CHAPTER 7

ARBITRAL CONTINUITY

PART I. ON THE CONSTANCY AND PEDIGREE OF THE ARBITRATOR'S HERITAGE

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At a meeting in London on 19 August 1696, the Board of Trade of England commissioned one of its members "to draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal."[1] The designated member was philosopher John Locke. He discharged his commission by drafting what became a 1698 statute encouraging the use of arbitration, both in England and in America. Locke was undoubtedly motivated by his belief that among those persons who actively hindered trade were "multitudes of lawyers."[2]

Arbitration is, of course, as old as the hills. The practice was common in medieval England.[3] The first book dealing extensively with arbitration was written by barrister John March in 1648.[4] The first book devoted exclusively to the subject was published in 1694.[5] Matthew Bacon's *The Compleat Arbitrator* appeared in 1731, with further editions to follow in 1744 and 1770.[6]

When one reads these early works, what is striking is how much is familiar. The fundamental practices and principles that we

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[1]Public Record Office, London, Colonial Office 391/9, 62. The full story of the legislation resulting from this commission is told in Horwitz & Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 Hist. J. 137 (1993).

[2]*Id.* at 139.

[3]*See, e.g.*, Powell, *Arbitration and the Law in England in the Late Middle Ages*, 33 Royal Hist. Soc'y Transactions, 5th series 49 (1983).

[4]March, Actions for Slander and Arbitrements (1648). I have used the 1674 edition, in which the section on arbitration covers over 250 pages.

[5]Arbitrium Redivivum: Or the Law of Arbitration (1694).

[6]Bacon, The Compleat Arbitrator (1731).

follow today have been around for hundreds of years, as I illustrate in the discussion to follow. Further, I will claim that there is less distance between labor and commercial arbitration than has traditionally been supposed.

We have thought of labor arbitration as a special preserve with unique characteristics. Recently, however, the Supreme Court has been blending labor and commercial arbitration, cross-citing authorities from both regimes. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[7] a case involving an agreement to arbitrate disputes arising from an automobile distribution contract for Puerto Rico, the Court articulated, without saying so, a *Collyer*- and *Spielberg*-type deferral doctrine, citing, among other cases, *Steelworkers v. Warrior & Gulf Navigation Co.*[8] More recently in *Gilmer v. Interstate/Johnson Lane Corp.*,[9] a nonlabor case dealing with age discrimination, the Court dealt extensively with *Alexander v. Gardner-Denver Co.*[10] and later related cases. In *Gilmer* the Court acknowledged its own view expressed in *Alexander* that "arbitration was inferior to the judicial process for resolving statutory claims," but then declared that its earlier "mistrust of the arbitration process" had been "undermined by our recent arbitration decisions," quoting the following from *Mitsubishi Motors*:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.[11]

In these cases the Court's message has been: Arbitration is a venerable, honorable process that we, the Court, strongly endorse, and the fundamental principles in both labor and nonlabor cases are the same. The latter point gains additional support from the increasing acceptance of the Federal Arbitration Act[12] as applicable to both labor and nonlabor cases.[13]

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[7]473 U.S. 614 (1985).

[8]363 U.S. 574, 46 LRRM 2416 (1960). The NLRB deferral doctrine originated in *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955) (postaward deferral) and *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

[9]500 U.S. 20, 55 FEP Cases 1116 (1991).

[10]415 U.S. 36, 7 FEP Cases 81 (1974).

[11]500 U.S. at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, supra* note 7, at 626–27).

[12]9 U.S.C. §1 *et seq.* (1988).

[13]*See, e.g.*, Duston, Gilmer v. Interstate/Johnson Lane Corp.: *A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?* 7 Lab. Law. 823, 824–28, 831–32, 834–37 (1991).

I will illustrate the historical consistency of arbitration by discussing three subjects: (1) the universally perceived advantages of the process, (2) the finality doctrine, and (3) judicial enforceability of arbitration awards. Before concluding, I will say a word about some of the participants in the process.

