Chapter 1

PRESIDENTIAL ADDRESS: SEEKING A VACCINE: AVOIDING THE SAD PRACTICES OF COMMERCIAL ARBITRATION

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There is an old adage that if you don't look behind you every so often, something may sneak up and bite you. That is what commercial arbitration—and employment litigation—is doing to labor arbitration, and why I am bringing this topic to the attention of a labor, management, and labor arbitrator audience.

The latest figures available reveal that in 1999 the American Arbitration Association (AAA) administered 2,200 of what it termed employment arbitration cases. All but 400 were settled or withdrawn at some point. Of the 400 that went to an award, only 13 percent, or about 50, involved a statutory discrimination claim. All the rest were straight commercial cases, dealing with the interpretation of an ordinary contract with an ordinary arbitration clause, the kinds of cases that have been arbitrated for hundreds of years. Many do not even deal with anything that occurred on the job; instead, they concern such issues as valuing stock options or determining the intent of employee compensation provisions. Others focused on noncompete provisions, where they are legal. Still others dealt with finding facts and applying them to the agreement. Examples are determining the propriety of employee duties after a change of control, or deciding whether an executive's firing was with or without cause, the latter conferring a much richer parachute for the executive's departure. My best guess, based on my own experience, is that very few of these cases involved claimants who would be eligible for inclusion in a collective bargaining unit.

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Despite their current paucity and diverse subject matter, these cases are having an inordinate impact on how labor arbitration is traditionally practiced, and how it is treated by the courts and, to a lesser but possibly increasing extent, by legislatures. Given this year's decision in *Circuit City Stores, Inc. v. Adams*,[1] particularly the way it was written, there will likely be many more of these cases, including those involving statutory claims.

I need to pause here to give a little background as to why I think I'm qualified to talk about this topic. I have a decent parochial labor arbitration practice. About 10 years ago I got into an argument with a friend at the AAA who was putting together a so-called high-powered panel of arbitrators to compete with JAM's[2] retired judges. I said that he should put labor arbitrators on the panel. He said we didn't know anything, that commercial arbitration compared to labor arbitration was like comparing complex court litigation to small claims cases. I disagreed and put together a letter outlining the kinds of issues I had had to deal with as a labor arbitrator, issues that are no different from those decided by my colleagues in this audience.

In the letter I debunked the notion that labor arbitrators neither knew how to nor had to deal with statutory interpretation. Despite the seemingly age-old debate about whether statutes are incorporated into labor agreements, I pointed out that labor arbitrators not only apply discrimination statutes but also tax laws; federal aviation, marine, and transport legislation and regulations; unemployment and disability law; the Employee Retirement Income Security Act;[3] the Multiemployer Pension Plan Amendments Act;[4] the National Labor Relations Act[5] in National Labor Relations Board deferral cases as well as section 302 cases; the myriad statutes and regulations in federal and public sector cases; and on and on.

I also pointed out that labor arbitration was not a small claims arena, noting that in many cases, and not just those involving baseball players, millions, if not billions (in the right interest case), of dollars might change hands, and real labor arbitrators didn't

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[1]532 U.S. 105, 85 FEP Cases 266 (2001).

[2]JAMS Endispute is an independent organization that provides panels of retired judges and others to parties seeking alternative dispute resolution services.

[3]29 U.S.C. §1001 et seq.

[4]Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980).

[5]29 U.S.C. §§151–168.

shirk from such awards if they were due. Examples in addition to interest cases are plant closings, double-breasted cases, and pension cases. Other so-called labor arbitration cases deal with settling real estate titles, corporate veil piercing, detailed and conflicting medical and psychiatric testimony of all kinds, or, my personal favorite as a former history major, why President McKinley was shot.

In the final portion of the letter, I put to rest the notion that labor arbitrators are so oriented toward just cause that we would deal with all cases as if that were the sole standard to be applied. After all, I pointed out, labor arbitrators apply just cause because labor agreements use that standard, and for no other reason. If the agreements contained some other standard, we would apply it. Similarly, I pointed out that by law and contract we do not normally award punitive damages and attorneys' fees, but if the governing law and contract did allow such remedies, we would impose them if warranted.

