VOLUNTARY ARBITRATION

JUNE 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

VOLUNTARY ARBITRATION IN THE EASTERN DISTRICT OF TENNESSEE

By Thomas W. Phillips
United States Magistrate Judge

Chairman of Standing Committee on Arbitrator Approval

The United States Court for the Eastern District of Tennessee has adopted a local rule implementing voluntary arbitration in cases filed in the district court. One provision of the Alternative Dispute Resolution Act of 1998 provided for arbitration with the consent of the parties. The Eastern District of Tennessee's arbitration program is expected to be an integral part of the alternative dispute resolution mechanisms available to parties to litigation in the Eastern District.

BACKGROUND

Under the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658; Public Law 105-315, October 30, 1998, 112 Stat. 2993, each district court was permitted to allow referral to arbitration any civil action, including any adversary proceeding in bankruptcy, when the parties consent, except in cases alleging violation of a constitutional right, when jurisdiction is based in whole or in part on 28 U.S.C. § 1343 (actions relating to civil rights and elective franchise), or when the relief sought consists of money damages greater than One Hundred Fifty Thousand Dollars ($150,000.00).

Although arbitration is a recent addition to ADR procedures, it is certainly not a new concept in the law. Arbitration as an alternative to litigation has been an active part of labor-management relations

since at least1938, and it has become prominent in the construction, finance and insurance industries in the past several decades. It has now been recognized as a part of the alternative dispute resolution mechanisms available in federal court.

HOW IT WORKS

The local rule adopted by the United States District Court for the Eastern District of Tennessee incorporates the provisions of the Alternative Dispute Resolution Act of 1998 as it relates to arbitration. The local rule is 16.5, denominated "Arbitration." The local rule provides that the court may refer any civil action, including any adversary proceeding in bankruptcy, to arbitration under the provisions of the rule if the parties consent to such reference. Such reference may not be made, however, where the action is exempted from alternative dispute resolution pursuant to Local Rule 16.3(b); where the action is based on an alleged violation of a right secured by the Constitution of the United States; where jurisdiction is based in whole or in part on 28 U.S.C. § 1343, providing for original jurisdiction in federal court of any action to enforce civil rights; or where the relief sought consists of money damages in an amount greater than One Hundred Fifty Thousand Dollars ($150,000.00) exclusive of punitive damages, interest, costs, and attorney fees. The arbitration reference may be withdrawn by the presiding judge upon a determination for any reason that the matter referred is not suitable for arbitration, but once an order is entered directing the parties to participate in arbitration, the parties are required to complete the arbitration process unless the court enters an order withdrawing the arbitration reference. Unless the parties specifically agree to binding arbitration, however, all cases referred to arbitration pursuant to Local Rule 16.5 shall be for non-binding arbitration.

ARBITRATORS

Local Rule 16.5 provides that the court shall approve those persons who are eligible and qualified to serve as arbitrators, and further provides that the court shall have complete discretion and authority to withdraw the approval of any arbitrator at any time. The rule further provides that any individual may be approved to serve as an arbitrator if, within the discretion of the court, he or she meets the following qualifications:

(a) All arbitrators must be approved by the chief judge and must be listed on the roster of approved arbitrators of the American Arbitration Association, the Federal Mediation and Conciliation Service, a similar reputable arbitration service, or must be lawyers, licensed to practice in the State of Tennessee, and admitted to practice before the United States District Court for the Eastern District of Tennessee.

(b) All arbitrators, except those approved as non-lawyer arbitrators, must have practiced law at least five years.

(c) All arbitrators shall take the oath or affirmation described in 28 U.S.C. § 453 and shall complete any training required by the court.

(d) All arbitrators must agree that they will be available to conduct at least one arbitration per year without compensation.

(e) All arbitrators must commit to at least one year of service on the arbitration panel.

(f) All arbitrators must agree to comply with 28 U.S.C. §§ 654-658, the provisions of this rule and of any standing order which may be entered in any division of this court for purposes of implementing this rule.

(g) All arbitrators must agree to provide to the court such biographical and other information as the court may require.

(h) All arbitrators must be recommended by the Standing Committee on Arbitrator Approval and determined by the chief judge to be competent to perform the duties of arbitrator. Arbitrators may be approved based on formal training in arbitration procedures, prior experience as an arbitrator, or some combination thereof. The chief judge shall certify, in his discretion, as many arbitrators as are determined to be necessary for proper operation of the program. The court specifically reserves the right to limit the size of the arbitrator panel. Any person whose name appears on the list of approved arbitrators may ask at any time to have his or her name removed or, if selected to decide a case, decline to serve but remain on the list.

(i) Applications to become an approved arbitrator shall be submitted to the administrator of the court's arbitration program. Applications shall be submitted in the form set forth in Appendix II to Local Rule 16.5. Forms are available from the clerk.