Advantages

Speed, informality, and inexpensiveness have always been regarded as hallmarks of arbitration. Thus, the author of the 1694 treatise on arbitration observed: "Arbitrament is much esteemed and greatly favoured in our Common Law . . . to prevent the great Trouble and frequent Expense of Law-Suits."[14] Similarly, in 1731 Matthew Bacon wrote that what chiefly recommended his book was "that it will be a Means of saving the Time and Expense, which too many have unhappily experienced attends the Prosecutions of Suits at Law and Equity."[15]

Another advantage has been using an expert of the parties' own choosing as the decision maker. In Matthew Bacon's words: "Arbitrators are Persons of the Parties own chusing, and . . . the Law presumes that every Man will be so wise as to pitch upon a Person, whose Understanding and Honesty he can rely on."[16] Nonetheless, according to Bacon, awards will be set aside by a showing of "Corruption and Want of Understanding in the Arbitrators," such as "that they were Idiots or Lunatics, Deaf, Dumb, or Blind."[17]

Finality

We associate the finality doctrine with arbitration clauses in collective bargaining agreements, as enforced by the courts after *Lincoln Mills*[18] and the *Steelworkers Trilogy*.[19] The advantage of arbitration as a final and binding method of nonjudicial dispute resolution, however, has long been recognized. In 1648 John March described the power of arbitrators as "far greater" than judges because arbitrators "may judge as they please, keeping to

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[14]Arbitrium Redivivum, *supra* note 5, at 10.
[15]Bacon, *supra* note 6, at v. *Id.* at 2, for an expanded version of the same point.
[16]*Id.* at 73.
[17]*Id.* at 73–74.
[18]*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).
[19]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, *supra* note 8; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

the Submission, so their sentences are absolutely definitive and conclusive, from which there lies no Appeal."[20] Recall also the charge of the Board of Trade in 1696 to draw up a scheme "that might be decisive without appeal."[21] Or consider the words of the Supreme Court a century and a half later (yet 70 years before the adoption of the Federal Arbitration Act) in the 1854 case of *Burchell v. Marsh*:[22] "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal."

This notion of finality has been reaffirmed by the Supreme Court in recent commercial and employment cases such as *Mitsubishi* and *Gilmer*, even where questions of statutory interpretation were presented. As the Court explained in *Mitsubishi*:

> 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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[23]

The Court added: "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[24]

This, of course, is something akin to the *Spielberg* doctrine, perhaps as glossed by *Olin Corp.*,[25] that the arbitrator's award will be upheld unless it is "clearly repugnant" to the statute, that is, "palpably wrong."[26] Furthermore, there is a kinship to the public policy exception as affirmed in *Misco*,[27] at least if

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[20]March, *supra* note 4, at 160.

[21]*See supra* note 1.

[22]*Burchell v. Marsh*, 58 U.S. 344, 349 (1854). The case was an action to set aside an arbitration award on grounds of gross partiality and misconduct on the part of arbitrators in a dispute between a buyer and a retailer. The Court concluded that neither a mere error in judgment nor the admission of illegal evidence or taking the opinion of third persons constituted misbehavior sufficient to affect the award.

[23]*Mitsubishsi Motors Corp. v. Soler Chrysler-Plymouth*, *supra* note 7, at 628.

[24]*Id.* at 638.

[25]268 NLRB 573, 115 LRRM 1056 (1984).

[26]Commercial arbitration awards have not traditionally been open to attack due to the arbitrator's misinterpretation of the law, although the award could be overturned for "manifest disregard of the law." *See* Annotation, *Construction and Application of sec. 10(a-d) of United States Arbitration Act of 1947 (9 USCS sec. 10 (a-d)), Providing Grounds for Vacating Arbitration Awards*, 20 A.L.R. Fed. 295, 365–69 (1974). "Manifest disregard of the law" has been generally construed to mean when arbitrators correctly understand the law but proceed to disregard it. *Id.* at 366.

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

the enforcement of the award would transgress an applicable statute.[28]

Statutory complications aside, an arbitrator's award will be upheld except for narrowly circumscribed bases for challenge, such as those itemized in the Federal Arbitration Act.[29] These generally involve some form of arbitral misbehavior, and again there is considerable congruity between labor and commercial cases, and between old and new cases.

Take, for example, the rule that an award cannot stand where it has exceeded the arbitrator's powers. In labor cases the powers are defined by the collective bargaining agreement; in commercial cases they are defined by the submission agreement. In the language of *Misco* and earlier cases, the award must "draw its essence" from the contract. In the words of John March in 1648, arbitrators must "keep themselves close to the submission."[30] Or, in the plain 18th century words of Matthew Bacon: "If one be chosen to make an Award upon one Thing, and he makes it upon another, the Arbitrament is void."[31]

Another form of arbitral misbehavior that can invalidate awards is partiality. In labor arbitration we are painfully conscious of the importance of maintaining impartiality. Questions and challenges nevertheless arise.