The letter resulted in my being put on that panel, and every now and then a case came in. With the advent of so-called employment arbitration in my state, however, the case load took off. Now I typically have a dozen or more case files open. In any given year, four or more of them fail to settle, advancing all the way to the issuance of a decision.

The point of this bit of self-glorification is that I think I have about as good a handle as the next person about how these cases are shaping up from a practical viewpoint and how they compare to traditional labor cases.

The Process

Let me illuminate the difference. In a labor case there is a continuing relationship, where the parties have to live together despite the arbitration hearing and its outcome. For example, in one case counsel was seeking to develop an important point on cross-examination when opposing counsel stated, with a twinkle in his eye, "Objection." When asked for the grounds, he said, "I don't want to hear the answer." Good-natured laughter followed, and he was right: he didn't want to hear the answer.

Now take a commercial/employment case. There the parties are in litigation. They most probably will not see each other again. By the time the case gets to arbitration it may be personal, not only between the litigants but between their counsel. There is no

continuing relationship to foster. In one commercial/employment case that went on for several years and reached the court of appeals just to get to arbitration, opposing counsel was giving a witness a hard time on credibility. Counsel objected. Asked the grounds, she said, with no twinkle in her eye, "I don't like his persona."

In a nutshell, the commercial/employment case is not simply a substitute for court litigation, it *is* litigation. There is discovery, with lots of depositions and interrogatories (if you allow them), and there are calls, faxes, e-mails, and motions to the arbitrator about what questions can be asked or answered. There are dispositive motions, motions in limine, motions for sanctions because of improper or incomplete disclosure of discovery materials, impeachment by allegedly inconsistent answers in those previous depositions, motions to disqualify counsel for various ethics violations, claimed admissions in the interrogatories, and on and on.[6]

Even if the arbitrator seeks to run the hearing informally, that doesn't prevent counsel from acting as if a jury or a TV camera is in the room. There are also separate proceedings for attorneys' fee calculations if they are due, as well as other proceedings that are necessary to fully flesh out an award, such as punitive damages hearings. And then there are post-final award proceedings before the arbitrator in the form of motions to reconsider or to correct the award or even to add things that the arbitrator forgot.[7]

The result is a long and expensive process—even if it is less costly than going to court—that is highly and hotly contested, where the personalities of counsel and clients are sure to surface, unfortunately, all too often not for good. The hearings themselves can be overly long, and, more importantly, the results may be challenged, not only by seemingly routine motions to correct or reopen, but by appeal. If an appeal on the merits is not possible, one may be lodged on the grounds of procedural irregularities, and/or arbitrator bias, and/or failure to disclose past relationships with the parties or counsel.

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[6]I got motion sickness just writing this paragraph!

[7]*See Century City Medical Plaza v. Sperling, Isaacs & Eisenberg,* 86 Cal. App. 4th 865 (2001) (arbitrator can add to award matters inadvertently left out if there was a good-faith reason to have done so, and a motion for the addition was brought during the statutory time period allowed for seeking correction of an award).

This talk is not a primer on how to run a commercial case, and indeed there are ways of optimizing this process. But that doesn't happen often enough.

For our purposes today, the more important issue is how these so-called "features" of commercial arbitration affect labor arbitration. Simply put, the people involved forget where they are. This is particularly true of the lawyers. I have nothing against lawyers. I hold a card that says I am one, because I passed a test over 30 years ago, pay my bar dues, and go to enough events like this to continue to educate myself.

But lawyers are getting used to commercial arbitration, and they are trying too many employment cases in court. This is happening on both sides. Management lawyers are doing more employment work than collective bargaining work. Younger ones have done hardly any of the latter, but have spent an inordinate amount of time on employment cases. Union lawyers are getting involved by doing plaintiff work when it comes their way.

What is being brought to labor arbitration from these commercial cases and their litigation evil twin is a scorched-earth, win-at-any-cost approach. Legitimate advocacy in a labor case is, of course, expected. But counsel are bringing an increasing lack of professionalism as well as incivility to the labor arbitration table.[8] Lawyers forget the fundamental difference between their labor cases and their employment cases and who and where their clients are—that they are in a long-term relationship and the parties have to live together regardless of whether they like the result in the labor case.

