CHAPTER 1

ARBITRATION IN A CHANGING ENVIRONMENT

INTRODUCTION OF MR. JUSTICE BRENNAN

DAVID E. FELLER*

The Academy is truly honored by the willingness of Mr. Justice Brennan to address it and it is an extraordinary honor and privilege to introduce him. The enormous and almost unparalleled contribution he has made to our jurisprudence during his 33 years of service on the Court—particularly in the area of constitutional protection of individual rights—has been so widely remarked that it would be supererogation for me to attempt to add to them. From the *New York Times* to the *Journal of the American Bar Association* to the *Harvard Law Review,* an extraordinary but fully justified amount of praise has been written about his contribution—and much more will surely be written. Nina Tottenberg perhaps said it best in the *Harvard Law Review*: "We will not see anyone like him again."

Rather than to repeat what was better said in the commentaries, I want to direct your attention to Justice Brennan's work in the area of the law with which we are most directly concerned as professional arbitrators. There are five Supreme Court cases that establish the legal bedrock on which we rest: The *Steelworkers Trilogy* in 1960, *AT&T Technologies* in 1986, and *Misco* in 1987. Justice Brennan was in the majority in each of them. Unfortunately, in each case so was the Chief Justice. I say unfortunately because, when he is in the majority, the Chief Justice decides who will write the opinion. In the *Trilogy,* Chief Justice Warren assigned the opinions to Justice Douglas. In *AT&T Technologies,* Chief Justice Burger assigned the opinion to Justice [Byron] White, and in *Misco* Chief Justice Rehnquist also assigned the opinion to Justice White.

---

*President-elect, National Academy of Arbitrators (1991); Professor of Law, University of California, Berkeley, California.

In each of these cases Justice Brennan joined the opinion of the Court, but he also wrote or joined in a concurring opinion to make clear, in simple and precise language, what the Court actually had held and to affirm, without unnecessary verbiage, the authority of arbitrators and the enforceability of awards. Those concurrences confirm what Justice Brennan's other opinions in the labor relations field demonstrate: He understands, as none of the justices I have mentioned did, the realities of the labor-management relationship. That understanding was equalled by no other member of the Supreme Court save perhaps one, a former partner of mine, in the 33 year period in which Justice Brennan served. It was clearly demonstrated in the cases in which he was able to write an opinion for the Court dealing with the labor-management relationship, such as *Tree Fruits, Allis-Chalmers,* and more central to our particular parochial concerns, *Boys Markets.*

Boys Markets is one of the few cases in the Court's history in which it overruled a prior decision dealing with a pure question of statutory interpretation. Justice Brennan had dissented in the overruled case, *Sinclair Refining,* in 1962. In 1970, only eight years later, his *Sinclair* dissent became his opinion for the Court. *Boys Markets* did not deal with arbitrability or enforcement of an arbitration award. However, despite the Norris-La Guardia Act, it held that a federal court had the power to enjoin a strike over an issue that the parties had committed to arbitration. This was the necessary complement to the *Trilogy* and served in its own way to reinforce the primacy of agreed upon arbitration as the method of resolving disputes arising under a collective bargaining agreement.

I promised the Justice that I would keep my introductory remarks to a minimum. I have perhaps exceeded that stricture, but I hope only slightly. I will say no more and, with the greatest of pleasure and sincere appreciation for his willingness to speak to us, give you Mr. Justice William A. Brennan, Jr.

DISTINGUISHED SPEAKER

WILLIAM J. BRENNAN, JR.*

Different people have differing views about the Eighties. I'm

*Associate Justice (Retired), United States Supreme Court, Washington, D.C. I am grateful for the assistance of my law clerk, James E. Castello, in the preparation of this speech.

referring to one's *own* eighties. The journalist Joseph Alsop, when he was nearly eighty, was asked to give his opinion on some matter. He replied, "When one is retired, it is sensible to refrain from having views." I am skeptical that Joe Alsop actually adhered to that advice. But I know that I have not been able to adhere to it, which is why I accepted your gracious invitation to be with you today. Indeed, my experience in retirement has been much closer to that of another journalist, Lowell Thomas, who once said: "After the age of eighty, everything reminds you of something else."

