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Alternative Dispute Resolution
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Are customized arbitration provisions the answer?

While arbitration may risk unbridled discretion by the arbitrator or ultimately involve the same inefficiency of traditional litigation, customized arbitration provisions may reduce the chances of these outcomes.

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While arbitration may risk unbridled discretion by the arbitrator or ultimately involve the same inefficiency of

traditional litigation, customized arbitration provisions may reduce the chances of these outcomes. Arbitration is frequently portrayed as a speedy, cost-efficient way for parties to handle disputes. While often true, agreements to arbitrate claims tend to grant a substantial amount of power and discretion to an arbitrator -- which can backfire on the parties down the road. The award in *Twentieth Century Fox Film Corp. v. Wark Entertainment Inc.*, stands out as perhaps the premiere example of an arbitrator's ability to exercise substantial discretion, often leading to highly unpredictable results. In his ruling, the arbitrator was forthright in stating that "a contractual arbitration is 'a private proceeding, arranged by contract, without legal compulsion. ... Consequently, the arbitration and award themselves [are] not governed or constrained by due process." (Quoting *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal. App. 4th 1282, 1291 (1994) (alteration in original). The arbitrator awarded staggering punitive damages of over $128 million to the respondents (which later was overturned by the courts in May 2019). With decisions such as this in mind, parties drafting agreements with arbitration provisions may have second thoughts about whether arbitration is a preferable forum to traditional litigation. Extended discovery disputes, restrictions on desired discovery, and such oddities as briefing to request the opportunity to brief the real issue typify many arbitrations, forcing parties to second guess whether or not arbitration really is the more efficient and cost-effective solution it once was sold as. Customized arbitration provisions may provide an answer. Parties can ensure that arbitration proceedings are more predictable by adding constraints on the proceedings -- including on the arbitrators' use of discretion -- from the outset through customized arbitration provisions. Customized arbitration clauses can circumscribe the scope of discovery at future arbitrations, making them more predictable, efficient and cost-effective. While there are limits to how strict these provisions may be, California case law provides a helpful roadmap for parties seeking to draft enforceable clauses. Including customized discovery procedures in parties' initial agreements may avoid costly discovery and related disputes down the road.

Customized Discovery Provisions

The notion of using customized arbitration provisions to limit the scope of discovery is not revolutionary. JAMS, for instance, provides sample addendums to its arbitration clause that prohibit, among other things, broadly phrased document requests and the use of interrogatories or requests for admission. *See* JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts. JAMS's standard rules also limit each party to one deposition unless the arbitrator determines, based on "all relevant circumstances," that more are warranted -- a feature that parties may wish to add to their own arbitration agreements whether or not they are using JAMS. The

American Arbitration Association also provides a guide for drafting dispute resolution clauses that includes sample provisions governing the duration of the arbitration proceeding and the number of depositions available to each party. *See* Drafting Dispute Resolution Clauses: A Practical Guide, American Arbitration Association (2013).

Parties, however, often fail to take advantage of these customized options. A 2019 study of 157 international supply contracts filed with the SEC from 2011 through 2015 revealed that only a quarter of the contracts with arbitration provisions addressed discovery availability or limitations. John F. Coyle and Christopher R. Drahozal, "An Empirical Study of Dispute Resolution Clauses in International Supply Contracts," 52 V*AND*. J. TRANSNAT'L. L. 323, 327-28, 366-67 (2019) (of the 157 contracts in the sample, 86 of them contained arbitration provisions. Twenty-one of those addressed discovery.) Another study of 402 material contracts attached as exhibits to corporate SEC filings in 2012 found that parties rarely modify discovery rights, even when their contracts include arbitration provisions. W. Mark C. Weidemaier, "Customized Procedure in Theory and Reality," 72 WASH. & LEE L. REV. 1865, 1905-07, 1922 (2015). And a study of 910 CEO employment contracts entered into over a 10-year period concluded that contract customization was "not widespread and has been oversold in the literature." Erin O'Hara O'Connor, et al., "Customizing Employment Arbitration," 98 IOWA L. REV.133, 158-60, 166-67 (2012). These studies suggest that while parties could use arbitration provisions to customize their dispute resolution process, in reality such customized provisions are rare.

Customized arbitration provisions can limit the breadth of discovery and the discretion of the arbitrator to order further discovery. Potential discovery limits include limiting the number of depositions, restricting the number of discovery requests, limiting the form of discovery requests (such as prohibiting requests for all documents "related to" or "pertaining to" particular topics), and restricting or even prohibiting certain types of written discovery -- such as interrogatories or requests for admission. Each one of these limitations could dramatically affect the cost and efficiency of any arbitration.

Unconscionability and the "Adequate Discovery" Requirement

When customizing an arbitration provision, the provision must be drafted to ensure that it is not overly restrictive. The foundational case of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 105 (2000), recognizes that while agreements to arbitrate typically constitute an agreement between the parties to "something less than the full panoply of discovery" guaranteed by the California Code of Civil Procedure, provisions that restrict parties from "discovery sufficient to adequately arbitrate their... claim" are not permitted.

