Don't throw up your hands in despair. What we have been discussing truly represents just another challenge to the arbitral process. And this, too, shall pass.

III. MANAGEMENT RESPONSE

FRAMROZE M. VIRJEE*

Introduction

Although I strongly agree with much of Arbitrator Bloch's paper—especially his opinions regarding the limited role of an arbitrator—I do think that on certain points his paper stirs the water just a bit. For example, although he clearly is correct that an arbitrator must be limited in the scope of review to a consideration of only the relevant contract and its terms, I must disagree with his mixing of judicial and arbitration decisions and standards—equating the "just cause" analysis of discharge under a collective bargaining agreement with the distinct and unrelated statutory analysis that courts are required to perform in discrimination cases. In any case, Arbitrator Bloch's central thesis is well taken. In an arbitration setting, management, union, and neutral representatives can all agree, I hope, that "just cause" must not evolve into an ever-shifting definitional standard dependent upon the degree of the arbitrator's importation of external law. Instead, just cause must remain what it has always been, a standard to be determined and applied in accordance with the bargain of the parties in light of the particular circumstances of the case. As such, it simply is not and cannot be the product of judicial decisions or statutes.

As Arbitrator Bloch correctly notes, the essence of any arbitrator's authority and decision is and must be the parties' agreement. The arbitrator is retained to review the parties' agreement, render an interpretation of the parties' bargain, and then apply that bargain to the given facts to determine whether or not the parties have abided by their respective promises. This is the arbitrator's sole obligation.

As Arbitrator Bloch also correctly notes, different collective bargaining agreements incorporate external law to differing degrees. But one should not lose sight of the fact that, by their own

*Partner, O'Melveny & Myers LLP, Los Angeles, California.

admission, arbitrators are not judges. Accordingly, their central task is to enforce the parties' agreement, not the law. It is when an arbitrator strays from the contract language—to incorporate external law based on independent notions of fairness, public/social policy, or obligation—that management counsel usually suspects that the arbitrator has lost sight of his or her assigned and proper role in the dispute.

Stated another way, although in most cases an arbitrator should read an agreement in a manner consistent with external law, to the extent that law and contract are inconsistent, the contract should control. That is equally true when, as is more often the case, the contract clearly does not incorporate an obligation imposed by external law. As Professor Theodore St. Antoine has stated, "[T]he arbitrator in the usual case remains just the 'reader' of the instrument before him. And if, after giving due weight to the presumption of legality, he cannot reconcile the contract and the law, he should render the award compelled by the contract."[1]

Unsolicited Incorporations of External Law: The Inequitable Paradigms

An arbitrator's enforcement of the parties' contractual provisions, without regard to external law, produces a result that is far more just and equitable than might appear at first blush. Consider the following example: An employee is discharged because he is a slow worker. The relevant collective bargaining agreement contains no provision regarding nondiscrimination or reference to external law. The employee grieves his discharge, claiming that: (1) he is not a slow worker, and (2) the real reason for the discharge was age discrimination. After hearing all the evidence, the arbitrator dismisses the grievance, concluding that the employer did *not* discriminate against the employee based on age, and in so doing, incorporates the law of the federal Age Discrimination in Employment Act (ADEA). The arbitrator also finds that there was good cause for the discharge. Under the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*,[2] even if the collective bargaining agreement contains express language characterizing the

---

[1]St. Antoine, *The Role of Law in Arbitration (Discussion)*, in Arbitration 1968: Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators (BNA Books 1968), 75, 79.

[2]415 U.S. 36, 7 FEP Cases 81 (1974).

arbitration process as "final and binding," the employee now has the right—notwithstanding the arbitrator's findings—to relitigate the issue of age discrimination under the ADEA in the courts. Moreover, because freedom from discrimination is a statutory right, not a contractual one, the arbitrator's finding of just cause will have little or no precedential effect on (and will likely be of little significance to) the courts.