What I am reminded of today is that we recently celebrated the 30th anniversary of the *Steelworkers Trilogy*[1] and the birth of modern grievance arbitration law. The *Steelworkers* decisions, in Bob Gorman's words, "exalted the role of the arbitrator as a force for industrial peace."[2] They also—again, in Bob's words—"announced a doctrine of judicial self-restraint [wherever] parties have assigned the task of dispute resolution to an arbitrator privately selected."[3] The Court's commitment to the *Steelworkers* doctrine shows no sign of abating. Indeed, only three terms ago, in the *Misco* decision,[4] the Court reaffirmed that judges "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."[5]

Nonetheless, there seems to be a feeling abroad in the land that the *Steelworkers* doctrine is waning. More than a decade ago, Dave Feller forecast the end of what he called arbitration's "golden age."[6] Professor Feller saw signs of twilight in the increasing "federal regulation of the terms and conditions of employment."[7] As he noted, "to the extent that the arbitrator decides disputed questions of external law, [the arbitrator] necessarily relinquishes his right to claim immunity from review."[8] More recently, Judge Harry Edwards has complained that "judi-

---

[1]Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 46 LRRM 2414 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2423 (1960).

[2]Gorman, Labor Law (West 1976), 53.

[3]*Id.*

[4]Paperworkers v. Misco, Inc., 484 U.S. 29, 126 LRRM 3113 (1987).

[5]*Id.* at 36.

[6]Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 INDUS. REL. L.J. 97, 130 (1977); *see also* Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 97.

[7]Feller, *Arbitration: The Days of Its Glory Are Numbered*, *supra* note 6, at 106.

[8]*Id.* at 109.

cial deference has been significantly undercut by a series of lower court decisions that vacate arbitration awards on the ground that they conflict with public policy."[9] Professor Gould laments the trends identified by Feller and Edwards, and he argues that if my late colleague Bill Douglas had intended in the *Steelworkers Trilogy* to "eliminate or diminish" challenges to arbitral awards, "the mission is unaccomplished."[10]

What do all these complaints add up to? Is the work that members of the Academy perform really less respected or less important now than it was 30 years ago? I think not. Indeed, the purpose of my brief remarks to you this afternoon is to suggest that arbitrators are as valuable today as they were when I first joined the Court, more years ago than any of us wish to remember. The proof of your continued importance lies partly in the expanded use of arbitration, particularly in its recent extension to cover labor grievances in the federal public sector, and I will turn to that development in a few minutes. But, notwithstanding the continued importance of your work, you—like all other participants in the world of industry and commerce—have had to adapt to a new era of individual rights that has made our society, one hopes, more just, but also more complex and more regulated. This state of affairs presents, I think, a challenge to arbitrators. The challenge is to preserve arbitration's effectiveness and utility in a more constrained environment. My hope is that you will focus on that challenge rather than on the thought that arbitration has lost some of its favored status.

Let me return for a moment to the causes of arbitration's supposed decline. Dave Feller, as I noted, has emphasized the intrusion of external law into the grievance process. Because arbitrators increasingly have been called upon to resolve disputes involving discrimination, maternity leave, fair pay, and other rights that are the subject of positive law, arbitral awards increasingly have been subject to judicial review or at least to judicial disregard.[11] I must plead guilty to having abetted this trend. I did not write the seminal opinion in *Alexander v. Gardner-*

---

[9]Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 4 (1988).

[10]Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers' Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 472 (1988).

[11]Feller, *Arbitration: The Days of Its Glory Are Numbered*, *supra* note 6, at 107.

Denver Co.[12]—my current comrade in retirement, Lewis Powell, did. But I did join that opinion, which upheld an employee's right to *de novo* trial on a Title VII claim, notwithstanding an arbitrator's determination that the employee had not suffered discriminatory discharge. And subsequently, in two opinions that I did write, the Court held that an employee could file a *de novo* claim in federal court for pay under the Fair Labor Standards Act[13] and a *de novo* civil rights claim under section 1983.[14]

