

# Arbitration Agreements after *Circuit City Store, Inc. v. Adams*

Luis F. Antonetti<sup>1</sup>  
Raquel Fas Bravo<sup>2</sup>

## I. Introduction

Disputants are turning to arbitration to resolve their controversies without going to court at an increasing rate.<sup>3</sup> The Supreme Court has clarified that the exclusionary clause in the Federal Arbitration Act (“FAA”)<sup>4</sup> applies only to agreements covering transportation workers and not to employment agreements generally.<sup>5</sup> Thus, the holding that the FAA applies to employment arbitration is certain to make employment arbitration more popular. Employment pre-dispute arbitration agreements require mandatory arbitration in a growing number of employment contracts.<sup>6</sup>

This article explores and discusses arbitration, its history, and the present practice in individual arbitration agreements in a nonunion setting before and after *Circuit City v. Adams*.<sup>7</sup>

## II. Legal Background

### A. What is arbitration?

Arbitration is a private dispute resolution process. It is an alternative dispute resolution method whereby the parties submit their dispute for decision to a third party, which is called an arbitrator or panel of arbitrators. In most cases, the arbitrator’s decision is final, and the parties have no

Este Registro es provisional, sujeto a revisión y cambio

---

<sup>1</sup> Luis F. Antonetti is a partner at Goldman, Antonetti & Córdova in Hato Rey, Puerto Rico, and concentrates his practice in the field of Labor and Employment Law.

<sup>2</sup> Raquel Fas Bravo currently studies her third year of Law at the InterAmerican University of Puerto Rico and is a law clerk at Goldman, Antonetti & Córdova.

<sup>3</sup> Russell D. Feingold, Mandatory Arbitration: What process is due?, 39 Hav. J on Legis. 281, 283 (Summer 2002).

<sup>4</sup> 9 U.S.C. § 1 et. seq.

<sup>5</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>6</sup> Melissa G. Lamm, Who pays arbitration fees?: The unanswered question in *Circuit City Stores, Inc. v. Adams*, 24 Campbell L. Rev. 93 (Fall 2001).

<sup>7</sup> *Circuit City*, 532 U.S. 105.

further recourse before the courts.<sup>8</sup>

Arbitration can be either binding or non-binding. If the arbitration decision is binding, parties agree in advance to abide by the arbitrator's decision, whatever that decision may be. By the contrary, if the arbitration decision is non-binding, the arbitrator's decision takes effect only if the parties agree to the resolution after they know the arbitrator's award.<sup>9</sup>

As well, arbitration can be either mandatory or voluntary. In mandatory arbitration, contracts contain clauses that designate arbitration as the exclusive remedy to resolve disputes. Therefore, if a dispute arises the arbitration clause prevents the complaining party from filing suit in court because he/she can only pursue arbitration. Contrariwise, in voluntary arbitration, the complaining party has the option of filing suit in court or of pursuing arbitration.<sup>10</sup>

The goal of employment based arbitration is the final disposition of disputes between employers and employees in a faster, less expensive, and more flexible manner than through ordinary litigation. Thus, the principal purpose of arbitration is to provide a reasonable alternative to a judicial forum.<sup>11</sup>

B. What are the benefits and limitations of arbitration?

Some of the benefits of arbitration are:

- (1) permits the parties to avoid the high costs of prolonged litigation (arbitration is less expensive);
- (2) guarantee that there will a hearing on the merits (provides reasonable access);
- (3) prompt hearings;
- (4) the proceedings are faster;
- (5) decision-makers with subject-matter expertise, but they do not need instruction on the law;
- (6) the proceeding are conducted in private and no opinion is released to the public (less publicity);

---

<sup>8</sup> Rafael A. Icaza, Fast, Cheap, and Efficient?: 2002 San Francisco Att'y 34 (Summer 2002).

<sup>9</sup> Feingold, supra note 1, at 283.

<sup>10</sup> Id.

<sup>11</sup> Lamm, supra note 4, at 111.

- (7) lower profile;
- (8) participation in the process by all those affected by the outcome;
- (9) the usual rules of evidence and civil procedure do not apply;
- (10) the awards are more predictable than those of an unknown jury;
- (11) the parties have more control over the process because the arbitrator draws its jurisdiction from the agreement. The arbitral award should be enforced as within the scope of the contract between the parties.