For example, in the 1975 case of *Fire Fighters (IAFF) Local 1296 v. City of Kennewick*,[32] a three-member panel conducted an interest arbitration. After the conclusion of the hearing, the impartial chairman, John Buchanan, sought a ride to the airport. Neither partisan arbitrator could help, but the union arbitrator asked a

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[28]*Misco* held that a court may refuse to enforce an arbitrator's award that would violate public policy, but the Court, quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, cautioned that public policy must be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* at 43 (quoting, in turn, *Muschany v. United States*, 324 U.S. 49, 66 (1945)). It is interesting to compare the opinion of the Supreme Court in the 1854 case of *Burchell v. Marsh*, *supra* note 22, where the Court quoted from an 18th century English case (*Knox v. Symmonds*, 1 Ves.jun. 369 (1791)) for the proposition that, to set aside an arbitrator's award, one must show "something more than an error of judgment, such as corruption in the arbitrator, or gross mistake." The Court cautioned: "Courts should be careful to avoid a wrong use of the word 'mistake,' and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards." 58 U.S. at 350.

[29]Four grounds for vacating arbitrators' awards specified in §10 of the Act may be summarized as follows: (1) an award procured by corruption or fraud, (2) arbitral partiality, (3) arbitral misconduct prejudicial to one party, and (4) an award exceeding the arbitrator's powers.

[30]March, *supra* note 4, at 161.

[31]Bacon, *supra* note 6, at 96.

[32]542 P.2d 1252, 92 LRRM 2118 (Wash. 1975).

fireman named Sleater, who had been a witness at the hearing, to provide the transportation. Sleater complied, and at the airport Buchanan and Sleater had drinks together (four apiece). Later they both affirmed that the arbitration was never discussed between them. The award (which had been announced verbally at the end of the hearing and which was later confirmed in writing without change from the oral version) was challenged by the city "because of the drinking incident at the airport."[33]

The trial judge agreed with the city, finding that the acts of impartial chairman Buchanan showed "incredible indiscretion" sufficient to generate "an inference of partiality."[34] The Supreme Court of Washington reversed, because under applicable state law the award could be set aside only if shown to be "arbitrary and capricious"—a showing not made.

It is interesting to compare *City of Kennewick* to a case that arose more than two centuries earlier in the Court of King's Bench in London. In *Rex v. Norris* (1764),[35] two women who owned a manor in Chelsea hired a solicitor named Stubbs and brought nuisance charges against George Norris for encroaching upon a public way by building a fence around a cowshed on his own property. The case went to trial, and after some testimony was taken, the judge called counsel to the bench and recommended that the matter be referred to arbitration. Counsel consulted with their clients and agreed. Stephen Hoare, a tailor and a member of the jury, was chosen as the arbitrator. Hoare had told the court before being sworn on the jury that he knew the fence in question and thought it should be moved two or three feet back. Hoare had also known the solicitor for the prosecutors, Stubbs, for 30 years, and 20 years previously Stubbs had hired Hoare as a tailor. Despite these circumstances the arbitration went forward.

Before the hearing, Hoare arranged to view the premises in the company of counsel for both sides. He then conducted the hearing at a residence "known by the sign of the Hole in the Wall in Chelsea." In a single day Hoare heard 7 witnesses for the prosecution and 17 or 18 for the defendant, all cross-examined by opposing counsel. Closing arguments were conducted on another day at the Sun Tavern. Hoare's award was that the fence was a public nuisance and should be moved back two feet, four inches.

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[33] *Id.* at 1254.
[34] *Id.* at 1255.
[35] *Reported in* Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (1992), at 2:902.

Norris moved to set aside the award, claiming that Hoare was biased not only due to his predisposition about the fence and his relationship with Stubbs, but also due to an event on the day testimony was taken. On that day Hoare went to dinner (at a local spot called "the Whim") with solicitor Stubbs and two other people, but he did so only on condition "that nothing should be mentioned with regard to the business of the arbitration." Hoare later swore, as did Stubbs, that no part of the conversation during dinner or during travel to and from the Whim pertained to the matter in dispute.[36]

Other forms of arbitral indiscretion can justify overturning the award. In *Brotherton v. Kreielsheimer*,[37] for example, an award was rejected by the New Jersey Supreme Court because one of the arbitrators, incognito and alone, visited the construction site in dispute before the hearing was held. When asked at trial if he had made such a visit, the arbitrator answered: "Quite naturally I did. I wanted to know what was being talked about and I had to form an opinion of it. I drove up there just like anyone else would."[38]

