Is One Deposition Enough? Limitations on Discovery in Arbitration Clauses

By Joel M. Grossman

Joel M. Grossman is a mediator and arbitrator with JAMS, The Resolution Experts in Santa Monica. His practice focuses on employment, entertainment and other business disputes. He has twice been selected as one of California's Top 40 Neutrals by the Daily Journal. For more information please visit www.jamsadr.com.

JAMS
THE RESOLUTION EXPERTS®

In the recent case of *Dotson v. Amgen, Inc.*[1] the court of appeal was presented with the issue of whether an arbitration clause that limited each side to taking one deposition, absent permission from the arbitrator, made the arbitration clause unconscionable and therefore unenforceable. The court ruled that it did not. While this simple question and answer is an adequate summary of the holding of the case, a full reading of the case presents more general questions about the role of discovery in arbitration, and about a court's role in rewriting a provision of an arbitration clause that it deems improper.

The *Dotson* case arose out of an arbitration clause that was a condition for employment at defendant Amgen. Dotson, an attorney, signed the clause at the outset of his employment. Four years later Dotson's employment was terminated, and he filed a complaint in court for wrongful termination. Amgen filed a motion to compel arbitration, to which Dotson objected, arguing that the following clause in the arbitration agreement was unconscionable: "Each party shall have the right to take the deposition of one individual and any expert witness designated by the other party. . . . Additional discovery may be had where the Arbitrator selected pursuant to this Agreement so orders, upon a showing of need."[2] Dotson argued, and the trial court agreed, that limiting the parties to only one deposition was unconscionable. In the trial court's words:

> This limitation on discovery is the reverse of the usual presumption in Superior Court where depositions are not limited unless the Court issues a protective order. Within the context of an employment case, this is a critical distinction. The employee typically has a greater need to take depositions to get access to persons not otherwise available to him/her in the form of company officers, supervisors, and employees who participated in the decision to fire, or who may have knowledge regarding the facts on which the decision was based.[3]

Given the employee's greater need for depositions than the employer's, the trial court deemed the "one deposition" provision unconscionable.

The court of appeal reversed. It pointed out that arbitration, as compared to court litigation, is intended to be a "streamlined" process; thus, limiting discovery, such as by limiting the number of depositions each party may take, is one way to help streamline the process. The court noted that in the seminal California case on arbitration clauses in the employment setting, *Armendariz v. Foundation Health Psychcare Services, Inc.*,[4] the California Supreme Court determined that arbitration clauses must allow discovery sufficient for the parties to vindicate their claims, not the same amount of discovery as would be afforded in a court of law. The court of appeal therefore concluded that under *Armendariz*, limitations on discovery are a permissible part of the arbitration process.[5] Because the Amgen arbitration clause was a permissible limitation on discovery rights, as approved by the California Supreme Court in *Armendariz,* the court held that Amgen's arbitration clause was not unconscionable.

The court also cited the more recent court of appeal decision in *Roman v. Superior Court*,[6] in which another appellate court approved an arbitration rule of the American Arbitration Association ("AAA") in which the parties are not guaranteed *any* depositions as a matter of right, since the clause grants the arbitrator the ability "to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of the arbitration."[7] Citing *Armendariz,* the *Roman* court noted that it is not unconscionable to leave it to the arbitrator to determine how much discovery the parties may have. Since the courts have approved provisions whereby the parties are not guaranteed the right to take any depositions, and all discovery is dependent on the permission of the arbitrator, the *Dotson* court had little trouble determining that it is not unconscionable to be allowed one deposition as a matter of right, with the ability to take additional depositions upon obtaining the permission of the arbitrator. Thus, the Amgen clause was not unconscionable.

