CHAPTER 5

THE REVISED UNIFORM ARBITRATION ACT: THIRD LEG OF MODERN ARBITRATION LAW

I. PRESENTER

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Introduction

In May 1992, at our 45th Annual Meeting here in Atlanta, I asserted that neither the members of this Academy nor the advocates who argue cases before us could afford to ignore the harbinger of change signaled by the U.S. Supreme Court's then very new opinion in *Gilmer v. lnterstate/Johnson Lane Corp.*[1] On that day I described what I believed to be a coming "third era" of labor and employment arbitration that would be triggered by post-*Gilmer* developments on the judicial and legislative fronts.[2] Today, 9 years later, I can affirm that the third era of labor and employment arbitration has begun. Its arrival was finally and definitively heralded by the confluence of the Supreme Court's opinion in *Circuit City Stores, Inc. v. Adams*[3] and the January 2001 promulgation of the Revised Uniform Arbitration Act (RUAA).[4]

Gilmer and *Circuit City* are not isolated phenomena. Rather, they are but two in a series of 17 commercial arbitration opinions handed down by the Supreme Court since 1983 that put into motion a radical shift in the law of commercial arbitration, a shift

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[1]500 U.S. 20, 55 FEP Cases 1116 (1991).

[2]Hayford, *The Changing Character of Labor Arbitration*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 70.

[3]121 S.Ct. 1302, 85 FEP Cases 266 (2001).

[4]Rev. Unif. Arb. Act (2001) [hereinafter RUAA], available at <http://www.naarb.org/finalRUAA2.html>.

that resounds increasingly in the labor arbitration field. The Court has established a sweeping, preemptive rule, founded on the Federal Arbitration Act (FAA),[5] that otherwise valid agreements to arbitrate, including employment arbitration agreements, are enforceable as a matter of federal law.

Barring the unlikely intervention of Congress, *Circuit City*, in conjunction with the accelerating de facto merger of the law of commercial and labor arbitration, portends a dynamic many times more significant than that foretold by *Gilmer* in 1991.[6] It premonishes that the legal paradigm for both labor arbitration and employment arbitration in the 21st century will reside in the very fluid intersection among the section 301 Labor-Management Relations Act[7] (LMRA)-based federal common law of labor arbitration, the FAA, and state law adaptations of the RUAA.

The imperative that gave rise to the great fiction on which the *Steelworkers Trilogy*[8] was founded—the need to escape the federal courts' traditional hostility toward commercial arbitration—has evaporated over the past two decades. Even a cursory review of the case law reveals that the federal courts are less and less inclined to treat labor arbitration as a distinct process that requires special legal treatment separate from other forms of arbitration.

The contemporary federal arbitration case law moves easily, and with little apparent notice, between commercial arbitration and labor arbitration precedent, effectively melding them into a single body of arbitration law. *Circuit City* directly interjects the entirety of the rapidly evolving, ever morphing collage of commercial arbitration law, including the RUAA, into the employment arbitration arena and will invariably lead to its increased intrusion into the once insular law of labor arbitration.

It is within this milieu that the relevance and significance of the RUAA must be evaluated and defined. None of us in the workplace dispute resolution business can afford to place our heads in the sand and be content with decrying *Circuit City* and the growing legalization of arbitration. We may recoil from this new reality, but

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[5]9 U.S.C. §§1–307.

[6]Hayford, *The Federal Arbitration Act: Key to Stabilizing the Law of Labor Arbitration*, 21 Berkeley J. Emp. & Lab L. 521 (2000); Hayford, *Unification of the Law of Labor and Commercial Arbitration: An Idea Whose Time Has Come*, 52 Baylor L. Rev. 781 (2000).

[7]29 U.S.C. §301.

[8]*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).

we have no viable alternative but to acknowledge and engage it in a proactive manner. As Machiavelli advised the prince, we must see the world as it is, not as we wish it were. This contention is the jumping off point for my substantive comments this afternoon.

