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Arbitration Provisions and Alternative Dispute Resolution in a Changing Legal Landscape

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Presented by

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Effectiveness of District Courts Terminating Cases

| Fiscal Year | Total Cases Terminated | % Cases Terminated Before Pretrial Conference | % District Court Cases Reaching Trial |
|-------------|------------------------|---|---------------------------------------|
| 1990 | 213,429 | 78.5 | 4.3 |
| 2000 | 259,234 | 87.9 | 2.2 |
| 2010 | 223,878 | 87.6 | 1.1 |
| 2017 | 236,270 | 85.9 | 0.9 |

Source: Annual Report of the Director: Judicial Business of the United States Courts



| Courts | % Cases Terminated Before Pretrial Conference | | | % District Court Cases Reaching Trial | | |
|------------------------|---|-------------|-------------|---------------------------------------|-------------|-------------|
| | <u>2010</u> | <u>2015</u> | <u>2017</u> | <u>2010</u> | <u>2015</u> | <u>2017</u> |
| Western District of PA | 96.0 | 98.1 | 98.2 | 1.7 | 0.9 | 1.0 |
| Middle District of PA | 94.3 | 95.6 | 95.2 | 1.3 | 1.2 | 1.0 |
| Eastern District of PA | 97.9 | 87.6 | 75.6 | 0.1 | 0.9 | 1.1 |
| Delaware | 92.8 | 72.6 | 75.3 | 4.9 | 2.5 | 5.5 |

Source: Annual Report of the Director: Judicial Business of the United States Courts



ABA Section of Litigation Survey of 3,300 Litigators (2009)

| | <u>Defense Counsel</u> | <u>Plaintiffs' Counsel</u> |
|--|----------------------------|--------------------------------|
| Arbitration Results Are <u>More</u> Fair Than Litigation Verdicts | 10% | 8% |
| Arbitration Results Are <u>Less</u> Fair Than Litigation Verdicts | 40% | 62% |



Mandatory Arbitration In U.S. Workplaces, By Size Of Employer

| Employer workforce size | Mandatory arbitration |
|--------------------------------|------------------------------|
| Fewer than 100 employees | 49.8% |
| 100 to 499 employees | 49.2% |
| 500 to 999 employees | 59.3% |
| 1,000 to 4,999 employees | 61.8% |
| 5,000 or more employees | 67.7% |

Source: Economic Policy Institute 2018



Speed of Arbitration versus Speed of Litigation

| Study | Arbitration | Litigation |
|--------------|--------------------|-------------------|
| Maltby | 201 days | 679 days |
| Colvin | 361.5 days | 709 days |

Source: Rutgers University Law Review (2018)



Employee Win Rate in Arbitration versus Litigation

| Study | Arbitration | Litigation |
|-------------------|--------------------|-------------------|
| Howard | 68% | 28% |
| Eisenberg & Hill | 26% | 36% |
| Colvin & Pike | 24.7% | --- |
| Hill | 34% | --- |
| Bingham | 27.6% | --- |
| Delikat & Kleiner | 46% | 33.6% |

Source: Rutgers University Law Review (2018)



Arbitration versus Litigation Costs

- 38.4% of lawyers surveyed say no difference in costs
- 39.2% of defense counsel say arbitration decreases costs

Source: ABA Section of Litigation Member Survey (2009)



Median Arbitration Awards are Lower than Median Verdicts in Employment Cases

| <u>Study</u> | <u>Median Arbitration Award</u> | <u>Median Litigation Award</u> |
|-----------------------|--|---------------------------------------|
| Eisenberg (1979-2013) | --- | \$153,463 |
| Delikat & Kleiner | \$95,554 | --- |
| Eisenberg & Hill | --- | \$150,500 |
| Colvin | \$117,715 (AAA) | --- |

Source: Rutgers University Law Review (2018)