Another palpable effect of commercial practices is an increasing amount of hearing time to complete a labor case. What used to take a half-day now takes all day. The former day-long case requires a return trip, often several months later. There are lengthened examinations of witnesses, particularly in terms of far-flung fishing expeditions regarding credibility. These are topped by new but not necessarily creative ticky-tack evidentiary and procedural objections, the latter raised for the first time not even at the beginning of the hearing, but sometimes held back to be inserted at some misperceived strategic but utterly inapt moment during the hearing itself.

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[8]This problem admittedly does not emanate from commercial arbitration or litigation alone. At one AFL-CIO attorneys' conference, an East Coast attendee told me that his union clients expected him to be less than civil, otherwise he would come off looking like an incompetent weakling—a "wuss," to use current parlance.

Partially caused by the fact that in commercial matters it is the law that counts, there are interjections of statutes, regulations, and/or purported formulations of public policy that really have nothing to do with the case. This includes employers piling on charges against disciplined employees when such charges have nothing to do with the original cause for discipline. There is also an increasing use of so-called expert witnesses on issues where they are not required, and a remarkable failure to call them when they would be truly useful.

A particularly disturbing trend is to import pretrial/prehearing processes into labor arbitration. I have received two requests in different 1-day cases this year where counsel for the employer sought a prehearing conference call to discuss prehearing briefs, witness lists, order of proof, what exhibits were to be exchanged, and what evidence would be relevant. No agreement provisions were cited to support these requests. I have been asked to rule on a formal prehearing motion in limine trying to limit what evidence would be relevant at the hearing. There have even been requests for depositions, not for the purposes of preserving evidence, but for discovery.

These elements, of course, do not emerge in all labor arbitration cases. But they are occurring, at least in my cases and in those of others I have talked to, often enough that there clearly is discernible evidence of longer hearings for the qualitatively same case. Moreover, those hearings are less pleasant and less productive. So far, I think, the professional arbitrator is able to keep perspective, but there should be a real concern that this trend will continue and become more pervasive.

The Law

Turning now to the law, arbitration is unique. In its modern form, from around the dawn of the commercial revolution, it was intentionally designed to avoid the law and judges. The parties wanted to keep their own disputes to themselves, to resolve them quickly, using expert referees of their own choosing. Examination of the law as written in the 1600s shows that that model that we still claim to honor today was well in place as far back as 400 years ago.[9]

[9] *E.g.*, A Gentleman of the Middle-Temple, *The Compleat Arbitrator* (2d ed. 1699).

For me, the real alarm started to sound from two sources. One was at our New Orleans meeting 2 years ago, when three Fifth Circuit judges talked to us about how they viewed arbitration.[10] As they told us, they didn't see that many labor arbitration cases, so they didn't know very much about the law governing them, but they still had a hard time understanding how an arbitration decision should not be reviewed the same way that any lower court decision should be. As one union attorney who was present summarized, "They were ignorant, wrong, and proud of it."

The second source is the body of cases itself. In labor cases alone, where the U.S. Supreme Court has remained steadfast to the *Steelworkers Trilogy*[11] for over 40 years, including twice this term in cases where the National Academy of Arbitrators participated with amicus briefs, the Supreme Court has told the circuit courts—again and in no uncertain terms—to keep their hands off labor arbitrators' decisions.[12]

Take a look at decisions in both labor and commercial cases. Many are the result of bad judging, which is driven, however unconsciously, by the courts' hostility to arbitration and its nonjudicial bias.[13] The courts haphazardly intermingle their authorities, citing labor cases in commercial ones and vice versa.[14] Even so-called experts do that. One management attorney, very recently extolling his perceived advantages of non-negotiated arbitration clauses in employment, gave as one of his reasons that "[a]rbitration was a good thing more than 40 years ago when the Supreme Court decided the famous *Steelworkers Trilogy*. It's a good thing now."[15]

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[10]Davis, Wierner & Benavides, *Judicial View of Labor Arbitration Awards*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), 150–168.

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

[12]*Eastern Associated Coal Corp. v. Mine Workers (UMW)*, 531 U.S. 57, 165 LRRM 2865 (2000); *Major League Baseball Players Ass'n v. Garvey*, 121 S.Ct. 1724, 167 LRRM 2134 (2001).

