claims arising under the statute's whistleblower provisions. Pub. L. 111-203, 124 Stat. 1376, 1739 (2010) (codified at 7 U.S.C. § 26(n)(2)); *id.* at §§ 922(b), (c), 124 Stat. at 1841 (codified at 18 U.S.C. §§ 1514A(e)(1), (2)).
8. The Federal Arbitration Act provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2 *see also* Caley, 428 F.3d at 1371 ("arbitration agreements under the FAA are enforceable absent fraud, duress, or some other misconduct or wrongful act recognized by the law of contracts for revocation of a contract.").
9. *See* Panhandle Fire Prot. Inc. v. Batson Cook Co., 653 S.E.2d 802, 806 (Ga. Ct. App. 2007)(arbitration agreements are a matter of contract and as such are challengeable on the basis of contract invalidity).
10. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 935 (4th Cir. 1999) (invalidating Hooter's arbitration agreement because of procedural and substantive unfairness issues, finding it "utterly lacking in the rudiments of even-handedness. . ."). Among the troubling aspects of the agreement were the requirements that arbitrators be selected from a panel maintained by Hooters, that the employee alone be required to disclose his or her witnesses and the facts on which the claim was based, and that Hooter's could change the terms of the arbitration agreement at will and without notice. *Id.* at 938-40. These provisions led the Fourth Circuit to conclude that the system established by Hooters was a "sham . . . unworthy even of the name of arbitration. . .". *Id.* at 940.
11. Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J. and Tjoflat, J. concurring) (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable.").
12. 133 S. Ct. 2304, 2310-11 (2013) (ellipsis added), citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U. S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights..."); *see also* Paladino, 134 F.3d at 1062 (the imposition of high arbitration cost on employees undermines the statutory purpose of Title VII).
13. Green Tree Fin. Corp. -Ala., 531 U.S. at 91-92.
14. Caley, 333 F.Supp.2d at 1375 (citing Dodd v. City of Gainesville, 551 S.E.2d 62, 64 (Ga. Ct. App. 2001)) ("Even an at-will employee may have certain enforceable rights pursuant to the policies of an employment handbook.").
15. *Id.* at 1375 (citing Fletcher v. Amax, Inc., 288 S.E.2d 49, 51 (Ga. Ct. App. 1981)) ("continued employment constitutes acceptance of new terms offered by employer.").
16. *Id.* at 1377 (citing Porter v. Cigna, 1997 WL 1068630, *1 (N.D. Ga. Mar. 26, 1997)) ("mutuality of obligation is established by explicit policy language stating that both employer and employee are bound to submit employment disputes to arbitration.").
17. *Id.* at 1373 (emphasis omitted) (ellipses added).
18. 9 U.S.C. §§ 1-16 (2006).
19. Volt Information Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 477-78 (1989) (citation omitted); *see also* American Gen. Fin. Svcs. v. Jape, 291 Ga. 637, 640 732 S.E.2nd 746, 748-749 (2012) (recognizing federal preemption of state laws would undermine agreements to arbitrate); *see also* Results Oriented, Inc. v. Crawford, 538 S.E. 2d 73, 78 (Ga. Ct. App. 2000), *aff'd* 548 S.E.2d 342 (Ga. 2001) (recognizing federal preemption of state law).
20. The Georgia Arbitration Act shall not apply to "[a]ny contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement[.]" O.C.G.A. § 9-9-2(c)(9) (2013).
21. Columbus Anesthesia Group, P.C. v. Kutzner, 459 S.E.2d 422, 424 (Ga. Ct. App. 1995).
22. The FAA reaches those arbitration agreements "evidencing a transaction involving commerce." 9 U.S.C. § 2. "Evidencing a transaction involving commerce" is a phrase that has been given broad meaning by the Supreme Court in the context of arbitration and covers almost all employment relationships. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-81 (1994); *see also* Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1370 (11th Cir. 2005) (discussing extent of FAA's reach).
23. Employment Arbitration Rules and Mediation Procedures, AM. ARB. ASS'N, p.32 (2009), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased.
24. *Id.* p.29.
25. *See supra.*, n.12.
26. *See* Haynsworth v. The Corporation, 121 F.3d 956, 963 (5th Cir. 1997) (forum-selection provisions in arbitration agreements that require excessive travel for arbitration are unreasonable and unenforceable).