Compare with *Kreielsheimer* another 18th century nuisance case, *Rex v. Jackman*,[39] tried in 1776. There the dispute concerned the safety of two blacksmith forges erected in an upstairs room at Jackman's premises. After testimony was taken at trial, the matter was referred to the arbitration of Jonas Broad, a bricklayer. In his award Broad ordered Jackman to move the two forges down to the ground floor. Jackman challenged the award, alleging, among other things, that Broad had, while a stranger to Jackman, appeared without notice at Jackman's premises to inspect the forges.[40]

Enforceability

Mr. Justice White in his *Gilmer* opinion wrote that the purpose of the Federal Arbitration Act (FAA), first passed in 1925 and reenacted in 1947, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitra-

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[36]The outcome of the challenge is unknown. *See id.* at 903–04 for additional details.
[37]83 A.2d 707 (N.J. 1951).
[38]*Id.* at 709.
[39]*Reported in* Oldham, *supra* note 35, at 907.
[40]Again, the outcome of the challenge to the award is unknown. Jackman filed with the court affidavits of six surveyors from various insurance offices, all of whom said that they had inspected the premises, that there was no danger of fire, and that Broad "was greatly mistaken in his opinion." *Id.* at 909.

tion agreements upon the same footing as other contracts."[41] The point was explained more fully in the 1924 House Report on the bill that became the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the grounds that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment.[42]

This notion, plus the exception in the FAA for contracts of employment,[43] contributed later to the perceived need to include in the Taft-Hartley Act section 301's grant of jurisdiction to federal district courts to enforce collective bargaining agreements.

In truth, the so-called "jealousy of the English courts for their own jurisdiction" was a mistake implanted in English law by two badly reported cases from the mid-18th century.[44] In other cases over a century later, the mistake was caught and corrected in England,[45] but not before it had traveled to America and taken root. The judicial correction of the mistake never traveled to America; thus the commentary in the 1924 House Report.

Even though it is true that for a time agreements to arbitrate were not specifically enforceable in England, it was never true that the courts were opposed to arbitration. In fact, in England throughout the 18th and the first half of the 19th centuries, the scheme drafted by John Locke, referred to at the beginning of this paper, was used for enforcement of arbitration agreements and some variation of the scheme was adopted in many American jurisdictions.[46]

Here is how John Locke's scheme worked. Prior to his study of the problem, it was common for litigated cases to be referred to arbitration, a practice that continued for centuries (as in the *Norris*

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[41] *Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 9, at 24.

[42] H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1–2 (1924).

[43] 9 U.S.C. §1.

[44] For detail, *see* Cohen, Commercial Arbitration and the Law (1918), chapters XIII–XVII. *See also* Horwitz & Oldham, *supra* note 1, at 146, for references to manuscript versions of the two badly reported cases—versions that are much fuller than the brief descriptions in printed reports.

[45] *See, e.g., Scott v. Avery*, 5 House of Lords Cases 811 (1856) (opinion of Lord Campbell); *see generally* Cohen, *supra* note 44, at chapter XVI.

[46] A full explanation must await another occasion, but some of the groundwork is laid in Horwitz & Oldham, *supra* note 1.

and *Jackman* cases). The referral might happen as the trial began before any testimony was given; in midstream; after the testimony was concluded but before the jury retired; or by making the jury verdict "subject to the award."[47] When agreement was reached in court to send the case to arbitration, it would also be arranged for the arbitration agreement to be made "a rule of court." This meant that the agreement would be entered in the court's order book, so that any deviation from the agreement, or any noncompliance with the award, could be dealt with as a contempt of court.

John Locke extended this procedure to disputes that had not yet become litigated cases. The trick was to allow the parties to *pretend* that there was a litigated case. Thus, any time parties to a dispute wished to have it arbitrated (either as a result of a contractual arbitration clause—and partnership and insurance agreements at the time usually contained such a provision—or on an ad hoc basis), it would be "papered up." That is, the parties would be styled as litigants and, after a visit to the clerk's office and payment of a fee, the "case" would be entered in the court's order book. This allowed the use of the contempt power for enforcement purposes the same as in actively litigated cases.

