CHAPTER 2

ARBITRATION: TOWARD A REBIRTH

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The settlement of commercial disputes by arbitration in the United States commenced in the seventeenth century,[1] but widespread arbitration in labor matters began with the passage of the National Labor Relations Act in 1935, and the impetus thus given to collective bargaining.[2] For the next 40 years, with some reduction during World War II, the number of arbitrators expanded, and arbitration was celebrated by courts, economists, and political scientists as the civilized way to settle industrial disputes. The enthusiasm for interest arbitration[3] was not unanimous, and, for obvious reasons, it never gained general acceptance by unions and management. But grievance arbitration was almost universally required in collective bargaining agreements. Professional associations of arbitrators flourished, arbitration acquired cachet, and, when litigation arose concerning an arbitrator's decision, courts accorded his opinion greater weight than that usually given the conclusions reached by either a trial judge or a jury.[4]

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[1]Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rut.-Cam. L.J. 1, 3 (1976). *See An Act for Determining Differences by Arbitration*, 9 & 10 Will. 3, C. 15, at 697 (1698).

[2]Further impetus was provided in 1947 by the concurrent enactment of Title 9 of U.S. Code and the Labor Management Relations Act, 29 U.S.C. §§ 171–187, establishing a national preference for arbitration of labor disputes.

[3]Unlike grievance arbitration under existing labor contracts, interest arbitration involves the fixing of new contract terms when bargaining negotiations are deadlocked. Gorman, Labor Law, at 573–74.

[4]Limited judicial review began, of course, with the *Steelworkers* trilogy. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568–59, 80 S. Ct. 1343, 1346–47, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585, 80 S. Ct. 1346, 1354, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 1360–62, 46 LRRM 2423 (1960). *Compare John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557–59, 84 S.Ct. 909, 918–19, 11 L.Ed 2d 898, 55 LRRM 2769 (1964) *and Safeway Stores* v. *American Bakery & Con. Workers Int'l Union, Local 111*, 390 F.2d

Interest arbitration has always been nonadjudicative in nature, at least in the sense that the decision is not reached in reliance on precedent or judicial-type principles, but appears to depend almost entirely on economic factors, industrial comparisons, social judgments, and evaluations of acceptability.[5] Grievance arbitration, however, while developed through collective bargaining, is adjudicative. Although the arbitrator is not bound by the rules of evidence or by some jurisprudential rules such as *stare decisis*, and although his freedom to shape remedies is broad, he is neither mediator nor administrator; he decides whether, under the collective bargaining agreement, the practices of industry, and, to some extent, the law, the grievance has merit and, if so, what relief should be given.[6] While law was certainly taken into account during the morning and high noon of this flowering of arbitration, the primary decisional factors were not found in the interpretation of statute or court decision. The arbitrators resorted mainly to the fiat of the contract and the common law of industry.

Professor David Feller, in "Arbitration: The Days of Its Glory Are Numbered,"[7] suggests that arbitration "is not a substitute for judicial adjudication but a part of a system of industrial self-government." It seems to me to be an error to contrast industrial self-government with a system for the adjudication of disputes arising in the industrial setting. It seems to me more correct to say that arbitration is the system of adjudication that industry has elected in lieu of resorting to the courts.

Increasingly, however, beginning in the mid-1960s, statutes and regulations governing the employer-employee relationship have become more complex and pervasive. Old statutes were reinterpreted to give them a broader impact on possible application to industrial relations.[8] Constitutional issues were raised in the industrial context. Matters once regulated by collective bargaining or, in default, left to management decision, have be-

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79, 81–84, 67 LRRM 2646 (5th Cir. 1968) *with* Fed. R. Civ. P. 52 *and Security Mut. Cas. Co.* v. *Affiliated FM Ins. Co.*, 471 F.2d 238, 245 (8th Cir. 1972). *See generally* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978).

[5]*See* Fleming, *Interest Arbitration Revisited*, 7 U. Mich J.L., Ref. 1, 2–4 (1973).

[6]Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 Ind. Rel. L.J. 97, 99–100 (1977); Dworkin, *How Arbitrators Decide Cases*, 25 Lab. L.J. 200, 204–207 (1974).

[7]*Id.*, at 105.

[8]E.J. 42 U.S.C. §§ 1981, 1983.

come subject to constitutional or statutory command. Long ago, wages and hours were governed by the Fair Labor Standards Act[9] and the Davis-Bacon Act,[10] but, in 1964, these were subjected to other requirements by the Equal Pay Act.[11] Title VII of the Civil Rights Act[12] has brought into effect broad strictures against discrimination in employment, as well as an administrative procedure, a conciliation process, and a new field of federal litigation.