There are some limitations, which ironically are at the same time mentioned above as advantages. See:

- (1) the factfinding process usually is not equivalent to judicial factfinding;
- (2) the record of the proceedings is not as complete as it is in court;
- (3) the usual rules of evidence do not apply;
- (4) rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable;
- (5) the arbitrators do not need to give their reasons for an award, thus the award does not need to be based on law;
- (6) arbitration carries no right to trial by jury;
- (7) judicial review of the award is more limited than judicial review of a trial;
- (8) it does not exist an agency that regulates arbitrators;
- (9) by being a private process, it does not sets precedent.

It is important to point out, that statistics have shown that arbitration awards were typically smaller than in litigation. However, employees who arbitrated their claims were far more likely to obtain relief. Therefore, it can be concluded that a fair arbitration process could provide reasonable compensation to a larger number of injured employees while protecting employers from the expensive costs of litigation.<sup>12</sup>

Finally, the benefit of a less expensive arbitration proceeding has been questioned. As one author

---

<sup>12</sup> B. Matthew Struble, Are all contracts of employment exempt from the provisions of the Federal Arbitration Act? The Supreme Court settles the matter, 67 Mo. L. Rev. 651, 682 (Summer 2002).

observed, that “we now face the chaotic potential of determining the enforceability of arbitration provisions on a state-by-state basis based upon each state’s rules regarding interpretation of contracts, unconscionability and public policy.”<sup>13</sup> Based on the Ninth Circuit ruling<sup>14</sup>, that traditional principles of contract law apply to arbitration agreements, the parties may spend their resources litigating the enforceability of arbitration agreements before resolving the merits of their claims. In the light of the above, it may not be necessarily true that there would be a significant cost savings from using arbitration rather than the judicial system.

### C. The History of the Federal Arbitration Act

The United States Congress enacted the Federal Arbitration Act (“FAA”) in 1925.<sup>15</sup> Its purpose in passing the Act was to overcome the longstanding hostility of American courts toward arbitration. The FAA made written arbitration agreements specifically enforceable and gave courts and aggrieved parties power to take action against those who failed to comply with their own arbitration agreements.<sup>16</sup> The express purpose of the FAA was to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts.<sup>17</sup> Moreover, arbitral rulings are reviewable by the courts and may be overturned where there is evident partiality or corruption in the arbitrators.<sup>18</sup> Section 1 excludes from the Act’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>19</sup> Section 2 explains the Act’s scope and provides that “a written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy...shall be valid, irrevocable, and enforceable...”<sup>20</sup> The issue before the federal courts for a long time was: whether or not the FAA excluded all employment contracts. More recently, the federal Supreme Court in *Circuit City Stores, Inc. v. Adams*<sup>21</sup> clarified that the exclusionary clause in the FAA applies only to agreements covering transportation workers and not to employment contracts generally. However, although the Court

---

<sup>13</sup> Stephen W. Jones, Some second thoughts on the use of arbitration to resolve employment discrimination claims, College of Labor and Employment Layers (Fall 2002).

<sup>14</sup> *Circuit City Stores, Inc. v. Adams*, 279 F. 3d 889 (2002).

<sup>15</sup> 9 U.S.C. § 1 et. seq.

<sup>16</sup> Struble, supra note 9, at 651.

<sup>17</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

<sup>18</sup> Lamm, supra note 4, at 96.

<sup>19</sup> 9 U.S.C. § 1

<sup>20</sup> 9 U.S.C. § 2

<sup>21</sup> *Circuit City*, 532 U.S. 105.

resolved the issue of the scope and application of the FAA, there are still many questions without answer regarding employment arbitration.

### III. The Early Mandatory Arbitration Cases

The Supreme Court decided three mandatory arbitration cases that set the stage for the controversy presented in *Circuit City*. In these cases the Court evidenced a doctrinal shift from complete hostility towards mandatory arbitration clauses to widespread acceptance of them.