The panel's specific charge is of several primary dimensions. First, I will acquaint you with the mindset and the methodology employed by the RUAA Drafting Committee, to which I was academic advisor. Second, I will give you a sense of the public policy thrust and the essential elements of each of the provisions of the RUAA most likely to affect the employment and labor arbitration processes.

I will stop at that point and leave to my three friends here on the platform the primary responsibility for discussing the likely impact the various state law adaptations of the RUAA will have on the practice of labor and employment arbitration. We will save at least 15 minutes at the close of our prepared comments for questions and answers.

Mindset, Methodology, and Field of Play of the RUAA Drafting Committee

The FAA is a sparse statute. Its operative provisions and the attendant case law focus almost entirely on the issues presented at the beginning of the arbitration proceeding (enforceability and substantive arbitrability) and after its conclusion (vacatur of challenged awards). The RUAA is the product of a 1995 determination by the National Conference of Commissioners on Uniform State Laws that the many voids in the FAA leave open to the states a very significant role in the regulation of modern-day arbitration.

Drafting Committee's Modus Operandi

From the beginning of its efforts in early 1996, there was a clear consensus among the members of the RUAA Drafting Committee that our consistent focus would be on strengthening and improving the arbitration process, listening to but not being driven by the entreaties of the various elements of the arbitration bar who represent particular interest groups. By identifying the efficacy and fairness of the process as the seminal goals of the drafting effort, we were able to minimize the type of intramural squabbling and turf battles that often debilitate this type of endeavor.

FAA Preemption

In the course of preparing to brief the drafting committee on the preemptive effect of the FAA on state efforts to regulate the arbitration process, I developed two analytical paradigms. These two frameworks were the baseline from which the committee ascertained precisely what issues were and were not subject to regulation by the states (see Figures 1 and 2).

The definitive FAA preemption case law establishes that state laws of any ilk mooting contractual agreements to arbitrate invariably must give way to the strong pro-arbitration public policy articulated in sections 2, 3, and 4 of the Act. This body of law also makes clear that determination of when an agreement to arbitrate has been made is a matter to be decided exclusively under state contract law principles. Thus, the two poles of a preemption continuum are defined.

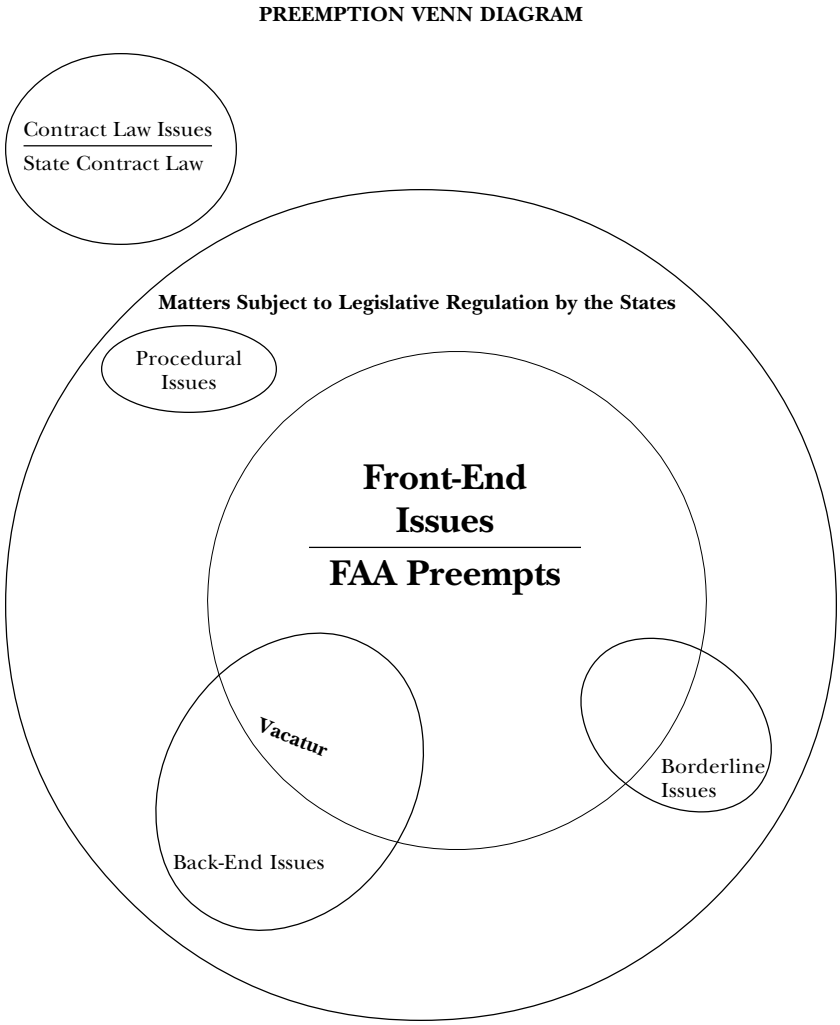
Front End and Contract Formation Issues. At the left-hand pole of the preemption continuum lie what can be described as the "front end" issues—those matters arising at the outset of the arbitration proceeding and typically concerned with enforcement of the