In all these opinions the Court has emphasized the differences between arbitral and judicial processes—that arbitrators' special expertise does not encompass statutory rights, that the union's interests may not coincide with the employee's right that the union espouses in an arbitral proceeding, that there may be deficiencies in arbitral factfinding, and that a collective bargaining agreement may constrain the arbitrator's ability to enforce the law. By underscoring these differences between the duties of arbitrators and judges, the Court may seem to have exalted judicial process at the expense of arbitration, but it would be a mistake to read our opinions in that way. Rather, our precedents should be viewed as recognizing two equally important but often separate spheres—that of the collective bargaining contract and that of statutory rights. In preserving a distinction between the two, the Court has simply implemented congressional will. Congress, in turn, has implemented the will of society as a whole by enacting statutory protections for individuals and by creating causes of action by which they may be enforced. Thus, as I wrote in *McDonald v. West Branch*, the case upholding a *de novo* trial for section 1983 claims, the Court's refusal to give preclusive effect to certain arbitral awards has been "based in large part on our conclusion that Congress intended the statutes at issue in th[e]se cases to be judicially enforceable."[15]

What can arbitrators do about the intrusion of external law into the world of dispute resolution? Dave Feller suggested that arbitrators should avoid deciding such questions where doing so is a matter of discretion or interpretation.[16] But he also recog-

---

[12]415 U.S. 36, 7 FEP Cases 81 (1974).

[13]Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 24 WH Cases 1284 (1981).

[14]McDonald v. City of West Branch, Michigan, 466 U.S. 284, 115 LRRM 3646 (1984).

[15]*Id.* at 289.

[16]Feller, *Arbitration: The Days of Its Glory Are Numbered*, *supra* note 6, at 120.

nized that an increasing number of collective bargaining agreements made consideration of external law unavoidable because the parties expressly required it.[17] I suspect that is even more true today than when Professor Feller made that observation 15 years ago.

In these circumstances, arbitrators must simply do their utmost to resolve complicated questions of external law in a way that is faithful to the statutes and that, one hopes, will satisfy the parties. Indeed, a paper by Deborah Willig, presented at your 1986 meeting, concluded that arbitrators were fulfilling this expanded role well since courts had overturned only a small percentage of awards involving discrimination claims.[18] Knowing that judicial second-guessing of their awards is increasingly likely, arbitrators may need to give—as Bill Gould has urged[19]—more detailed, written defenses of their findings. This may dissuade some parties from seeking to overturn the award or persuade a reviewing court to give the award more credence.

I do not imagine that this is welcome advice, since it involves mastering increasingly complex areas of the law and in the process compromising two of arbitration's traditional advantages—speed and informality. But I assure you that your predicament is not unique. Judges—and even Justices—often find it more difficult to write an opinion today than they did thirty years ago. The law, like life itself, is more complex. My point is simply that although Congress, the courts, and even the collective bargaining parties may have made your lives more difficult, this should not be seen as an assault on the status of arbitrators or a devaluation of the role that they play. The vast majority of awards prevail as final resolutions of disputes. And, as Dave Feller suggested, there are still "great advantages to both unions and employers in attempting to resolve their problems themselves, even those involving the external law, . . . which may ultimately be subject to final adjudication elsewhere."[20]

As I noted before, Judge Edwards has focused upon another cause of arbitration's perceived decline that is closely related to the intrusion of external law into the grievance process. He and

---

[17]*Id.* at 124.

[18]Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1987), 101.

[19]Gould, *supra* note 10, at 491–92.

[20]Feller, *Arbitration: The Days of Its Glory Are Numbered*, *supra* note 6, at 129.

others have stressed the increasing tendency among lower courts to overturn awards on the ground of conflicting "public policy." I do not know if the Court's recent decision in *Misco*[21] has yet succeeded in curtailing that trend. I note that a panel at your Annual Meeting three years ago produced a split of opinion on this matter. Michael Gottesman decried what he called "a veritable explosion of decisions from the lower federal courts setting aside arbitration awards."[22] On the other hand, John Irving, representing management, contended that most employers know they have almost no hope of reversing an award and seek to do so only in the rare instance when they believe the result is egregious.[23]

Certainly Justice White's opinion in *Misco* tried to convey the message that, according to John Irving, management received. The decision in *Misco* emphasized that the Court would not "sanction a broad judicial power to set aside arbitration awards as against public policy"[24] and that an allegedly conflicting public policy must be "well defined and dominant, and . . . be ascertained by reference to the laws and legal precedents."[25] Judge Edwards believes the Court needs to go further by limiting the public policy exception to cases where the award actually violates a law or commands illegal action. He counts me in his camp because I joined Justice Blackmun's concurrence in *Misco*, which Judge Edwards reads as taking a harder line.[26] Whether or not the Court ultimately embraces an even more restrictive view of public policy, I would think the change would only be one of small degree. What matters is that the vast majority of arbitral awards should not be subject to attack on grounds of public policy, and the Court has so stated.