In *Alexander v. Gardner-Denver*<sup>22</sup> the Supreme Court unanimously held that a member of a union could pursue his racial discrimination claim in court despite an adverse arbitral ruling pursuant to mandatory arbitration provision in a collective bargaining agreement. For many years, the courts applied Gardner-Denver decision to permit employees with mandatory arbitration agreements to bring independent statutory claims against their employers.<sup>23</sup> This was a blow to the institution of arbitration<sup>24</sup>, which resulted in a noticeably increase in civil cases which flooded the federal courts<sup>25</sup>.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>26</sup> the Supreme Court changed the doctrinal judicial hostility towards arbitration. The Court relied on the FAA liberal policy favoring arbitration and held that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” With this decision, the Court held that unless Congress has shown an intention to preclude a waiver of judicial remedies, the party should be compelled to mandatory arbitration. Although this case was in a business context, it was apparent that the Supreme Court was starting to view individual mandatory arbitration agreements as voluntary contracts between the parties.<sup>27</sup>

In 1991, *Gilmer v. Interstate/Johnson Lane Corp.*<sup>28</sup> solidified Mitsubishi’s doctrine in favor of

---

<sup>22</sup> 415 U.S. 36 (1974)

<sup>23</sup> Christine M. Reilly, Achieving knowing and voluntary consent in pre-dispute mandatory arbitration agreements at the contracting stage of employment, 90 Calif. Rev. 1203, 1213 (July 2002).

<sup>24</sup> Jenemiah A. Byrne, “Another day” has come and gone: *Circuit City stores, Inc. v. Adams*, Application of the Federal Arbitration Act to employment disputes, 40 Brandeis L.J. 163, 169 (Fall 2001).

<sup>25</sup> Reilly, supra note 20, at 1214.

<sup>26</sup> 473 U.S. 614 (1985).

<sup>27</sup> Reilly, supra note 20, at 1214.

<sup>28</sup> 500 U.S. 20 (1991).

mandatory arbitration. Gilmer was required, as a condition of employment with a brokerage firm, to register with a stock exchange whose employment agreement compelled the arbitration of the signer's employment claims. Although Gilmer signed the agreement, he later filed an age discrimination claim instead of submitting the matter to arbitration. The Court, granted defendant's motion to compel arbitration. The Court held that Section 2 of the FAA required the arbitration of an age discrimination claim based upon a securities registration application that included a mandatory agreement to arbitrate employment disputes. Therefore, statutory claims are fully arbitrable unless Congress has evidenced an intention otherwise. Thus, the showing of congressional intent to preclude waiver of a judicial forum should be demonstrated by offering evidence in the statute's text, the legislative history, or an inherent conflict between arbitration and the underlying purpose of the statute. In conclusion, Gilmer held that an agreement to arbitrate statutory claims is enforceable.

To this day, the Supreme Court continues to fully embrace mandatory arbitration agreements. Nevertheless, it is essential to have in mind, that whatever the Court's opinion, Congress maintains the power to exclude what it feels appropriate from the scope of arbitration agreements.<sup>29</sup> Thus, Congress has the last word.

#### **IV. Circuit City Stores, Inc. v. Adams**

In 1995, Saint Clair Adams signed an employment application to work as a sales counselor at a Circuit City Store in Santa Rosa, California. As part of the application, Adams signed the "Circuit City Dispute Resolution Agreement," which required employees to submit all claims with Circuit City to binding arbitration. Adams was compelled to sign the mandatory arbitration agreement if he wanted the job because Circuit City does not even consider applicants who fail to sign it. Two years later, Adams resigned and filed an employment discrimination lawsuit in state court against Circuit City, which in turn then filed suit in the federal court seeking to enjoin the state court action and to compel arbitration of Adams' claims pursuant to the FAA. The District Court entered the order to enforce arbitration, but the Ninth Circuit reversed the district court decision.<sup>30</sup> Basing its decision upon *Craft v. Campbell Soup Co.*<sup>31</sup> the Ninth Circuit held that the FAA did not apply to contracts of employment. Circuit City appealed the decision to the Supreme Court, noting that the Ninth Circuit holding was contrary to every other circuit interpretation of Sections 1 and 2 of the FAA. The United States Supreme Court reversed the Ninth Circuit,<sup>32</sup> holding that Section 1 of the FAA only excludes contracts of transportation workers from the provisions of the FAA. The majority began its analysis by noting that all of the federal courts of appeals but the Ninth

---

<sup>29</sup> *Nguyen v. City of Cleveland*, 312 F. 3d 243 (6<sup>th</sup> Cir. 2002).