Industrial safety standards are prescribed by regulations adopted under the Occupational Safety and Health Act.[13] Title III of the Consumer Credit Protection Act[14] limits the right of an employer to discharge for garnishment and thereby limits the permissible scope of collective bargaining on that subject. The Employee Retirement Income Security Act (ERISA),[15] adopted less than four years ago, has imposed a statutory mold on collective bargaining with respect to a variety of subjects relative to pension, profit-sharing, and employee-benefit plans.

These statutes and the regulations adopted pursuant to their authority introduce legal, not industrial, principles as the basis for the rights of individual employees. They also require that the forum for the vindication of these rights be the courts, and, in each instance I have mentioned, the federal courts.

Almost every statute has an administrator. Almost every administrator has power to adopt regulations. Legislative and administrative decisions are prolific and frequently require interpretations and clarification. Often these decisions are challenged in the courts as arbitrary. Almost every regulation appears to invite litigation. Every lawsuit requires judges, and all of this creates a Scylla of indecision across from a Charybdis of arbitrary action. The result has been parodied by North Dakota State Senator I. E. Solberg:

> "What we ought to do now, obviously, is suspend all activity until we hold a plebiscite to select a panel that will appoint a commission authorized to hire a new team of experts to restudy the feasibility

[9] 29 U.S.C. §§ 201–219.
[10] 40 U.S.C. § 276(a).
[11] Equal Pay Act of 1963, 29 U.S.C. § 206(d).
[12] 42 U.S.C. § 2000(e)–2000(e)–17.
[13] 29 U.S.C. §§ 651–678; 29 C.F.R. §§ 1910–1926 (1977).
[14] 15 U.S.C. §§ 1671–1677.
[15] 88 Stat. 162, codified in various portions of the U.S. Code, Titles 5, 18, 26, 29, 31, and 42. *See generally* 29 U.S.C. § 1001, *et seq.*

of compiling an index of all the committees that have in the past inventoried and cataloged the various studies aimed at finding out what happened to all the policies that were scrapped when new policies were decided on by somebody else. Once that's out of the way, I think we could go full steam ahead with some preliminary plans for a new study with Federal funds of why nothing can be done right now."

The statutes themselves accord jurisdiction to the courts to resolve problems arising out of their application or violation. Hence, we have become increasingly dependent on litigation to resolve industrial problems. Some disputes have been withdrawn entirely from arbitration. Others that may arise in a grievance procedure context involve judicial problems, as Professor Feller has pointed out, with some pessimism about the future status of arbitration, in the article previously cited. As a result, the arbitrator's decision is not accepted as final when it involves a legal interpretation.[16] The bright arbitration sun has begun to wane.

A step was taken toward the use of arbitration rather than administrative and judicial dispute-resolution in *Collyer.*[17] The employer had unilaterally changed certain wage rates and maintained that the contract authorized it to do so. The National Labor Relations Board required arbitration despite the union's invocation of the Board's established jurisdiction over the alleged unfair labor practice. Subsequent Board decisions have shown, however, that the arbitrator's decision, insofar as it deals with statutory issues, as opposed to matters regulated solely by collective bargaining, is not final.[18] As the scope of arbitral issues has expanded, the autonomy of the arbitrator's decision has yielded increasingly to judicial oversight.

Our attempts to find solutions to industrial problems through litigation have created profound new problems. In the first place, it means expense. Litigation requires lawyers and, perhaps because I have been a happy lawyer for 35 years, I think well of the breed. But lawyers' expenses—and their fees—have skyrocketed. Discovery procedure, particularly in the kind of

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[16] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct.1011, 39 L.Ed 2d 147, 7 FEP Cases 81 (1974).

[17] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

[18] *Illinois Bell Trucking & Materials Co.*, 221 NLRB 989 (1975); and *Trinity Trucking & Materials Co.*, 221 NLRB 364 (1975), both fully discussed and analyzed in Feller, *supra* note 6, at 110 *et seq.*

cases we are considering here, has become a Serbonian bog in which vast armies of paper, experts, and money vanish.

In addition, solution by litigation entails delay. The controversy is almost forgotten before it is decided. Or it festers and suppurates. The median time required to move a case from filing to trial in the federal courts is now one year. That means that *half* the cases require *longer* than a year to reach trial. If the decision is appealed, another wait starts. The median time from disposition by a trial court to resolution on appeal exceeds a year thereafter. Thus, over half of the disputes that result in an appeal take more than two years to resolve. The difficult civil cases are almost always in the slow half, are seldom settled, and are seldom decided summarily. The easy civil cases and the cases disposed of summarily lower the average-time figures. Unless an injunction is sought, a civil case involving industrial relations may not be entitled to priority, so it dawdles on the calendar. It is not unusual for a difficult civil court case to linger four years before final decision. And we all know of cases that have waited longer.