Mean Arbitration Awards are Significantly Lower than Litigation Verdicts in Employment Cases

| <u>Study</u> | <u>Mean Arbitration Award</u> | <u>Mean Litigation Award</u> |
|-------------------|-------------------------------|------------------------------|
| Delikat & Kleiner | --- | \$377,030 |
| Eisenberg & Hill | --- | \$336,291 |
| Colvin | \$40,624 (AAA) | --- |
| Maltby | \$49,030 | \$530,611 |

Source: Rutgers University Law Review (2018)



Essential Elements of the Revised Uniform Arbitration Act in Pennsylvania



Known in Pennsylvania as the
“Revised Statutory Arbitration Act”

Found at 42 Pa.C.S. §§ 7321.1-
7321.31 (the “Act”).



When?

- Adopted on June 28, 2018
- Effective on July 1, 2019



Replaces the Uniform
Arbitration Act,
42 Pa.C.S. §§ 7301-7320.



End of Common Law Arbitration in Pennsylvania, 42 Pa.C.S. § 7341. The revised Act does this by making many key portions of it applicable to Common Law Arbitration, essentially ending the uniqueness of Common Law Arbitration.



Why?

With the advent of the Information Age and the proliferation of case law, the Pennsylvania Bar Association lobbied the legislature for the revised Act, which attempts to codify more than 50 years of case law on the original act.



What?

The most significant changes fall into six categories:

- (1) Disclosure by the Arbitrator;
- (2) Arbitrator Immunity;
- (3) Discovery;
- (4) Punitive Damages;
- (5) Waiver; and
- (6) Retroactivity.



Disclosure by the Arbitrator

The revised act requires an arbitrator to disclose known financial or personal interests, including any existing or past relationships with any party, their counsel or representatives, a witness, or another arbitrator.



Disclosure by the Arbitrator

The disclosure obligation of the revised Act is ongoing and may be used to establish “evident partiality,” which is a new ground for vacating an arbitration award.



Disclosure by the Arbitrator

“Evident partiality”

is the failure of an arbitrator to disclose any known facts that a reasonable person would consider “likely grounds” to affect the arbitrator’s impartiality.



Other Grounds for Vacating an Award

Expanded to include:

- an award procured by corruption, fraud, or other undue means,
- when the misconduct of an arbitrator, lack of notice of the initiation of an arbitration proceeding, or unreasonable decision not to postpone a hearing prejudices the rights of a party; and
- an arbitrator exceeding her powers.



Immunity

Subject to very limited exceptions, the revised Act provides arbitrators with immunity from civil liability and protects arbitrators from being compelled to testify or produce their records regarding the arbitration proceedings.



Immunity

The revised Act further provides that, if a party files a motion challenging the immunity of an arbitrator, the prevailing party may be awarded attorneys' fees.



Immunity

Exceptions:

- to the extent necessary to determine a claim of the arbitrator against a party to an arbitration proceeding
- or
- at a hearing on a motion to vacate an award based on conduct or bias of the arbitrator, but only if the court determines that the movant has first established a prima facie case.



Discovery

Expansion of Discovery. Under the original act, written discovery of third parties was very limited and depositions of third parties were not permitted.



Discovery

The revised Act provides that an arbitrator can permit discovery from third parties, and the arbitrator is empowered to issue subpoenas. Also, use of electronic records is encouraged.



Discovery

Depositions of party and non-party witnesses are permitted, and the arbitrator has the power to manage the conditions of the depositions so as to ensure their fairness and that they are cost-effective.



Discovery

Arbitrators are empowered by the revised Act to take action against non-compliant parties to the same extent as the Court of Common Pleas. Moreover, those courts are empowered to enforce discovery rulings of arbitrators.



Discovery

The revised Act authorizes arbitrators to issue protective orders and provisional remedies to the same extent as judges. The only caveat is that no party may be prejudiced by such orders.



Punitive Damages

The power of an arbitrator to award punitive damages is now explicitly recognized in the revised Act.



Punitive Damages

An award of punitive damages is subject to two threshold requirements.

The arbitrator must explicitly specify:

- (1) the basis in fact justifying such an award, and
- (2) the basis in law for the award.