<sup>30</sup> 194 F. 3d 1070 (9<sup>th</sup> Cir. 1999), rev'd, 532 U.S. 105 (2001).

<sup>31</sup> 177 F. 3d 1083 (9<sup>th</sup> Cir. 1998), overruled by *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>32</sup> 532 U.S. 105 (2001).

Circuit had reached that conclusion. In addition, the majority argued that exempting all contracts of employment from the FAA would render the specific exemption of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in...interstate commerce” meaningless. Therefore, the majority concluded that the Section 1 exemption was to be interpreted under the *ejusdem generis* canon. As a result, the Supreme Court held that the meaning of the residual clause was controlled by reference to the categories of workers refer to just before it (seamen, railroad,...), and could not extend to all employment contracts.

Relying on the *ejusdem generis* construction, the Supreme Court concluded that the text of the FAA foreclosed the Ninth Circuit’s broad reading exempting all contracts of employment. Therefore, Section 1 exempts from the FAA only contracts of employment of transportation workers. As well, the majority pointed to the benefits of arbitration of disputes, including avoiding the costs of litigation. Finally, quoting familiar language from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>33</sup> the Court stated that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”<sup>34</sup>

#### **V. The case law after *Circuit City Stores, Inc. v. Adams***

After *Circuit City* Federal Circuits have decided a line of cases regarding employment individual arbitration agreements. In other words, cases involving pre-dispute agreements in which an employer and an employee in a nonunion setting agree to resolve employment related disputes, including those arising under antidiscriminatory statutes, through resort to an arbitral rather than a judicial forum. Prior to *Gilmer* and *Circuit City*, considerable doubt existed as to the validity of such agreements. Through the case law discussed below, the Federal Circuits have demonstrated their support in favor of mandatory employment arbitration in a nonunion setting.



---

<sup>33</sup> *Mitsubishi Motors*, 473 U.S. at 628.

<sup>34</sup> *Circuit City*, 532 U.S. at 122.

Typically, the arbitration agreement may be given to the applicant separately, or as part of an employment contract, the employment application form, or by reference to other documents such as employee manuals. Most applicants must sign the arbitration agreement before they begin work, but there are some cases in which the employer presents the agreement to the employee after he began working for them.<sup>35</sup>

*Adkins v. Labor Ready*<sup>36</sup>, decided in 2002, reaffirmed the *Circuit City* doctrine in favor of mandatory arbitration. In this case Adkins filed a lawsuit against Labor Ready alleging that the payroll procedures violated the federal Fair Labor Standards Act (FLSA). Adkins contended that since the agreement to arbitrate was contained in an employment application rather than a post-hire writing, it cannot create binding contractual obligations. The United States Court of Appeals for the Fourth Circuit held that an arbitration agreement contained in an employment application compelled the arbitration of the signer's employment claims. The Fourth Circuit stated that: "[t]he employment application does more than govern a single day's work. Rather, it sets the employment framework for the entire business relationship...".<sup>37</sup> In addition, the Court held that the exception of contracts of employment of transportation workers must be construed narrowly in favor of arbitration. Thus, for an employee to qualify as a transportation worker, he must show that a majority of his daily assignments are in transportation-related industries.

In *Tinder v. Pinkerton Security*<sup>38</sup> the United States Court of Appeals for the Seventh Circuit held that the mandatory arbitration agreement did not need to be signed to be enforceable because the FAA requires the arbitration agreements to be written, though it does not require them to be signed. Tinder worked as a security officer and about one year after she started working, Pinkerton Security implemented a mandatory arbitration program that broadly covered all legal claims including discrimination under the federal civil rights statutes. The Seventh Circuit held that because Tinder remained on the job past the effective date of the program, that showed her mutual promise to arbitrate her disputes with Pinkerton Security.

In *Horenstein v. Mortgage Market, Inc.*<sup>39</sup> the Federal District Court invalidated a prior arbitration agreement in its entirety. Nevertheless, this decision did not affect the arbitration clause contained in the employment contract between Horenstein and Mortgage Market. Horenstein alleged that the illegal arbitration agreement specifically superseded all prior agreements, thus voiding the arbitration clause in the employment contract. The Court of Appeals for the Ninth Circuit held that there were two separate agreements, the arbitration agreement which was illegal and the other agreement in the employment contract that resulted valid. In addition, Horenstein

---

<sup>35</sup> Reilly, supra note 20, at 1208.