Conversely, suppose that the arbitrator finds that the employer acted in a discriminatory manner—again incorporating the external law of the ADEA to reach that decision—and therefore finds that there was no just cause for the discharge. The employee is then put back to work with back pay, and the employer is left with the "final and binding" decision of the arbitrator on the ADEA discrimination issue with no right to appeal. Meanwhile, the employee again has the right to file his statutory claim seeking additional damages in court and holding in his hand an arbitrator's finding of ADEA discrimination. In other words, regardless of the arbitration's outcome, by incorporating and applying external law, the arbitrator provides the employee two bites at the apple, where the employer is limited to one. And perhaps most unfair from the employer's perspective is the fact that, by applying the external law of the ADEA, the arbitrator has incorporated into the contract a promise to which the parties clearly did not agree—the ADEA and its terms and obligations. Hence, an arbitrator under this fact pattern "adds insult to injury" first by incorporating external law into a private agreement, thereby establishing contract terms and conditions that were not bargained for, and then by creating a situation under *Gardner-Denver* where the employee receives two opportunities to succeed on the issue, while the employer is limited to one.

Now alter the fact pattern to one where the parties' collective bargaining agreement includes a nondiscrimination provision that expressly references and incorporates the external law of the ADEA (and likely the Americans with Disabilities Act (ADA) and Title VII to boot!). Here, the arbitrator's analysis and decision as described above is quite understandable and appropriate. The arbitrator's incorporation of the external law of the ADEA is in no way inconsistent with the contract. Instead, it is simply an appropriate enforcement of the obligations created by the parties' express agreement. Put another way, it is difficult to feel much compassion for an employer that has bargained itself into this "double jeop-

ardy" situation by *expressly* incorporating by reference the provisions of the relevant statute (here, the ADEA).

Yet another permutation of this fact pattern creates the arbitrator's greatest dilemma. Assume the parties' collective bargaining agreement contains a nondiscrimination clause, but that the clause is silent as to the definition of discrimination based upon age, race, gender, etc. If the arbitrator looks to the external law of the ADEA to interpret this contract's terms, is he or she exceeding the obligation to enforce only the terms of the parties' agreement, or simply turning to a "common sense" source of a definition to help interpret the parties' contractual terms and conditions?

I think most would agree that, before turning to external law, the arbitrator should first review the parties' bargaining history surrounding the terms used in the nondiscrimination clause, look to past interpretations of the language under the contract by the parties and other arbitrators, and examine any other facts and circumstances particular to the contract that would tend to explain the parties' contractual intent. Only if the arbitrator is "at sea" for any evidence of definitional intent should he or she then turn to external law as a possible landmark for definitions to help identify the parties' intent—much as arbitrators will often turn to Webster's Dictionary for the "plain meaning" of terms for which they have no other evidence to establish the parties' intended definition. And even then, the arbitrator must be ever cognizant that by using external law as a signpost for definitional assistance, one is not "incorporating" the statutory scheme of a particular law, but simply using it as a reference to help in defining terms used by the parties in establishing their contractual obligations. Thus, in the instance where external law is not expressly incorporated into the terms of the contract, the arbitrator's reference thereto should not be used to create new contractual obligations for the parties, but only to help the arbitrator in interpreting and enforcing the parties' contractual intent.

As an aside, employers are not the only parties who "have something to lose" when an arbitrator imports external law into a collective bargaining agreement *sua sponte*. In *Cotran v. Rollins Hudig Hall International, Inc.*[3] (where an employee accused of

[3]69 Cal. Rptr. 2d 900 (Cal. 1998).

sexual harassment was terminated and sued his employer for wrongful discharge), the California Supreme Court held the relevant inquiry in such a wrongful discharge suit to be, "Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?"[4] If an arbitrator were to incorporate such a standard into a collective bargaining agreement, in the absence of an express contract provision providing for such incorporation, the result would be to deprive an employee of the right to be discharged only for *actual* misconduct in favor of a result that permits an employer to discharge an employee whenever the employer has a "good faith" basis for concluding that the employee had engaged in the alleged misconduct.[5]

In sum, an arbitrator should not import external law into an agreement to the unintended and unbargained-for benefit of one party, be it the employee or the employer. Just as absent express contractual language to the contrary, employers should not be found to have submitted themselves to "double jeopardy" under *Gardner-Denver*, employees should not be found to have forfeited the right to be discharged only for *actual* misconduct in the absence of express contract language to that effect.