Waiver

Unlike the original act, the revised Act generally permits the parties to specify in their arbitration agreement which provisions of the Act are waived. However, some terms are fundamental and cannot be waived.



Waiver

Fundamental terms that can never be waived are provisions relating to:

- access to judicial relief to enforce or stay arbitration;
- to correct, modify, vacate or enforce an award; and
- the immunity of arbitrators.



Waiver

Some provisions may be modified and/or waived only **after** a dispute subject to arbitration arises, including:

- waivers or modification of the right to challenge the existence or enforceability of an agreement to arbitrate;
- access to provisional remedies;
- ability of arbitrator to issue subpoenas and/or permit subpoenas;
- the right to counsel (unless otherwise modified by collective bargaining agreements);
- the designation of the court in which to seek judicial relief; and
- the right to appeal judicial rulings relating to arbitration agreements or awards.



Retroactivity

The revised Act takes effect on **July 1, 2019.**

By statute, it applies to all arbitration agreements made on or after July 1, 2019.



Retroactivity

However, the revised Act allows parties to contract into its provisions prior to July 1, 2019, so long as the agreement to do so is in writing and explicitly requires application of the revised Act.



Retroactivity

- If an arbitration agreement signed before July 1, 2019, does not otherwise specify, it will be subject to the terms of the original Act—no matter how far into the future the parties' dispute occurs.
- The revised Act will only apply to agreements that either (1) are formed on or after July 1, 2019, or (2) specify its application.



Advantages to Arbitration

- Speed
- Confidential
- Lower awards in Employment cases
- Subject matter expertise of arbitrator
- No run away juries
- Employer can maximize leverage by limiting discovery in employment cases



Discovery Parameters Under Revised Statutory Arbitration Act at § 7321.18(c)

An arbitrator may permit discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.



Maximize Leverage in Employment Cases

- Limit or preclude discovery deposition
- Limit number of document requests



Disadvantages to Arbitration

- No forum shopping
- No right to file Motion to Dismiss
- Limited discovery
- No joinder of third parties



Disadvantages to Arbitration

- Motions for Summary Judgement may be permitted but are unlikely to succeed
- Rules of evidence are relaxed or non-existent
- Arbitrators are more apt to rule on equities, not on law
- Extremely limited opportunity to appeal
 - Error of law is not sufficient
 - Error of fact is not sufficient



Top Suggestions for Arbitration Agreements

- In light of the revised Act, we recommend that you at least consider negotiating arbitration clauses in contracts.
- Recommend that you continue to permit court action for injunctive relief.
- Consider advantages/disadvantages of 3 versus 1 arbitrators and including a mechanism for choosing the arbitrator(s).
- Choose venue in agreement.
- Select and specify discovery types and methods.
- Recommend inclusion of class action arbitration waiver where possible: employees and consumers.



Jay D. Marinstein



Jay D. Marinstein is the Office Managing Partner for the Pittsburgh Office and is a member of the firm's Executive Committee. Jay also leads the firm's commercial litigation group in Pittsburgh. Jay serves midsize to large publicly and privately held for profit companies and nonprofit organizations in complex and high-stakes commercial litigation in state and federal courts across the country. Serving in a strategic advisory role, Jay focuses on long-term partnerships to achieve his clients' business and financial objectives. He has represented manufacturers, retailers, and service providers in a variety of cases involving trade secrets, restrictive covenants, Uniform Commercial Code, breach of contract, fraud and breach of fiduciary duties, partnership and shareholder actions, piercing the corporate veil, tortious interference, and executive compensation.



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John represents individuals, partnerships and companies in diverse legal matters including complex commercial litigation, bankruptcy litigation and franchising issues. He represents both franchisors and franchisees in litigation and general corporate matters, including advice respecting FDDs, franchise agreements and related contracts. In addition to his litigation practice, John serves as trusted advisor to several companies and individuals, assisting his clients in developing a carefully coordinated approach to identify and address legal issues effectively and efficiently.



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