<sup>36</sup> 303 F. 3d 496 (4<sup>th</sup> Cir. 2002).

<sup>37</sup> Id. at 505.

<sup>38</sup> 305 F. 3d 728 (7<sup>th</sup> Cir. 2002).

<sup>39</sup> 9 Fed. Appx. 618 (9<sup>th</sup> Cir. 2001).

claimed that the arbitration agreement was illegal because it eliminated his statutory right to a collective action. The court concluded that under the agreement, even though it was prohibited to file a class action, the employee retained all his substantive rights under the law. The court expressed that the employee knowingly signed an agreement to arbitrate his statutory claims, thus he abandoned his right to enforce those claims as part of a class action. Based on the foregoing, the court decided that his claim under the Fair Labor Standards Act (“FLSA”) was subject to arbitration.

## **VI. The unanswered questions after *Circuit City Stores, Inc. v. Adams***

### **A. Types of claims that may be subject to mandatory arbitration**

In 1991 the Supreme Court stated that statutory claims, specially those under the Age Discrimination in Employment Act (ADEA), may be subjected to the FAA because nothing in the text or legislative history explicitly precludes arbitration.<sup>40</sup> In *Gilmer* the controversy was regarding a federal statute. In *Circuit City*, the claims were brought under state laws. With the holding in *Circuit City*, the Supreme Court made no distinction regarding the type of claim that may be subject to mandatory arbitration.

It has been suggested that the employment contract must specify which statutory claims are subject to arbitration and that the specific statute should be referenced. Nevertheless, this interpretation is not consistent with *Circuit City*'s decision.

After the Supreme Court decision in *Circuit City*, the Federal Circuits have maintained the strong policy favoring arbitration. The most recent case law has reiterated that the provisions of the FAA apply to employment agreements to arbitrate discrimination claims brought pursuant to federal statutes, including Title VII of the Civil Rights Act and the Fair Labor Standard Act (FLSA). In conclusion, at the present time there is no limitation in the type of employment claim that can be subjected to arbitration.

### **B. E.E.O.C. versus *Circuit City***

The Equal Employment Opportunity Commission (“EEOC”) in July 10, 1997 published a Policy Statement disfavoring mandatory binding arbitration of employment disputes as a condition of employment.<sup>41</sup> In 2001, the United States Court of Appeals for the District of Columbia decided a case that examined the aforementioned policy statement.<sup>42</sup> *Borg-Warner* required its employees to

---

<sup>40</sup> *Gilmer*, 500 U.S. at 33.

<sup>41</sup> “Policy Statement on Mandatory Binding Arbitration of Employment Disputes as a Condition of Employment” (July 10, 1997).

<sup>42</sup> *Borg-Warner Protective Services Corp. v. E.E.O.C.*, 345 U.S. App. D.C. 323 (D.C. 2001).

sign, as a condition of employment, an arbitration agreement. Based on the EEOC Policy Statement, Borg-Warner filed a lawsuit against the EEOC in the district court seeking a declaratory judgment that its arbitration agreement were enforceable and that it had not violated Title VII by insisting that its employees sign such agreements as a condition of their employment. The Court concluded that Borg-Warner was not aggrieved by the existence of the EEOC's Policy Statement; therefore, Borg-Warner had no standing. Nevertheless, the court discussed the legal doctrine and expressed that all the federal courts of appeals (except the Ninth Circuit) agreed that Title VII claims may be subject to mandatory arbitration. In addition, held that "the EEOC's Policy Statement carries no special weight in the courts: if it has any force, it is derived from the power of the EEOC's reasoning to persuade." It is important to bear in mind that even though the EEOC policy statement carries no special weight in the courts, the EEOC intervenes in many cases as a plaintiff or as an *amicus curia*.<sup>43</sup> In addition, it is important to consider that the EEOC launched a voluntary mediation program.