By these examples I am not suggesting that arbitrators are prohibited from referencing or considering, or should never reference or consider, external law. Instead, I simply suggest that they should incorporate external law and enforce obligations thereunder *only* where doing so is consistent with the parties' clear agreement—where the parties have expressly agreed that such laws and standards are part of their bargain.[6] As many arbitrators and commentators have stated, "Arbitration should not be an initial alternative to adjudication. It has been (and should be) a separate

---

[4] *Id.* at 910.

[5] *See infra* at 53–54 for a more detailed discussion of this judicial interpretation of "good cause" versus the more traditional arbitrator's view of "just cause."

[6] For example, after *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991), many nonunionized employers have instituted binding arbitration agreements with their individual employees, requiring the arbitration of all employment-related disputes. However, *Gilmer* and its progeny dictate the presence of certain procedural and substantive safeguards in such individual employment arbitration agreements before they will be considered enforceable (*e.g.*, the right to limited discovery, cross-examination, to bring dispositive motions, and the recovery of all damages that would be obtainable at law). Accordingly, many, if not most, of these individual employment agreements to arbitrate routinely incorporate *all* relevant external law. In such cases, the incorporation of external law by the arbitrator is not only quite appropriate, but likely required.

system of judicature respecting *private* rights and duties resulting in final decisions—not decisions on *public* matters reviewable by (courts or administrative agencies) and deferred to if not repugnant to (external law)."[7]

Just Cause versus Legitimate Nondiscriminatory Reason: Different Standards for Different Issues

In his paper, Arbitrator Bloch raises many interesting issues, and highlights many dilemmas and difficulties facing arbitrators today as they wrestle with whether or not to integrate external law into the arbitration setting. One of the most important of these difficulties facing arbitrators is recognizing the crucial distinction between: (1) the decision of an *arbitrator* pursuant to the terms of a collective bargaining agreement that an employer did or did not have "just cause" for a termination; and (2) the decision of a *court* pursuant to the terms of a statute that there is insufficient evidence to demonstrate that a particular termination was or was not motivated by discrimination.

Simply put, in applying federal and state discrimination laws, courts do *not* regularly analyze the facts of a case to determine whether or not an employer's stated reasons for discharging an employee were "fair" or sufficient, or whether the employee actually engaged in the conduct alleged. Instead, the fundamental question before the court in a discrimination case is intent (*i.e.,* was the employer motivated by an unlawful intent; did the employer intend to discriminate against the employee based upon the employee's membership in a protected class). Thus, once the employee has established his or her *prima facie* case of discrimination under *McDonnell Douglas v. Green*[8] and its progeny (*e.g.,* (1) membership in a protected class; (2) qualification for the job; (3) specific adverse employer treatment; and (4) other similarly situated employees *not* similarly treated), the burden then shifts to the employer only to *articulate* a legitimate nondiscriminatory reason for its conduct. In evaluating the legitimate, nondiscriminatory reason proffered by the employer, the courts do not examine evidence to see whether or not the employee actually committed the conduct alleged. Instead, the inquiry is limited, under the

---

[7]Seitz, *The Limits of Arbitration,* 88 Monthly Lab. Rev. 763, 764 (1965).
[8]411 U.S. 792, 5 FEP Cases 965 (1973).

traditional framework for analyzing discrimination claims, to the question of whether or not the employer has, in good faith, articulated a legitimate, nondiscriminatory reason for the conduct. If the employer has done so, then any presumptions that may exist fall away and the burden of proving such intent remains on the employee.

Conversely, in a grievance arising out of a termination, the burden of demonstrating just cause falls on the employer. In deciding such an issue, the arbitrator looks afresh or *de novo* at the facts and circumstances to determine not only whether the employer can in good faith "articulate" a legitimate reason for the discharge, but also whether or not the conduct alleged *actually occurred,* and whether the discipline assessed was fair (in light of traditional notions of progressive discipline).

This important distinction is lost when the issue is not properly framed by the parties for the arbitrator, or when the arbitrator attempts to import external law regarding discrimination into a just cause analysis. Accordingly, in commencing an arbitration the arbitrator must remember that he or she is there only to interpret and enforce the contract. Given this fact, it is important for arbitrators to frame the issue in a discharge arbitration, not as whether or not the employer violated the ADA or Title VII, but whether the employer has violated some express or implied contractual promise not to discriminate. In seeking to decide this issue, the arbitrator must look to the agreement of the parties for guidance.