Aside from the specific holding of the case—that an arbitration clause is not unconscionable if it limits each party to one deposition, and permits additional depositions at the discretion of the arbitrator—the *Dotson* case is notable because it highlights an important issue in arbitrations: whether an unconscionable provision can be severed, and the balance of the arbitration clause can be enforced. The court of appeal explained that even if the trial judge was correct in determining that a "one deposition" rule was unconscionable, the court should not have declined to enforce the agreement. Rather, the trial court should have severed what it deemed to be the unconscionable provision and enforced the arbitration clause: "Where, as here, only one provision of the agreement is found to be unconscionable and that provision can easily be severed without affecting the remainder of the agreement, the proper course is to do so." [8]

In discussing how to determine which kinds of unconscionable provisions should be severed while enforcing the overall arbitration clause, and which kinds of unconscionable provisions require the entire arbitration clause to be set aside, the court once again cited *Roman*:

> In determining whether to sever or restrict illegal terms rather than voiding the entire contract, '[t]he overarching inquiry is "'whether the interests of justice would be furthered . . . '" by severance.' [Citation] Significantly, the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement. Although 'the statute appears to give a trial court discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement[,] . . . it also appears to contemplate the latter course only when an agreement is "permeated" by unconscionability.'[9]

An interesting contrast to the severance discussion in *Dotson* appears in *Young Seok Suh v. Superior Court*,[10] a case decided just a few weeks after *Dotson.* In *Young Seok Suh* the issue was whether the arbitration rules set forth in the agreement (called the AHLA Rules), which did not allow punitive damages, were unconscionable.[11] The court held that the limitation on remedies was unconscionable, and that it could not be severed: "the AHLA Rules cannot be severed from the arbitration clause. The agreement does not provide for any replacement rules." The court, quoting from *Parada v. Superior Court*,[12] stated, "[s]everance is not permitted if the court would be required to augment the contract with additional terms."[13] Thus, while the "one deposition" rule in *Dotson* could be severed without rendering the contract unenforceable, the AHLA Rules in *Young Seok Suh* could not be severed because the trial court would have had to augment the parties' arbitration clause with its own set of rules.

One final note on limitations on discovery in arbitration: it has been suggested by some arbitrators that the original purpose of arbitration—to provide a streamlined and less expensive method of dispute resolution—has been undermined by allowing discovery that is as broad as what is allowed in court. In a recent article in *Los Angeles Lawyer,*[14] arbitrators Kenneth C. Gibbs and Barbara Reeves Neal cited a recent survey indicating that corporate counsel are starting to remove arbitration clauses from agreements because they believe that arbitration has become as cumbersome and costly as litigation. Gibbs and Neal cite a New York State Bar Association report concluding that arbitration costs have exploded because of the increasing use of wide-ranging discovery. They note that: "standard arbitration agreements and practices have taken on all the trappings of litigation—protracted discovery, extensive motion practice, and invocation of the rules of evidence. Litigators, accustomed to the rules and procedures of the courtroom, import those habits into arbitration, demanding broader discovery and motion practice."[15] While arbitration was originally intended to operate with little or no discovery, it now is burdened with the high costs of discovery that are present in court cases, thereby eliminating much of the benefit of arbitration. The *Dotson* decision, upholding the "one deposition" limitation, may be a helpful step back toward the original purpose of arbitration—providing a faster and cheaper way to resolve disputes.

ENDNOTES

1. 181 Cal. App. 4th 975 (2010).
2. *Id*. at 978.
3. *Id*. at 982.
4. 24 Cal. 4th 83 (2000).
5. *Id*. at 106 n11.
6. 172 Cal. App. 4th 1462 (2009).
7. *Id*. at 1475.
8. 181 Cal. App. 4th at 985.
9. 181 Cal. App. 4th at 986, citing to *Roman, supra,* 172 Cal. App. 4th at 1477-78.
10. 181 Cal. App. 4th 1504 (2010).
11. The rules at issue were the American Health Lawyers Association arbitration rules, that had been incorporated in the doctors' employment agreement.
12. 176 Cal. App. 4th 1554 (2009).
13. *Id*. at 1586.
14. *It's Time to Fix Arbitration Discovery*, L.A. Law., Jan. 2010, at 48.
15. *Id*.