Locke's statute also provided that an arbitration award could be avoided on proof "that the Arbitrators or Umpire misbehaved themselves, and that such Award, Arbitration, or Umpirage, was procured by Corruption or other undue Means."[48] This feature (which may have inspired parts of section 10 of the FAA) plus the contempt scheme for enforcement, accounted for the following passage by William Blackstone in *Commentaries on the Laws of England* (written in the 1760s):

> In consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when . . . illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to such rules and orders as are issued by the courts themselves.[49]

Turning to modern times, *Fairweather's Practice and Procedure in Labor Arbitration* states that "civil or criminal contempt is used to enforce an award confirmed by a court but with which there has

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[47] *See generally* Oldham, *supra* note 35, at 151–55.
[48] 9 Will. 3, ch. 15 (Eng.).
[49] Blackstone, Commentaries on the Laws of England, 3:17 (1768).

been no compliance."[50] Further, "it is . . . clear that both state and federal courts have authority, under Section 301 [of the LMRA], to find a party in contempt for failure to abide by an arbitration award previously enforced by the court."[51]

The striking parallel between John Locke's scheme for enforcing arbitration awards and the passage from *Fairweather* is evident. Also evident is the fact that Locke's scheme was superior, in that the arbitration agreement was automatically "confirmed" when entered in the court's order books. This was merely a clerical step, and it covered both the prearbitral as well as the postaward stages. The 20th century "confirmation and contempt" formula would approximate the Locke scheme, at least in the postaward phase, if the "confirmation" process were largely pro forma. This appears to have happened to some extent in New York.[52] Also, it may be possible in these cases to recover costs and attorney fees.[53]

Participants

The title of my paper refers to the "pedigree" of the arbitrator's heritage. As to that, look around the room; consider our roster of past and present officers and members. The prominence of NAA members in the labor arbitration process and their contributions to the stability of industrial relations in the postwar era are well known.

In commercial arbitration perhaps the profile is lower; no organization comparable to the NAA exists, and no path-breaking

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[50]Fairweather's Practice and Procedure in Labor Arbitration, 3d ed., ed. Schoonhaven (BNA Books 1991), at 462. As a modern example, the case of *Drywall Tapers & Pointers of Greater N.Y. Local 1974 v. Plasterers & Cement Masons Local 530*, No. 81 C 0337 (E.D.N.Y. 1986) is cited. The procedure for "confirming" an arbitration award in court is spelled out in §9 of the Federal Arbitration Act, 9 U.S.C. (1947).

[51]Fairweather's Practice and Procedure in Labor Arbitration, *supra* note 50, at 462.

[52]*See, e.g., Schoenholtz v. Benley Lingerie Co.*, 56 LRRM 2766 (N.Y. Sup. Ct. 1964) (motion to confirm arbitration award granted as to corporate alter ego of collective bargaining contract signatory corporation after latter ceased doing business); *In re Solomon*, 72 N.Y.S. 2d 639, 20 LRRM 2536 (1947) (motion to confirm arbitration award granted in two-paragraph opinion). For a case in which the employer was found in contempt for refusal to honor an arbitration award that had been confirmed in the New York courts, see *In re Lorenz-Schneider Co.*, 230 N.Y.S. 2d 672, 50 LRRM 2011, 2012 (1962) (employer "offers the same arguments which were urged before the justice who heard the original motion to confirm the arbitration award"; employer adjudged in contempt of court, ordered to comply with the award, and "in the event of noncompliance, an order of commitment may issue against those officers responsible for such non-compliance").

[53]*See, e.g., Fire Fighters (IAFF) Local 215 v. City of Milwaukee*, 89 LRRM 2977 (Wis. Cir. Ct. 1975) (City of Milwaukee and Chief Engineer of Fire Department found in contempt of arbitration award granting firefighters right to earn overtime; fines against both City and Chief Engineer imposed; costs and reasonable attorneys' fees awarded to union).

"Taylor-style"[54] arbitral leadership pointed the way. Nevertheless, the arbitration process has been a familiar and important part of the business of lawyering since the 1700s, and it was well known to, and participated in, by leading members of the bench and bar. Extensive documentation of participation in arbitration proceedings can be found, for example, in the surviving papers of John Marshall,[55] John Adams,[56] Thomas Jefferson,[57] Andrew Jackson,[58] Alexander Hamilton,[59] Daniel Webster,[60] and Robert Morris.[61]

In the early years who were the arbitrators in the commercial cases? During the second half of the 18th century in England, many merchants, tradesmen, and jurors served as arbitrators, as in the *Norris* and *Jackman* cases. One barrister emerged as essentially a full-time commercial arbitrator, but he was the exception.[62] At the beginning of the century, however, most arbitrators were prominent members of the bar, leaders in society, or active judges.[63]

The early pattern whereby active judges stepped off the bench to assume the role of arbitrator in litigated cases is of interest in light of a 1994 opinion by Judge Richard Posner in *DDI Seamless Cylinders v. General Fire Extinguisher*.[64] When the market disappeared, General Fire Extinguisher backed out of a contract for the manufacture of metal fire extinguisher cylinders, and DDI Seamless Cylinders sued in federal district court under diversity

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[54]*See* Mittenthal, *Whither Arbitration?* in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 35.