THE PROCESS

To Begin

Parties agreeing to arbitration shall file with the clerk an application to have their case referred to arbitration. (Application forms are available from the clerk.) If the request is granted, the presiding judge shall enter an arbitration reference order. Upon entry of the arbitration reference order, the clerk serves copies of the order on the designated arbitrator, counsel of record, and any parties proceeding pro se. The presiding judge may refuse to approve a proposed arbitration reference order if, in the court's discretion, the case is not appropriate for arbitration or if such approval would cause undue delay in the prompt resolution of the case. A proposed arbitration reference order submitted within thirty (30) days of the filing of a scheduling order in the case will be presumptively timely. Once an arbitration reference order is approved by the presiding judge and filed, any trial date previously scheduled is automatically canceled, unless otherwise ordered by the court.

Discovery

In addition, unless otherwise stipulated by all parties, formal discovery pursuant to Rules 26-37, Federal Rules of Civil Procedure, will be stayed upon entry of an arbitration reference order. Notwithstanding this stay, however, the arbitrator may allow, or the parties may agree to, limited discovery utilizing the procedures set forth in Rules 26-37, Federal Rules of Civil Procedure, or other less formal means. The arbitrator shall have the authority and discretion to control the course, scope and manner of discovery while the case is under reference to arbitration. The arbitrator shall also have authority to resolve discovery disputes while the case is under reference to arbitration.

Scheduling

Once the arbitration reference order is served on the arbitrator, he or she shall consult promptly thereafter with counsel of record and any pro se parties for the purpose of arranging a schedule for completion of any prehearing discovery, any other necessary prehearing preparations, and the setting of a date, time and place for the arbitration hearing. Within thirty (30) days of service of the arbitration reference order, the arbitrator shall file with the clerk an "arbitrator's notice of scheduling" in substantially the same form as Appendix III attached to Rule 16.5. Forms for this purpose are available from the clerk.

Where and When

The arbitration hearing shall be held in a suitable place designated by the arbitrator, or, if space is available, in the United States Courthouse in a space designated by the clerk. The arbitration hearing and the filing of the arbitration award shall take place not later than one hundred fifty (150) days after entry of the arbitration reference order unless the parties obtain an order from the court, based upon good cause shown, granting an extension of time. If the arbitration award is not filed within the one hundred fifty (150) days allowed, the clerk will automatically restore the case to the docket of the presiding judge and notify the judge and the parties that the arbitration has been terminated.

Parties' Obligations

The hearing before the arbitrator may proceed in the absence of any party, who, after notice, fails to be present. In addition, if a party fails to participate in the hearing, the court may impose appropriate sanctions, including, but not limited to, the striking of any demand

for a trial de novo filed by that party. If any party fails to pay the arbitrator's fees or expenses in a timely manner, the costs of his or her services, or any portion thereof, may be taxed as costs.

The Hearing

The arbitrator is authorized to administer oaths or affirmations and each party shall have the right to cross-examine witnesses. The arbitrator shall be authorized to make reasonable rules and issue orders necessary for the fair and efficient conduct of the hearing including, but not limited to, requiring the parties to submit prehearing statements to the arbitrator and requiring service of the same on the parties. The Federal Rules of Evidence shall be used as the guide to the admissibility of evidence, but shall not be controlling. The arbitrator shall control the admission of evidence at the arbitration hearing. A party may have a recording and transcript made of the arbitration hearing at that party's expense.

The Award[1]

Unless otherwise stipulated by the parties, the arbitration award shall state in writing the reasoning underlying the award. It shall be the responsibility of the arbitrator to serve counsel of record and any pro se parties with a copy of the arbitration award. In accordance with 28 U.S.C. § 656(b), such award shall be treated as confidential and not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the case or the case is otherwise terminated. The arbitrator shall not file the award with the clerk. That is the responsibility of the prevailing party.

[1]The decision of an arbitrator or panel of arbitrators is generally referred to as an "award" and may be for the plaintiff or the defendant.

In addition to arbitration by a single arbitrator, the parties can agree to arbitration by a panel of three arbitrators, one of which will be chosen by the parties as chairperson. In order for a valid arbitration award to be made, a majority of the arbitrators in the case must agree to the award and sign it. A separate dissent may be filed with the arbitration award. In addition, at any time before the arbitration hearing, the parties may stipulate in writing that the award of the arbitrator or panel of arbitrators shall be binding upon the parties and is not subject to appeal. Such stipulation shall be submitted to the presiding district judge or magistrate judge for approval and shall be filed with the court.

AFTER THE DECISION

The Filing of the Award

In the absence of the agreement of the parties to binding arbitration, an arbitration award made by an arbitrator, or a panel of arbitrators, is subject to a de novo review. An arbitration award made by an arbitrator, or a panel of arbitrators, along with proof of service of such award on the party or parties by the prevailing party or by the plaintiff, shall be filed with the clerk by the prevailing party or plaintiff within five (5) days of service of the arbitration award on the prevailing party or plaintiff. To make certain that the arbitrator's award is not considered by the court or jury either before, during, or after the trial de novo, the clerk shall, upon filing of the arbitration award, enter on the docket only the words, "arbitration award filed," and the date and nothing more, and shall retain the arbitrator's award in a separate file in the clerk's office.

Trial Demand

In the absence of consent by the parties to binding arbitration, within thirty (30) days of the filing of an arbitration award with the

clerk, any party may file a written demand for a trial de novo in the district court. Upon demand for a trial de novo, the action shall be restored to the docket of the presiding judge and treated for all purposes as if it had not been referred to arbitration.