C. E.E.O.C. v. Waffle House, Inc.

In *E.E.O.C. v. Waffle House, Inc.*,<sup>44</sup> decided in 2002, the question presented to the court was whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the EEOC from pursuing victim-specific judicial relief (such as backpay, reinstatement, and damages). In the present case, as a condition of employment, all Waffle House employees were required to sign an application containing a mandatory arbitration agreement. Baker, an employee, after suffering a seizure was fired by Waffle House. Baker filed a timely discrimination charge with the EEOC alleging that his discharge violated Title I of the Americans with Disabilities Act of 1990 (ADA). Subsequently, the EEOC filed a suit to which Baker was not a party. The EEOC complaint requested specific relief designed to make Baker whole. The Federal Supreme Court held that "an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an ADA enforcement action." In addition, the Supreme Court held that once an ADA charge is filed, the EEOC becomes the master of the case, and has the authority to recover victim-specific relief. Moreover, the court held that the ADA "statute specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed." Therefore, the EEOC could bring an enforcement action for all statutory remedies, including backpay, reinstatement, and compensatory and punitive damages, even though the discharged employee had entered into an arbitration agreement with his employer.

D. Title VII and *Duffield v. Robertson Stephens & Co.*

Before Circuit City the Ninth Circuit had decided in *Duffield v. Robertson Stephens & Co.*<sup>45</sup> that

---

<sup>43</sup> *E.E.O.C. v. River Oaks Imaging and Diagnostic*, 67 F.E.P. (BNA) 1243 (S.D. Tex. 1995).

<sup>44</sup> 534 U.S. 279 (2002).

<sup>45</sup> 144 F. 3d 1182 (9<sup>th</sup> Cir. 1998).

an employer cannot require an employee to arbitrate claims under Title VII or parallel state statutes as a condition of employment. The Court concluded that Congress had the intention to preclude compulsory arbitration of Title VII claims with the passage of the Civil Rights Act of 1991. Even though, the Federal Supreme Court declined certiorari, it is understood that the decision in *Circuit City* overruled *Duffield*.<sup>46</sup> Therefore, *Duffield*'s continuing validity is questionable.<sup>47</sup> As well, the recent decisions cast doubt as to whether Congress precluded compulsory arbitration of Title VII claims. In addition, in *Weeks v. Harden Manufacturing Corp.*,<sup>48</sup> the Court held that *Duffield* does not say that requiring employees to sign arbitration agreements violates Title VII. Based on the foregoing, all the Federal Circuits have held (except the Ninth Circuit) that Title VII claims may be subject to compulsory arbitration.

#### E. Collective Bargaining and Circuit City

The United States Supreme Court held in *Alexander v. Gardner-Denver Co.*<sup>49</sup> that an arbitration of a discrimination grievance under a collective bargaining agreement does not preclude subsequent litigation of Title VII claim or require deferral by court to an arbitration award. Nonetheless, the Supreme Court made clear in *Gilmer*<sup>50</sup> that statutory claims are subject to binding arbitration. It could be postulated that the right to submit a statutory claim in a judicial forum cannot be waived in a collective bargaining agreement. Nonetheless, the United States Supreme Court implied in *Wright v. Universal Maritime Service Corporation*<sup>51</sup> *Alexander-Gardner* could be overruled if the arbitration clause expressly named the anti-discrimination laws.

The Puerto Rico Supreme Court applied *Alexander-Gardner* ruling in *Vélez v. Servicios Legales de Puerto Rico, Inc.*<sup>52</sup> In this case, the Court made an analysis of the legislative history and created an exception to the policy favoring arbitration when an employee filed a sexual harassment suit. The Court concluded that an employee affected by an act of sexual harassment cannot be compelled to arbitration. The Court created the right for a sexual harassment discriminated employee to avoid mandatory arbitration and submit his claim to the judicial forum.

---

<sup>46</sup> *Weeks v. Harden Manufacturing Corp.*, 291 F. 3d 1307, 1315 (11<sup>th</sup> Cir. 2002).

<sup>47</sup> Keith A. Becker & Dianne R. LaRocca, Divided Court crosses wires over Circuit City decision: Holding casts doubt on Ninth Circuit's *Duffield* decision, 7 Harv. Negotiation L. Rev. 403, 411 (Spring 2002).

<sup>48</sup> *Weeks*, 291 F. 3d 1307.

<sup>49</sup> *Alexander*, 415 U.S. 36.

<sup>50</sup> *Gilmer*, 500 U.S. 20.

<sup>51</sup> 525 U.S. 70 (1998).

<sup>52</sup> 98 T.S.P.R. 1.