[55]The Papers of John Marshall, eds. Hobson et al., vol. v: Selected Law Cases, 1784–1800 (1987) (*see Latham v. Gaines*, at 16; *McHaney v. George*, at 32; *Hunter, Banks & Co.*, at 190; *Mercer v. Bell*, at 446).

[56]Legal Papers of John Adams, eds. Wroth & Zobel, 2 vols. (1965) (*see Bancroft v. Lee*, at 1:179; *Pierce v. Wright*, at 2:20; *Doane v. George*, at 2:68).

[57]The Papers of Thomas Jefferson, eds. Boyd et al. (1950), vol. 2 at 641 ("A Bill for Enforcing Performance of Awards Made by Rule of Court"). This bill, apparently never enacted, was drafted for the Virginia legislature as a simplification of state legislation already existing that was virtually a duplicate of John Locke's 1698 statute ("An Act concerning Awards," enacted 17 December 1789).

[58]Legal Papers of Andrew Jackson, eds. Ely & Brown (1987) (*see Hay v. Hickman*, at 47; *McNair v. Edgar & Tait*, at 91; *Witherspoon v. Jackson*, at 261).

[59]The Law Practice of Alexander Hamilton, eds. Goebel & Smith (1969–1981). Hamilton was involved in many arbitrations; space limitations prevent itemizing them.

[60]The Papers of Daniel Webster, eds. Konefsky & King (1982–1983) (Legal Papers, vols. 1 & 2—many arbitration cases).

[61]The Papers of Robert Morris, eds. Ferguson et al. (1973–1988) (numerous papers pertaining to arbitration; see especially vols. 6 & 7).

[62]His name was Thomas Lowten. On him and on who the arbitrators were in the late 18th century, see Oldham, *supra* note 35, at 151–55 and Appendix E.

[63]This information comes from an inspection of the King's Bench Rule Books at the Public Record Office in London: PRO, KB 125, vols. 123–126.

[64]14 F.3d 1163 (7th Cir. 1994).

jurisdiction. The trial judge tried hard but unsuccessfully to settle the case, and it was assigned to Magistrate Judge Bobrick. He also tried unsuccessfully to settle the case and, according to Posner: "Then the lawyers had a brainstorm: appoint Judge Bobrick the arbitrator of the dispute." Bobrick agreed, heard the case, and issued an award, retaining "jurisdiction to act as the arbitrator if any impasse arises as to any of the elements of loss."[65] General Fire Extinguisher lost badly in the arbitration and then "appealed" from Bobrick's award, which was styled at different stages as an "order" and as a "judgment." According to Judge Posner:

> Even after questioning General Fire's counsel closely at argument, we are uncertain what relief he seeks from this court. But he seems to want us to rule that the parties had no power to appoint a magistrate judge to arbitrate their dispute and that the judgment (if that is what it is) ... should be treated as if it were an ordinary civil judgment rather than an arbitrator's award and should be reversed because the magistrate judge's findings of fact with regard to DDI's damages were clearly erroneous.[66]

Posner first cited section 9 of the FAA to the effect that an arbitration award must be confirmed by a court to be enforceable. Then he observed that, if judges could double as arbitrators, Judge A might issue an arbitration award and the winner might take it to Judge Z for an order of confirmation. This, according to Posner, is "an ingenious idea and since 'alternative dispute resolution' is all the rage these days—since at least one state (Connecticut) already authorizes its judges to moonlight as arbitrators, ... the day may not be distant when federal judges will be recommissioned ... as arbitrators."[67] He continued with what we might call his "Pooh-Bah" vision:

> Even more curious, ingenious, and economical would be a procedure by which a judge or magistrate judge would on day 1, wearing his judge's hat, encourage the parties to submit their dispute to arbitration; would on day 2, wearing his arbitrator's hat, arbitrate the parties' dispute; and on day 3, wearing his judge's hat once more, would confirm the arbitration award. That is one possible characterization of what Judge Bobrick did.[68]

Unfortunately for General Fire Extinguisher, this scheme was not possible in the case before Posner, originating as it did in a federal

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[65] *Id.* at 1164.
[66] *Id.* at 1165.
[67] *Id.* For the Connecticut reference, Judge Posner cited a *New York Times* article: Johnson, *Public Judges as Private Contractors: A Legal Frontier*, N.Y. Times, Dec. 10, 1993, at B9.
[68] 14 F.3d at 1164–65.