In *Fitz v. NCR Corporation*, the California Court of Appeal evaluated an arbitration provision in an employment agreement that limited the parties to two depositions each and prohibited any other discovery unless the arbitrator found that a fair hearing was "*impossible* without additional discovery." 118 Cal. App. 4th 702, 709 (2004) (emphasis added). The court held that the limited

scope of discovery in the arbitration provision, coupled with the "impossibility" standard for requesting additional discovery, rendered the agreement unenforceable because it deprived the employee of the opportunity to adequately vindicate her claims.

Admittedly, *Fitz* precedes the U.S. Supreme Court's *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), decision, which significantly limited parties' ability to challenge arbitration provisions based on state law. But courts have relied on *Fitz* in more recent opinions following the *Concepcion* decision. In its 2017 opinion in *Baxter v. Genworth North America Corporation*, 16 Cal. App. 5th 713, 727 (2017), the California Court of Appeal evaluated an employment agreement's arbitration provision that limited the parties' written discovery to 10 interrogatories, five written requests for documents, and two depositions, and that allowed further discovery "for good and sufficient cause shown" to "ensure that a party has a fair opportunity to present a case." Relying heavily on *Fitz*, the *Baxter* court held that the small amount of default discovery permitted, coupled with the "good and sufficient cause" requirement for additional discovery, rendered the provision limiting discovery substantively unconscionable. In *O'Hanlon v. JPMorgan Chase Bank, N.A.*, 2015 WL 5884844, *6 (C.D. Cal. Oct. 7, 2015), the Central District of California rejected a provision that restricted the parties to "a request for production of documents from the other party," a maximum of two depositions per party, and which granted the arbitrator discretion to permit further discovery "upon a showing of sufficient cause."

Notwithstanding the above, there are numerous opinions upholding customized discovery provisions. For example, despite the *O'Hanlon* court's opinion, the court in *Campos v. JPMorgan Chase Bank, NA*, 2019 WL 827634, *10-11 (N.D. Cal. Feb. 21, 2019), upheld an employment agreement arbitration provision providing for three fact depositions and depositions of all expert witnesses, with additional discovery permitted "as necessary or upon request of the Parties" and within the arbitrator's "reasonable discretion." In *Sanchez v. Carmax Auto Superstores California, LLC*, 224 Cal. App. 4th 398, 404-05 (2014), the Court of Appeal held that an employment agreement's arbitration provision requiring the disclosure of relevant documents upon request and limiting the parties to 20 interrogatories and three depositions, in addition to requiring a showing of "substantial need" to permit additional discovery, did not violate the employee's right to conduct adequate discovery. And *Dotson v. Amgen*, 181 Cal. App. 4th 975, 982 (2010), an older case that even precedes *Concepcion*, upheld a provision in an employee agreement that limited the parties to "the deposition of one natural person, and all expert witnesses," where the parties had to show "need" to seek additional discovery. The court held that the discovery limitation was not unconscionable, noting that "arbitration is meant to be a streamlined procedure" and that the provision granted broad discretion to permit additional discovery.

Drafting limits on discovery in a customized arbitration provision is a balancing act between limiting the discovery available to the parties and granting discretion to the arbitrator to expand discovery rights beyond these limits. Parties seeking to maximize the predictability of future arbitration proceedings may limit the discretion of the arbitrator to permit additional discovery, however, doing

so may require permitting more discovery requests to avoid a finding of unconscionability. A good example is the *Sanchez* decision which upheld a provision that required "substantial need" to seek additional discovery, but included a broad customized provision that allowed for 20 interrogatories, three depositions, and effectively no limits on the number of document requests (parties were required to disclose "relevant documents and ... the personnel file upon request, with each party under a continuing obligation to supplement its initial disclosure."). *Sanchez*, 224 Cal. App. 4th at 404. Alternatively, parties may hope to escape an unconscionability finding by drafting provisions that set strict limits on the default amount of discovery, but that grant arbitrators greater discretion to exceed these limits -- such as the provision in *Dotson* which only permitted one deposition, but which permitted additional discovery upon the showing of "need." *Dotson*, 181 Cal. App. 4th at 984.

Parties drafting arbitration provisions may also consider guaranteeing the disclosure of certain information or documents up front. For example, AAA provides Initial Discovery Protocols for employment arbitration that include limits on discovery (i.e., production is limited to a three-year period before the date of the matter in controversy), while also listing documents that the parties are required to produce. *See* American Arbitration Association Initial Discovery Protocols for Employment Arbitration Cases, American Arbitration Association. Requiring particular disclosures in the arbitration provision may preempt future unconscionability arguments that claim an imbalance between the parties. *See, e.g.*, *Baxter*, 16 Cal. App. 5th at 727 (noting that employers typically have more access to the relevant documents than employees in support of holding striking down discovery limits on both parties).

Conclusion

Customized arbitration provisions may help to limit the effects of arbitration proceedings that, left unchecked, might become costly and inefficient. Even if the parties grant arbitrators discretion to permit additional discovery in order to avoid having the customized provisions overturned, such customized provisions will set a baseline level of discovery which will help streamline the process and indicate to the arbitrator the parties' intentions at the time they entered the agreement. In short, customized discovery provisions can make arbitration more predictable, less costly, and more efficient -- and help return arbitration to the streamlined process it was intended to be.

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