More recently, in *Medina Betancourt v. La Cruz Azul de P.R.*<sup>53</sup> the Supreme Court applied the *Vélez* ruling. Medina was terminated from her job at Cruz Azul. She filed a complaint under Puerto Rico's Law 100<sup>54</sup> for pregnancy discrimination. The collective bargaining agreement contained a provision that stated that the employee agree to settle all employment-related claims against the employer through arbitration before the Arbitration Bureau of the Labor Department of Puerto Rico (or in Spanish "Negociado de Conciliación y Arbitraje del Departamento del Trabajo y Recursos Humanos"). The Supreme Court held that the Bureau's Regulation stated that employment discrimination claims brought under Law 100 can not be decided by their arbitrators. Based on the foregoing, the Court concluded that Medina could not resolve her claim at the arbitral forum and had to proceed directly to the judicial forum.

#### F. Contract of Adhesion

One of the arguments against mandatory arbitration agreements in employment contracts on a "take-it-or-leave-it" basis is that it is an unenforceable contract of adhesion. In 2002,<sup>55</sup> the Fourth Circuit held that for the court to find that the agreement is a contract of adhesion, two requirements have to be met: (1) gross inadequacy in bargaining power, and (2) terms unreasonably favorable to the stronger party. In this case, the plaintiffs claimed that the employment agreement was an unconscionable contract of adhesion because the plaintiffs did not complete high school, were paid the minimum wage, live in low-income neighborhoods, and did not know what arbitration was when they signed the employment application. Labor Ready was a large international corporation. In other words, there was a huge disparity in the bargaining power, but the court concluded that the second requirement was not met. Furthermore, the Court stated that a ruling of unconscionability based on a huge disparity in the bargaining power alone "could potentially apply to every contract of employment in our contemporary economy."<sup>56</sup> Therefore, a ruling of unconscionability based on this analysis requires both findings, as well as evidence of unfair terms in the arbitration clause.

However, on remand in *Circuit City Stores, Inc. v. Adams*<sup>57</sup> the Ninth Circuit held that the arbitration agreement was procedurally unconscionable and thus unenforceable under California law because it was an adhesion contract offered on a take-it-or-leave-it basis. The Court stated that when assessing procedural unconscionability, they consider "the equilibrium of bargaining power between the parties and the extent to which the contract clearly discloses its terms."<sup>58</sup> Thus,

---

<sup>53</sup> 2001 T.S.P.R. 163.

<sup>54</sup> 29 L.P.R.A. § 146 et. seq.

<sup>55</sup> *Adkins*, 303 F. 3d at 502.

<sup>56</sup> *Id.* at 501.

<sup>57</sup> *Circuit City Stores, Inc. v. Adams*, 279 F. 3d 889 (9<sup>th</sup> Cir. 2002).

<sup>58</sup> *Id.* at 893.

the Court concluded that it was an adhesion contract because it was drafted by the party with superior bargaining power and because the agreement was a prerequisite to employment, the applicants were not permitted to modify the agreement's terms. However, this theory is not supported by the majority of the Federal Circuits because individual mandatory arbitration agreements are valid and enforceable.

The Supreme Court of Puerto Rico has defined a contract of adhesion as the one in which "only one of the parties sets the conditions...that the other party has to accept"<sup>59</sup>(our translation). In addition, the Court has stated that a contract is not void only because it is a contract of adhesion, because an employment contract is a contract of adhesion.<sup>60</sup> It is important to point out that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions, but general contract defenses may operate to invalidate arbitration agreements.<sup>61</sup> Therefore, the controlling point will be if it is ruled by contractual good faith.

#### G. Arbitration Expenses in the Employment Setting

One of the challenges before the courts today is determining who should bear the burden of paying for the arbitration of disputes. At the present time there is not a conclusive answer to the question of: if the employee may or should bear the burden of the of costs? With the recent Supreme Court decision in *Circuit City*, the issue regarding fee-splitting is a growing concern. The Federal Circuits are split in their treatment of this issue and the Supreme Court has yet to take a stand.

Este Registro es provisional, sujeto a revisión y cambio

In *Cole v. Burns International Security Services*<sup>62</sup> the United States Court of Appeal for the District of Columbia Circuit held that a "an employee could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." In addition, the Court concluded that "there is no reason to think that the [United States Supreme] Court would have approved a program of mandatory arbitration of statutory claims in *Gilmer* in the absence of employer agreement to pay arbitrator's fee."<sup>63</sup>The court went even further, stating that an employee can never be required, as a condition of employment, to pay an arbitrator's fees in order to secure the resolution of statutory claims, any more than an employee can be made to pay a judge's salary. Furthermore, the Court declared that they were unaware of any case in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear the case.