district court operating under Article III of the U.S. Constitution (something of no concern to the judges of England in the early 1700s). According to Posner, Bobrick's arbitration order had no legal effect since it had not been confirmed, and a void order was not appealable. He explained: "It may seem a considerable paradox that if the judge's error is so flagrant as to make his order void, the appellate court loses jurisdiction. But a void order has no bite, and Article III precludes an appeal from a harmless order." Posner admitted that there was some room for judicial review of Bobrick's arbitration award, that is, the grounds for vacating an arbitrator's award specified in the FAA. Beyond this, however, "unless the parties provide otherwise, an arbitrator's award is unappealable.[69]

Conclusion

Throughout this paper I have been conveying two main messages. First, the world of arbitration is more of a unified whole than we realize. No longer is there a bright line between commercial and labor arbitration; moreover, the 17th and 18th century Anglo-American history of arbitration supports this unified view. Second, the more things change, the more they stay the same. I hope that the parallels between early and modern arbitration principles and practices have been of interest, perhaps even surprising.

I close with a final counterpoint between then and now. The final illustration concerns the occasional problem of the grievant who, after losing an arbitration, seeks revenge against the arbitrator. I discovered a colorful 18th century example, which I will describe in a moment, but for comparison I went in search of a modern example or two. These are hard to find in printed records, but they are not hard to find when one talks to practicing arbitrators. My first phone call—to Rich Bloch—served extremely well. Rich offered several examples from his experience; I will use two. The first was when he sustained the discharge of a District of Columbia Metro employee. After the award was issued, the ex-employee came to the union office and threatened to kill both the union staff and the arbitrator. Rich was given two weeks' police protection, fortunately without incident.

Rich's second example is one which some of you may know; it arose when he was Chairman of the Foreign Service Grievance

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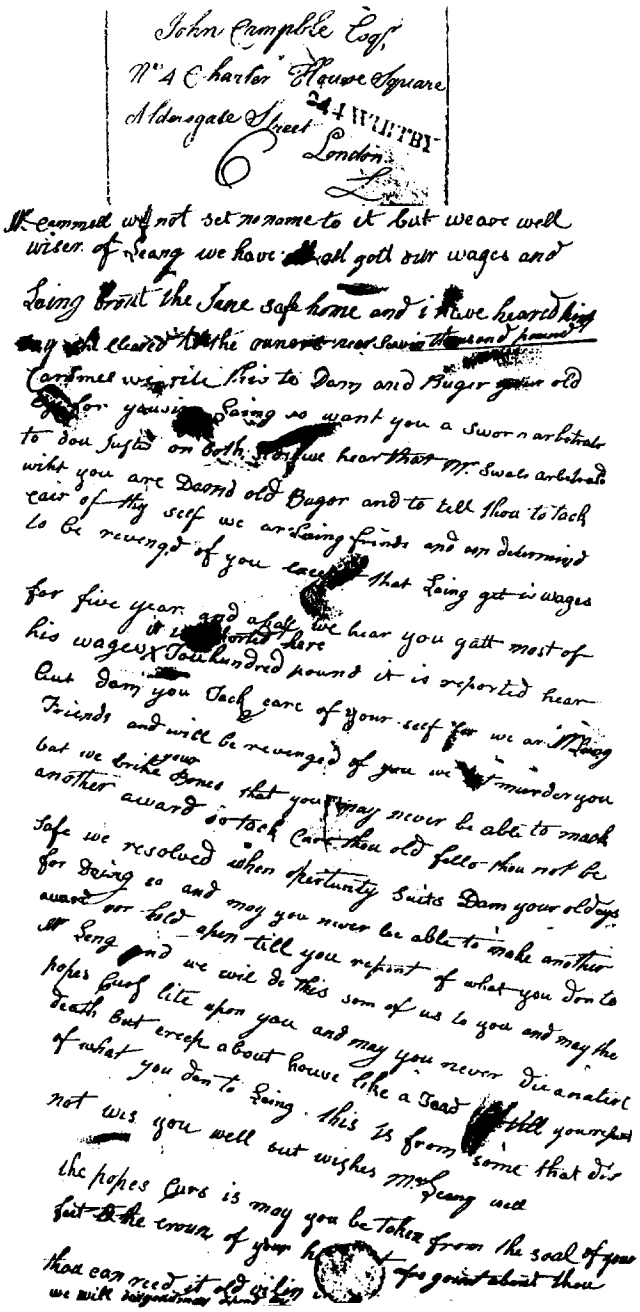
[69] *Id.* at 1166.