[13]An alternate suggestion is that law clerks using LEXIS or Westlaw, who have no inkling that there may be differences between these two species of arbitration, simply grab headnotes under "arbitration."

[14]*E.g., Employers Ins. of Wasau v. National Fire Ins.*, 933 F.2d 1481 (9th Cir. 1991) (using a non-*Trilogy* grounds for reviewing an arbitration award that sprang from three previous labor cases in an undifferentiated muddling of labor and commercial cases in its citations).

[15]Cane, *Arbitration Contracts Treat Workers and Employers Fairly and Provide Both With Cost-Effective Justice*, Cal. B.J., May 2001, at 11.

The *Trilogy,* of course, has nothing to do with providing a forum for individual employment litigation in non–collective bargaining relationships.

In a discrimination case, the Second Circuit determined that, based on its review of both the law and the *facts,* the arbitrators got the case wrong, and reversed the arbitration decision.[16] Using the facts to reverse a decision is (or was) something new. But even more disturbing was that the court figured out that the arbitrators got the facts wrong *without* any kind of record of the arbitration proceedings. This kind of thinking, even if not cited, had already spilled over into circuit court labor decisions. Hopefully, it was stopped dead in its tracks by the *Garvey* decision.[17]

Consider a second, very recent labor case. In *Safrit v. Cone Mills Corp.*,[18] the court found that there was a clear and unmistakable waiver in a collective bargaining agreement of the right of individual bargaining unit members to pursue their individual discrimination cases in court. In justifying its decision, the court noted that "the Supreme Court itself has recently acknowledged the continuing viability of arbitration claims in the employment context,"[19] citing *Circuit City.* That case had absolutely nothing to do with collective bargaining, let alone the law governing that particular collective bargaining relationship.

With the advent and acceptance of non-negotiated employment arbitration of statutory rights, the stakes have changed. Given the *Circuit City* decision, the field will likely explode. What is particularly important about that case is the way the majority decision, unanswered by the dissent, purposely went out of its way to tell the states to keep their hands off employment arbitration. The decision banned legal barriers to the free flow of the employment arbitration process, opening the way to the formulation of a federal common law of employment arbitration.[20]

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[16] *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 77 FEP Cases 182 (2d Cir. 1998).

[17] *Major League Baseball Players Ass'n v. Garvey*, 121 S.Ct. 1724, 167 LRRM 2134 (2001).

[18] 248 F.3d 306, 167 LRRM 2070 (4th Cir. 2001) (meeting the test of *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998)). Compare the current situation in Canada, where the collective agreement's dispute resolution mechanism may be the *only* recourse the employee may have for torts or other actions that have some connection with employment. *See* Picher, *Defining the Scope of Arbitration: The Impact of Weber, An Arbitrator's Perspective,* 1 Lab. Arb. Y.B. 1999–2000, at 99 (2000).

[19] *Safrit*, 248 F.3d at 308 (citing *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 85 FEP Cases 266 (2001)).

[20] *Circuit City, supra* note 1, at Part III.

In 1976, Dave Feller talked about the decline of the golden age of arbitration. Fortunately, the decline has been gradual. Dave predicted that, as labor arbitrators got more and more into interpreting statutes, they would become de facto magistrates, fairly neutered ones at that, with their awards subject to ordinary court review.[21]

The stakes are far different now in employment arbitration as opposed to labor cases, where ordinarily there is no post-award judicial review.[22] As usual, California leads the way. If you want statutory rights arbitration in California and you're an employer, you can have it, but at a price. First, the employer pays; second, there will be some kind of yet unspecified court review of the decision[23]—thus, the arbitrator becomes a magistrate, assuming that all of this holds up under *Circuit City*.

My real fear about the law is that an inordinate number of these cases will end up in the courts. This is because the assiduous litigant has little to lose by appeal, and possibly a lot to gain if the judges don't like arbitration. This will be particularly true if the cases are decided by arbitrators who do not know what they are doing, and a real skewing of the law concerning arbitration will occur. Then the intermingling of commercial and labor cases will escalate once again, and the greatest long-term adverse impact will be on the labor-management relationship.