No Trial Demand

If the parties have agreed to binding arbitration, or in the event no demand for trial de novo is filed within the designated time period, the clerk shall unseal the award, notify the presiding judge, and enter it as the judgment of the court. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of a court in a civil action, except that the judgment shall not be subject to review in any court by appeal or otherwise.

CONCLUDING COMMENTS

The Alternative Dispute Resolution Act of 1998 and Local Rule 16.5 make it abundantly clear that consent to arbitration must be freely and knowingly obtained. 28 U.S.C. § 654(b); E.D.TN.LR 16.5(o)(1). The statute and the local rule both stipulate that consent to arbitration shall be freely and knowingly obtained and that no party or attorney shall be prejudiced in any way for refusing to participate in arbitration. The local rule further requires district judges and magistrate judges to advise attorneys and parties of the availability of the arbitration program, but, in doing so, the judges are required to also advise the attorneys or parties that they are free to withhold consent without adverse consequences.

Individuals chosen as arbitrators and placed on the panel of arbitrators for the Eastern District of Tennessee must take the oath or

affirmation set forth in 28 U.S.C. § 453, which is the oath taken by each justice or judge of the United States. In addition, arbitrators are also subject to the disqualification rules set forth in 28 U.S.C. § 455, which also apply to all federal judges. The Alternative Dispute Resolution Act of 1998, however, specifically states that all individuals serving as arbitrators in an alternative dispute resolution program under the Act are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity. Arbitrators, like judges, are prohibited from communicating ex parte with any counsel or party.

Although the Act and the local rule stipulate that a case wherein the relief sought consists of money damages in an amount greater than One Hundred Fifty Thousand Dollars ($150,000.00) may not be referred to arbitration, both the Act and the local rule further provide that the court may presume damages are not in excess of One Hundred Fifty Thousand Dollars ($150,000.00) unless counsel certifies that damages exceed such amount. In addition, both the Act and the local rule provide that nothing in the Act or in the local rule prevents the parties, upon their own initiative and by mutual consent, from arbitrating a pending matter pursuant to the provisions of 9 U.S.C. § 2, et seq., the Federal Arbitration Act, or § 29-5-301 et seq., Tennessee Code Annotated, the Tennessee Uniform Arbitration Act. An agreement to so arbitrate, without an order of reference or authorization by the court, shall not be subject to the local rule or the Act, and arbitrators who are approved pursuant to the local rule are not restricted from participating in these non-court-annexed arbitrations.

There has been some concern expressed that voluntary, non-binding arbitration will not become a viable alternative to litigation because it could add to the cost and delay attendant to litigation in federal court. Manifestly, with the right of de novo review, voluntary non-binding arbitration could simply become another layer to be added to the already cumbersome process of getting a case tried in federal court.

There are countervailing considerations, however, because even voluntary, non-binding arbitration would give the parties and counsel an opportunity to evaluate their case by presenting it to a highly respected member of the bar who is acting as an arbitrator and whose award will give the parties and counsel a neutral, unbiased opinion of the case. In addition, as pointed out by Professor E. Allan Lind of the Fuqua School of Business at Duke University, "The great benefit of court-annexed arbitration in enhancing litigants' belief that justice has been done appears to result from its capacity to provide more litigants with an adjudicatory hearing than do traditional procedures." Moreover, Professor Lind notes, "Even though a trial de novo is often requested in court-annexed arbitration, very few of the cases actually go to trial."

There is also evidence that cases with trial de novo requests settle with greater frequency than the same case would without an arbitration hearing. Professor Lind, who has conducted empirical research for over twenty years on court-annexed arbitration programs in federal courts, concludes that what appears to be happening is that the hearing and the arbitration award satisfy the litigants' desire to have their case heard, and the trial de novo request is simply a move to give one side or the other a bit of bargaining room once the hearing has provided the psychological groundwork for acceptance of a settlement. (Hearing statement of

Professor E. Allan Lind, Fuqua School of Business, Duke University, made in connection with hearings on the predecessor bill to the ADRA, H.R. 2603, which were held by the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives, October 9, 1997.)

In addition, the ADRA implicitly recognizes the value of binding arbitration in the settlement of legal disputes. The parties can always decide at any time before the arbitration hearing that the arbitration proceeding will be binding and that the decision is not subject to appeal. The parties must express their consent thereto in writing and must specifically waive their rights to request a trial de novo, but the recognition by the ADRA that binding arbitration can be a legitimate part of ADR may very well increase awareness of the benefits to be derived from arbitration. Binding arbitration is undoubtedly the most expeditious way of resolving disputes, and experience in the labor, construction, finance, and insurance industries indicates that it is a mechanism to resolve legal disputes fairly, expeditiously, and inexpensively. Whether arbitration as a part of ADR in the Eastern District of Tennessee is binding or non-binding, however, it must be voluntary, and it may very well be a valuable tool in the attempt of the federal courts to eliminate as much as possible the cost and delay attendant to litigation in federal courts.