Board. A grievant claimed that he had been deprived by the State Department of prisoner of war reparations; he filed thousands of pages of exhibits and obtained half a dozen postponements covering several years. Finally the case was assigned to a panel chaired by Rolf Valtin, and Rich told Rolf that, if the grievant missed another deadline, Rich was going to dismiss the case. This is what happened, and in retaliation the grievant sued Rich and Secretary of State Cyrus Vance. As to Rich, the grievant's theory was imaginative, possibly even brilliant. On searching *Who's Who* and finding that Rich was born in East Orange, New Jersey, the grievant traveled to East Orange, where he discovered that there was no record whatever of one Richard Bloch. In fact, this was because Rich was born Richard Simon, and later he took the name of his stepfather by whom he was adopted. This was unknown to the grievant, who then stated two grounds for vacating Rich's order dismissing the case: (1) that the Secretary of State was holding Richard Bloch hostage by systematically erasing all records of Richard Bloch's existence; and (2) that, since Richard Bloch did not exist, he obviously had no authority to issue the order, which was, perforce, a nullity!

The 18th century example comes from a contempt proceeding against one Francis Leng in 1786.[70] Leng had brought suit for wages due him from service on board the ship *Jane*, and the case was referred to arbitrator John Campbell, a London merchant. Leng lost the arbitration and, pretending to be writing on behalf of a group of his friends, wrote a threatening letter to Arbitrator Campbell. When it was discovered that Leng himself was the author, the contempt action resulted. Attached to interrogatories exhibited to Leng in the case was his original letter, a copy of which is printed here. I will attempt a translation, interpolating missing words as best I can:

> Mr. Cammell, we [will] not set no name to it but we are well wiser of Leang. We have all gott our wages and Laing brout the Jane safe home, and I have heard him say she cleared to the owners near seavin thousand pounds. Cammel, we rite this to Dam and Buger your old eyes for yousing Laing so. Want you a sworn arbitrator to dou Justice on both Sides? We hear that Mr. Swals arbitrated with you. [You] are a Damd old Buger, and to tell thou to tack cair of thy self. We are Laing['s] friends and are determined to be revengd of you except that

[70] *Rex v. Leng*, Public Record Office, London, King's Bench papers, 32/20.


John Campble Esqr
N°4 Charter House Square
Aldersgate Street
24 HUTTER-
London.

Laing get [h]is wages for five year and a half. We hear you gott most of his wages—Tou hundred pound it is reported hear. But dam you, tack care of your self, for we are Mr. Laing's Friends and will be revenged of you. We [will] not murder you, but we [will] brake your Bones that you may never be able to mack another award. So tack care thou old fello, thou be not safe. We [are] resolved, when opertunity suits. Dam your old eyes for doing so. And may you never be able to make another award nor hold a pen till you repent of what you don to Mr. Leng. And we will do this, some of us, to you, and may the Pope's Curse lite upon you and may you never die a natural death but creep about the house like a Toad till you repent of what you don to Leing. This is from some that does not wis you well but wishes Mr. Leang well. The Pope's Curse is, may you be taken from the soal of your feet & the crown of your head . . . [wax blot]. We will do it. You may depend on [it].

PART II. HARRY SHULMAN: DECIDING WOMEN'S GRIEVANCES IN WARTIME

LAURA J. COOPER*

The purpose of labor arbitration is to resolve satisfactorily real workplace disputes that arise between union-represented workers and their employers. There is a question, however, whether the very nature of the labor arbitration process precludes it from adequately performing this function at a time, like today, when society is changing and when those changes are reflected in the workplace.[1]

There is every reason to expect that grievance arbitration would be unresponsive generally to social change and, specifically, unresponsive to rapid change in the gender composition of the work force. Grievance arbitration in North America, unlike workplace dispute resolution elsewhere in the world, is exclusively rights based and purports only to recognize rights previously established by collective agreement. That collective agreement is negotiated

*Member, National Academy of Arbitrators; Professor, University of Minnesota Law School, Minneapolis, Minnesota. This project was funded in part with a grant from the Fund for Labor Relations Studies.

[1]Fraser, *A New Diversity in the Workplace—The Challenge to Arbitration: I. The U.S. Experience*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 143. Between 1960 and 1990, while male union membership fell from 35% to 20% of the work force, women's union membership doubled. Since 1960 women's share of total union membership increased from 18% to 37%. Albelda, *Engendering Unions*, Dollars & Sense (Sept./Oct. 1993), 10.