In the foregoing discriminatory discharge example, what should an arbitrator do with external law? The answer lies within the particular collective bargaining agreement the arbitrator is being asked to interpret.[9]

Again, if the contract is silent on the question, the arbitrator should ignore external law and its statutory obligations. Although some arbitrators have "extended" their authority by determining that the standard of "just cause" somehow implicitly includes the nondiscriminatory policies embodied in the ADEA, ADA, and Title VII, one wonders how an employer can be found to have breached a *contractual* promise that it simply did not make.

Similarly, if the contract contains a nondiscrimination clause, but expressly provides that it is *not* grievable, such a clause should

---

[9]*See Duraloy,* 100 LA 1166 (Franckiewicz 1993).

be viewed by the arbitrator as nothing more than an exhortation, an expression of the good intent of the parties, but wholly unenforceable as the basis for a grievance.

If the contract contains a grievable nondiscrimination clause, then the arbitrator's only task must be to determine whether the employer violated its express collectively bargained promise not to discriminate. In this case, external law may or may not be relevant to the question of whether or not there has been a breach of the nondiscrimination promise. Accordingly, the arbitrator should receive evidence as to the parties' intent when they originally agreed to the clause (*e.g.,* did the parties intend to incorporate the entire statute, or just the general nondiscrimination principles?). In light of the limited role of arbitration, the arbitrator should incorporate external law only to the extent that the parties have foresworn its violation. As always, it is the agreement that is the essence of the arbitrator's authority; thus, the agreement must establish the limits of that authority.

Judicial "Good Cause" versus "Good Cause" in Arbitration

An equally pressing issue facing arbitrators today is the extent to which the courts' frequent interpretation of "good cause" in the employment setting to mean a fair and reasonable cause regulated in good faith should be adopted or incorporated by arbitrators into just cause arbitrations. Advocates and neutrals must acknowledge that more and more courts are tending to defer to employers in wrongful discharge litigation, based upon an implied contract theory to discharge only for good cause. They are refusing to conduct a *de novo* review of employer investigations into alleged employee misconduct. Instead, as already noted, many courts restrict their inquiries to a question of whether "the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual."[10] Put another way, the issue for the courts deciding a case based upon an alleged implied contract to terminate only for good cause is not whether the employee actually engaged in the alleged conduct that provided the basis for the discharge, but whether the employer acted reasonably in so concluding under the circumstances.

---

[10]*Cotran v. Rollins Hudig Hall Int'l, Inc.,* 69 Cal. Rptr. 2d 900, 910, 75 FEP Cases 1074 (1998).

However, in most of these decisions, the courts also recognize that the propriety of such a deferential standard will depend on the circumstances of the case. This "good faith" standard is an *implied* standard, used by courts in the absence of any express agreement by the parties. Even the courts acknowledge that such a standard may not be appropriate where parties have bargained for an express just cause term in their employment contract or collective bargaining agreement.[11] Where, as in many collective bargaining agreements, there is an express agreement to discharge only for "good cause," the arbitrator necessarily must apply the contractual standard for which the parties have bargained.

Conclusion

In accordance with the traditions of arbitration, just cause is, always has been, and must remain in the future exactly what the parties bargained for in their agreement. If there is no enforceable promise not to discriminate in the collective bargaining agreement, then there is nothing for the arbitrator to enforce and the question of discrimination should be reserved for the courts. This is particularly true in light of the different standards that are applicable in a just cause arbitration and a discrimination lawsuit. Similarly, "good faith" defenses recognized by the courts in single-employer breach of implied contract wrongful discharge cases are not applicable or suitable for incorporation into the arbitration setting. Such decisions are generally a result of a court attempting to flesh out terms of the implied contract to terminate for cause and, by the courts' own admissions, are not applicable when express contractual provisions provide for a "just cause" standard.

---

[11] *See Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 928, 115 LRRM 4002 (Ct. App. 1981) (" 'Good cause' in this context is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.").