Meeting the Challenge

If labor arbitration is to continue to be of value in maintaining workplace fairness, avoiding wildcat strikes, and strengthening the labor-management relationship, we've got to keep a barrier, or at least a one-way permeable membrane, between labor arbitration and commercial/employment arbitration.

So what is to be done? First, to maintain the labor arbitration process:

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[21]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97.

[22]This is so even if the court review of these cases should be as limited as in labor cases. *See* Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 Berkeley J. Emp. & Lab. L. 521 (2000).

[23]*Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 6 P.3d 669 (2000).

1. Make sure that those who are involved and who have a stake in the process are aware of the problem. Hopefully, this screed is part of the awakening process.
2. Can the parties help? Sure, but only if they stay ever-vigilant in using restraint, and, frankly, that has only been a sporadic and partial success. It is too easy for parties to be carried away, forsaking long-term relationships for the short-term, self-generated excitement they attach to the arbitration case of the moment.
3. It is up to the labor arbitrator to guide the parties where necessary, to be active, and to cut in if required, keeping the case moving and on course. Obviously, the arbitrator must use discretion, but the days of just sitting and listening Buddha-like to anything that goes on should be over. The arbitrator should be quite active, not to favor one party or to catch a plane, but to make sure only relevant, noncumulative evidence is being presented. In this way the practices smuggled in from employment arbitration and litigation can at least be muted.
4. Labor arbitrators themselves must use restraint in their awards, addressing only the specific issue presented within the context of the particular agreement under which the arbitration is held.[24] They should also be aware of the court-mandated limitations on their authority while maintaining the fearlessness and integrity that has characterized labor arbitration.

Second, the NAA, its members, and the labor-management parties themselves should be more active in the employment arbitration arena:

1. The NAA is the only identifiable neutral, nonadvocate arbitrator group not tied to a money-making administrative process. Because the NAA does not refer arbitrators to parties, the parties should look to the NAA directory for arbitrators who will represent the best of the process in hearing cases. By being labor arbitrators, we know how to hear and decide cases and can curtail the worst abuses the commercial system might

[24] *See* S. Kagel, *Recent Supreme Court Decisions and the Arbitration Process,* in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 1.

bring to a case. Hopefully, by presiding over full and fair hearings and writing decisions from real records that deal only with applicable facts, the law, and the issues, our decisions will avoid a skewing of the law of arbitration if and when they are appealed. To foster this effort, the NAA should not only list its members on its Web site, which it does currently, but it also should display their resumes for public scrutiny.

2. The NAA needs to maintain and strengthen its education programs, including mandatory member refresher training in both the practices and legal overlay of all forms of arbitration. It can—as several of its regions do now and as we do annually—sponsor sessions for counsel and the public on all of these issues.
3. On the judicial and legislative side, labor-management parties and the NAA should be vigilant about what develops. We should participate much more actively in lobbying and filing amicus briefs. Let the courts know we are watching, but don't limit our scrutiny to labor cases—any legislation or decision about arbitration at all affects labor arbitration.

   I'm very, very proud of the Academy's record on amicus briefs in the United States, and, at last, in Canada as well. We should remain as active as we can, seeking out these types of opportunities.
4. Finally, and above all else, Academy members must remember that the NAA is an organization that fosters fair and voluntary arbitration, not arbitrators. The most important function we can perform for the community at large is to identify and apply proper standards for voluntary, fair arbitration. The Due Process Protocol, our guidelines on taking employment cases, efforts by members on their own time with the American Bar Association, the American Arbitration Association, the California Dispute Resolution Council, and similar groups all count and must accelerate. The NAA and all organizations that signed the Protocol must be particularly watchful to ensure that it is followed and not emasculated, particularly for financial gain. As new groups form, such as the American College of Commercial Arbitrators, NAA members can influence their standards and practices.

With near total court acceptance of employment arbitration, the only ones who can set standards for fairness are those who know what fair arbitration is. And, to paraphrase Pogo, "they is us." Labor

and management, the NAA, and the organizations and individuals devoted to fair and honest resolution of labor disputes make up the thin line that must prevent labor arbitration from being swallowed up by bad commercial arbitration. And in the process, we just might make that institution fair and honest, too.