If any doubts remain that the courts and Congress continue to support arbitration, they should be dispelled when one looks at arbitration's expanding role outside the realm of private labor-management relations. For example, in a remarkable string of decisions over the last few years the Court has repeatedly upheld

---

[21]*Supra* note 4.

[22]Gottesman, *Enforceability of Awards: A Union Viewpoint*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989), 88.

[23]Irving, *Enforceability of Awards: A Management Viewpoint*, in Arbitration 1988: Emerging Issues for the 1990s, *supra* note 22, 96.

[24]484 U.S. at 43.

[25]484 U.S. 29 (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766, 113 LRRM 2641).

[26]Edwards, *supra* note 9, at 30–31.

the arbitrability of commercial disputes under the Federal Arbitration Act (FAA). These decisions have held that the FAA preempts state laws barring certain types of arbitration agreements,[27] that the FAA preempts certain state law causes of action,[28] and that agreements to arbitrate bar judicial resolution of claims under such federal laws as the Sherman Act,[29] the Securities Acts of 1933[30] and 1934,[31] the RICO statute,[32] and, most recently, the Age Discrimination in Employment Act.[33] In the last of these opinions, issued only two weeks ago, the Court reiterated its determination to enforce arbitration of any federal statutory claim "unless Congress itself has evinced an intention to preclude waiver of judicial remedies."[34] I am not sure I agree with the result in this most recent case, but it is indisputable that the Court's record over the last decade reveals very strong support for the institution of arbitration.

In my view, however, the most significant expansion of arbitration during my years on the Court has been the emergence of grievance arbitration for labor-management disputes in the *public* sector. It is to that development that I want to devote the remainder of my remarks this afternoon. When I first came to the Court employee-employer arbitration in the public sector was virtually nonexistent. At the federal level, as you know, grievance arbitration was nurtured slowly under a succession of Executive Orders, beginning with one issued by President Kennedy in 1962.[35] That Order paved the way for negotiation of grievance procedures, but such negotiations were still optional; any procedure agreed upon was only an alternative to the statutory process, and awards issued under negotiated procedures were merely advisory. Gradually, however, arbitration assumed a more significant role under subsequent Executive Orders and arbitration grew in use.[36] The Civil Serv-

---

[27]Southland Corp. v. Keating, 465 U.S. 1 (1984).
[28]Perry v. Thomas, 482 U.S. 483 (1987).
[29]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).
[30]Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
[31]Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).
[32]*Id.*
[33]Gilmer v. Interstate/Johnson Lane Co., 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).
[34]*Id.* at 1652 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., *supra* note 29, at 628).
[35]Exec. Order No. 10,988, 3 C.F.R. 521 (1959–1963).
[36]*See generally* Ingrassia, *Federal Sector Arbitration: A Management Viewpoint*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1991) 207; Smith and Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 HASTINGS L.J. 855 (1980).

ice Commission recorded 127 arbitrations in the federal sector in 1970 (only 6 of which were binding) and exactly twice that many in 1976 (all but 10 of which were binding).[37]

This growth set the stage for passage of the Civil Service Reform Act in 1978.[38] I would have expected the Reform Act's strong support for public sector arbitration to be more significant than it has turned out to be. On paper, at least, the Reform Act's provisions seemed to represent a major advance. For the first time federal sector managers and unions were required to negotiate a grievance procedure that included arbitration, and the range of grievances covered by such procedures was also established by statute (subject to restrictions negotiated in the agreement). For many of these grievances the negotiated procedures were exclusive, although for adverse personnel actions and charges of discrimination alternative procedures were preserved at the employee's or union's option.

The experience to date, however, has not lived up to expectations. The data collected by the Office of Personnel Management are not perfect, but they suggest that the annual number of arbitration awards in the federal sector peaked at about 900 in 1983 and has since declined to fewer than 500.[39] By contrast, nearly seven times that number of grievances have been brought before the Merit Systems Protection Board—grievances that could, under the Reform Act, have been submitted instead to arbitration.[40] It is scarcely surprising then that—with the exception of a major panel at your Annual Meeting two years ago[41]—the federal sector seems to have received little attention from the NAA.