Indeed, in the Fifth Circuit, it will soon be 24 months from the time a notice of appeal is filed until a nonpriority civil case reaches decision. This is true even though about 55 percent of the cases are disposed of without oral argument, by summary affirmance or reversal. If the Fifth Circuit caseload continues to increase at the present rate and no additional judgeships are added, then, by 1980, an ordinary civil case that is important enough to require oral argument will *never* be heard. That bizarre result will be reached because, aside from the cases that can be disposed of summarily, every period available for oral argument will be filled by criminal cases or civil cases entitled to preferential hearing. Civil cases that lack a priority and are too complex or important to be heard summarily will wait in vain for a day in court.

Human beings cannot wait four years or more to find out whether they have a job. Industry should not wait four years—or five—or six—to find out whether it is or is not adhering to the law.

Some arbitrators suggest that expedition is not a virtue unique to arbitration.[19] Look, it is said, there are some speedy

[19] *See* Feller, *supra* note 6, at 97–98.

courts, and small-claims courts are used as an example. Society is willing to trust small matters to these courts in order to achieve speed and economy. Usually, for the sake of these advantages, we dispense with advocates and briefs, and all formality. Trials are brief, decisions are usually oral, and the purpose is a resolution of a dispute in the quickest, most informal way possible. But none of us would want to entrust a matter of serious personal import to such a tribunal—or to any arbitrator who holds hearings in such a fashion. Federal courts can and do proceed rapidly in injunction cases[20]—but only because they have relatively few of these cases, are required by statute to abandon other cases for that purpose, and then do so only at great expense to both the litigants and the usual processes of judicial administration.

Arbitration is not, of course, cheap. The more formal processes can be tremendously expensive. But even the most costly arbitration proceedings are economical by comparison with the cost of trial of a law suit with similar issues.

It seems to me that arbitration is not only a just means of resolving disputes, but that even the most formal arbitration proceeding is much faster, less expensive, and more responsive to industrial needs than the best-run courts available today. It is a myth that access to justice must mean access to the courts, especially the federal courts. This idea is unique to the United States; even here, it has been fully developed only in the last 30 years.

Fiat Justitia, Ruat Coelum, is an ancient maxim: Let justice be done though the heavens should fall. We can agree with the necessity for justice without deluding ourselves that impartiality and wisdom and fairness reside only in judges, or only in that sacred kind of judge who is federal.

Resort to the judiciary to resolve governmental and political issues is not new. Its roots are found in the beginning of our republic and in judicial activism dating back to *Marbury* v. *Madison.* Social and economic problems have been resolved by courts, too—not always well. Consider the *Dred Scott* case.

There is a problem inherent in judicial resolution of conflict that goes beyond the questionable competence of law-trained judges. We must question whether the litigation process, even

[20] *Id.*

when it functions at its best, is desirable as a primary means of resolving the problems of the employer-employee relationship. We know that not every arbitrator is a master of the science of employer-employee relationships. But most arbitrators who are acceptable to unions and employers are far more conversant with the special problems of industry than are federal judges.

Moreover, our federal judicial system is not only slow and expensive, it is fairly inelastic. There is little room for growth without endangering the values that make us esteem the system. Already we are doing this by diluting court jurisdiction, abandoning oral argument, and employing more law clerks to share in carrying the judge's load. The 1977 Report of the Federal Judicial Center states (at 2–3):

> "The delivery of justice, moreover, involves more than the opportunity to litigate. Problems of backlog and expense are already of serious concern to litigants in the federal system. It is important to distinguish between the formal right to file a lawsuit, and the delivery of justice, which implies that the relief due an aggrieved litigant will in fact be afforded. Moreover, as the report of the American Bar Association's Pound Conference Follow-Up Task Force, chaired by the present attorney general, reminds us, 'Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of the claim is consumed by the expense of asserting it.' "

As new issues and problems in improving employment conditions arise, and as we deliberate better ways to handle issues now being resolved only in the courts, we must consider seriously the possibility that some problems can best be resolved by giving a wider hand to collective bargaining and to resolution of disputes by arbitration. I would like to discuss two recent Fifth Circuit cases that epitomize areas governed by statutory principles which might better be controlled by collective bargaining. In doing so, I imply no criticism of either decision. I do suggest, as I shall state again, that Congress should consider statutory changes that would relegate the ultimate decision in these matters to good-faith collective bargaining.