---

<sup>59</sup> *Zequeira v. CRUV*, 83 D.P.R. 878, 880 (1961).

<sup>60</sup> *Arthur Young v. Vega*, 136 D.P.R. 157 (1994)

<sup>61</sup> *Circuit City*, 279 F. 3d at 892.

<sup>62</sup> 105 F. 3d 1465, 1485 (D.C. 1997).

<sup>63</sup> *Id.* at 1484.

More recently, after the Supreme Court decision in *Green Tree Financial Corp. v. Randolph*<sup>64</sup> courts have adopted a case-by-case approach to the issue regarding fee-splitting. In *Green Tree*, the Supreme Court examined the issue of whether fee-splitting precluded a litigant from effectively vindicating federal statutory rights in the arbitral forum. The Supreme Court held that when “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”<sup>65</sup> Nevertheless, the Court refused to resolve the issue by declaring that “how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss...”<sup>66</sup> Instead of resolving the matter, the Court brought the parties lack of evidence to support their claims.

In *Adkins v. Labor Ready*,<sup>67</sup> decided in 2002, the employee claimed that the arbitration clause was unconscionable and unenforceable as it forecloses redress of his rights because it effectively precluded access not only to the courts, but to the arbitration forum itself. The employee argued that the arbitration costs were so prohibitively expensive that no plaintiff would be willing to gamble on victory in arbitration. The Court reaffirmed the Supreme Court decision in *Green Tree* stating that the party that seeks to invalidate an arbitration agreement on the ground that arbitration would be so high, bears the burden of showing the likelihood of incurring such costs.

In sum, the United States Supreme Court has provided little guidance because exactly how much proof a court should demand prior to invalidating an arbitration provision is not yet clear. Nevertheless, it is clear that the mere risk of incurring prohibitively high costs is not sufficient to invalidate an otherwise valid arbitration agreement. For the moment, the employer should bear all costs unique to arbitration.

## VII. A practical guide for drafting arbitration clauses

The arbitration process should be impartial and fair. As well, the arbitrator should be impartial, neutral and knowledgeable of the subject matter. For an employment arbitration agreement to be valid, (1) it may not limit statutorily-imposed remedies, such as punitive damages and attorney fees; (2) it must admit sufficient discovery; (3) the arbitrator must provide a written decision; (4) the employer must bear the costs, at least the costs unique to the arbitration process; (5) the agreement must be bilateral, thus it must not require the employee to do anything the employer is not also required to do.<sup>68</sup> Based on the above, it is not enough to state that the disputes arising

---

<sup>64</sup> 531 U.S. 79 (2000).

<sup>65</sup> *Id.* at 92.

<sup>66</sup> *Id.*

<sup>67</sup> *Adkins*, 303 F. 3d 496.

<sup>68</sup> *Icaza*, *supra* note 5, at 35.

under the agreement shall be settled by arbitration. Therefore, the arbitration agreement should be precise and specific, thus issues such as to when, where, how, and before whom a dispute will be arbitrated should be inserted in the arbitration agreement.

### **VIII. Conclusion**

The reality in our society at present is that choosing between the arbitral forum and the judicial forum is more complex than originally contemplated. Even though *Circuit City* settled the circuit split regarding the scope of the FAA, many questions still remain unanswered regarding employment arbitration. Therefore, employers should carefully choose between the two systems. Furthermore, the employer has to be constantly aware of the new developments in employment arbitration, especially regarding arbitration expenses, discrimination claims under a collective bargaining agreement and the future actions of Congress.

Arbitrating disputes rather than litigating them can be advantageous for employers as well as for employees because it is less formal than litigation and arbitration cases are typically resolved more quickly and confidentially than those which are litigated. However, determining the enforceability of an arbitration provision may result in an unpredictable proceeding for the parties. Thus, an arbitration agreement should only substitute the judicial forum for an arbitral forum, without compelling the waive of any substantive right of the employee.

Este Registro es provisional, sujeto a revisión y cambio