To what should this disappointing record be attributed? At the panel discussion during your meeting two years ago the union representative stressed the problem of cost: choosing arbitration is expensive, whereas submitting a dispute to the Merit Systems Protection Board is essentially free.[42] When the

---

[37]United States Civil Service Commission, Grievance Arbitration in the Federal Service (1977), 35.

[38]Pub. L. No. 95-454, 92 Stat. 1192 (codified at 5 U.S.C. §§7101–7135 (1978)).

[39]Luneburg, *The Federal Personnel Complaint, Appeal and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 KY. L.J. 1, 84 (1989).

[40]*Id.* at 62.

[41]*Arbitration in the Federal Sector: A Panel Discussion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1990).

[42]*Id.* at 210 (remarks of John Mulholland).

union has a choice, it may often prefer the latter. Obviously, however, choices based on cost reflect in some measure an assessment of relative utility. Both management and labor have expressed disappointment with the quality of some federal sector awards,[43] and arbitrators in turn have been dissatisfied with the conditions under which they must adjudicate federal disputes.

I sense that the problem involves some of the same complaints I've already noted in the private sector—namely, that arbitral awards are not accorded sufficient finality and that federal law intrudes at every turn.[44] There is no dispute about these constraints. The Reform Act provides that all arbitral awards are appealable to some entity—most of them to either the Federal Labor Relations Authority or ultimately the Court of Appeals for the Federal Circuit.[45] Moreover, arbitrators must adjudicate disputes based not only on the collective bargaining agreement but also on the relevant laws and regulations, of which there are an inordinate number.

This aspect of federal grievance arbitration was highlighted by the one case in this area that has so far reached the Supreme Court. In *Cornelius v. Nutt*,[46] the Court overturned an arbitrator's award on the ground that he had improperly interpreted the Reform Act's "harmful error" standard in reinstating two discharged employees. I joined Justice Marshall's dissent in that case[47] believing that the arbitrator should have been permitted his interpretation. But it was common ground among all the Justices in that case that the issue was reviewable.

If I am right in thinking that these factors have dissuaded arbitrators from fully involving themselves in the federal sector, then my message to you is simply a more emphatic version of what I said about private sector arbitration a short while ago: Arbitrating within the constraints of diminished finality and increased regulation is a challenge. No doubt it requires more work, more study, more ingenuity. But there is still an important role to be played and, judging by the numbers, federal sector

---

[43]*See, e.g., id.*, at 218–220 (remarks of William Dailey).

[44]Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985), 47; *see also* Grodin and Najita, *Judicial Response to Public Sector Arbitration*, in Public Sector Bargaining, eds. B. Aaron, J. Najita, and J. Stern, 2d ed. (Washington: BNA Books, 1988).

[45]Elkouri and Elkouri, *supra* note 44, at 52–57.

[46]472 U.S. 648, 119 LRRM 2905 (1985).

[47]*Id.*, at 666.

arbitration is not living up to its potential. I recognize that the arguments for arbitration's virtues do not fully extend to the public sector. In the *Steelworkers Trilogy*, for example, the Court embraced arbitration as a substitute for strikes,[48] a rationale that obviously does not apply in the public sector. And, to the extent that arbitrators lack federal sector experience, reliance on their knowledge of the "common law of the shop"[49] may be misplaced. But my intuition as a one-time—albeit long time ago—labor lawyer is that the flexibility that arbitrators possess, the ease with which disputes may be presented to them, and their knowledge of workplace environments are virtues that could well serve the resolution of public sector disputes.

I leave you, then, with this thought. All of you have contributed enormously to the success of arbitration over the past decades, and I applaud that success. But today you operate in a somewhat changed environment—one that is more constrained by federal laws and federal courts. This limited encroachment upon arbitral finality may be unsettling. It is, however, an unavoidable result of greater protection for individual rights and for that reason it presents a challenge to all of us. "The law," wrote Benjamin Cardozo, "like the traveler, must be ready for the morrow. It must have the principle of growth."[50] Our task is to grow with it.

---

[48]*See, e.g.*, Steelworkers v. American Manufacturing Co., 363 U.S. 564, 567, 46 LRRM 2414 (1960).

[49]*See, e.g.*, Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[50]Cardozo, The Growth of the Law (New Haven: Yale University Press, 1924), at 19–20.