In *McArthur* v. *Southern Airways, Inc.*,[21] a group of airline employees brought a Title VII class action. As a result of good-faith collective bargaining, an agreement that resolved the dispute was reached and embodied in a consent decree. However, addi-

[21] 556 F.2d 298, 15 FEP Cases 1123 (5th Cir. 1977), *vacated*, 569 F.2d 276 (1978).

tional employees intervened to contest the terms of the decree; modifications were made, and an appeal therefrom was taken. Two years after the agreement was reached, while the case was pending on appeal, the Supreme Court decided *United Air Lines, Inc.* v. *Evans*,[22] which made it apparent for the first time that the plaintiffs in *McArthur* had not complied with the filing requirements of Title VII. The court concluded that this failure created a jurisdictional defect and vacated the consent decree.

In *Weber* v. *Kaiser Aluminum & Chemical Corp.*,[23] the employer had only five black employees amongst its 290 craftsmen. The Government was pressuring it, through Executive Order 11246 sanctions, to develop an affirmative-action program, and the company quite reasonably feared private Title VII suits. In good faith, it sought to comply voluntarily with the statutory requirements to the extent that they could be divined, and reached a collective bargaining agreement under which workers belonging to a minority group would enter on-the-job training with less seniority than their white competitors. The employer could not have done more to resolve the problem without litigation; there was no contention that the union or the employer had not bargained in good faith. But the Fifth Circuit found that the agreement violated Title VII and entered a permanent injunction against its use. Judge Wisdom pondered in dissent how a national contract can be written when different circuits adopt different detailed blueprints for the industrial solutions dictated by Title VII.

In each case, an agreement produced by good-faith collective bargaining, and based upon a realistic appraisal of external law as it existed when the accord was reached, was required, as the court said, to be vacated. Thus, unions and employers sought to avoid the expense and friction of litigation to the final decision, but were not able to do so.

If, indeed, we are to restore greater latitude to collective bargaining, we should likewise consider making it possible by statute for unions and employers to agree on the resolution by arbitration of many of the issues that are governed by both statute and agreement. Many issues of employment discrimination, equal pay, age discrimination, and the like could be de-

[22] 431 U.S. 553, 97 S.Ct. 1885, 57 L.Ed. 571 (1977).
[23] 563 F.2d 216 (5th Cir. 1977).

cided as well or better by an arbitrator as by a federal judge.

The Government is obliged to ensure that those responsible in collective bargaining—both employers and unions—discharge their obligations with fairness, impartiality, and respect for individual rights as determined by the national policy shaped by Congress. The individual is not to be abandoned. But collective bargaining, followed by fully implemented grievance procedures, private arbitration, and mediation, can resolve individual problems and accord individual equality with more expedition, less expense, and greater responsiveness to industrial conditions. It is also possible by statute to shape a nonjudicial process for the protection of rights and the resolution of conflicts in industries or businesses where there is no collective bargaining agent.

Where governmental administrative solutions must be sought, as may be necessary in connection with some equal-opportunity problems, the agency must be more adequately staffed and accorded greater resources to seek to resolve the disputes by mediation and arbitration rather than by court action. There is no inherent reason why the next step, after exhausting mediation attempts, must be court action; it could be community-based expeditious arbitration.

Litigation is not a solution to every employment problem; it is a last resort, to ensure effective representation of employees and employment terms that comport with fundamental fairness. The Government sets the goals and ideals to be achieved, but the industrial forum must be responsible for formulating specific and individual programs to fit these ends.

Only a few months ago I attended a seminar, sponsored by the Aspen Institute, to compare the actual administration of justice in Europe with its administration in the United States. No western European nation entrusts judges with the resolution of industrial problems. In some countries there are special labor courts; in others there are industrial tribunals. In some, there is compulsory arbitration.

The rest of Western industrial society is not out of step. They, too, have respect for human rights, for the need for fairness toward human beings, accompanied by some consideration for managerial efficiency. We, too, should turn from our increasing reliance on a court system as a forum for the resolution of employee-employer problems.

Only in this manner can we accord basic employment rights

to the men and women whose lives are directly affected without crippling the industrial process that is indispensable to the nation and provides the jobs and income on which all employees —not only labor lawyers and arbitrators—depend. By resorting in large measure to nonjudicial conflict-resolution, we can retain bargaining freedom while achieving justice more promptly, less expensively, and with greater regard for industrial reality. In doing so, we do not merely recapture our yesterdays, but we herald a new dawn, a harnessing of arbitration's solar energy.