Figure 1. The Preemption Continuum.

THE PREEMPTION CONTINUUM

TOTAL PREEMPTION				**NO PREEMPTION**
"FRONT END" ISSUES	**"BACK END" ISSUES**	**"BORDERLINE" ISSUES**	**"PROCEDURAL" ISSUES**	**"CONTRACT FORMATION" ISSUES**
– enforceability – substantive & procedural arbitratibility	– vacatur – modification – correction – completion	– punitive damages – arbitrator disclosure – arbitrator immunity – atttorney's fees – provisional remedies – other remedies	– discovery – other pre hearing matters – arbitrator's subpoena authority – hearing conduct – summary disposition – functus officio fixes	– consent – unconscion-ability

Figure 2. The Preemption Venn Diagram.



agreement to arbitrate, determinations of substantive and procedural arbitrability, and any other questions raised when a party attempts to avoid its arbitration bargain. In this domain the FAA rules, and there is no role for state law that does not mirror the Act as interpreted by the federal courts. Figure 2 conceptualizes the

"zero degrees of freedom" available to the states with regard to the front end issues by placing them wholly within the center of the FAA preemption element of the larger sphere, which represents the matters subject to regulation via state arbitration acts.

Thus, section 6(a) of the RUAA is drawn almost verbatim from the language of section 2 of the FAA, which states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] Section 6(b) of the RUAA articulates the federal rule regarding substantive arbitrability determinations, that it is for the courts to decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."[10] Again codifying the federal law standard, section 6(c) of the RUAA establishes that procedural arbitrability claims are to be decided by the arbitrator.[11]

At the other extreme of the preemption continuum (see Figure 1) lie the issues pertaining to when an agreement to arbitrate has been made. The Supreme Court has made clear that these "contract formation issues" are matters to be decided solely under state contract law principles. There is no role for the FAA in determining the actual legal standards for enforceability. However, the FAA's pro-arbitration public policy will trump state law that singles out agreements to arbitrate for treatment different from that afforded other contracts.

The Supreme Court has set down a strict, unbending rule that any state law regulating the enforceability of arbitration agreements must place such agreements on an equal footing with all other contracts.[12] Special rules applicable only to arbitration agreements, and not to all other contracts, are voided by the command of section 2 of the FAA, which makes agreements to arbitrate enforceable.

In application, the equal footing rule will always vitiate state legislative efforts to level the playing field between the "big guys" and the "little guys" of the world of commerce by creating special rules of contract law applicable only to arbitration agreements. The equal footing rule prompted the RUAA Drafting Committee to conclude that it was proscribed from tinkering with the strong

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[9]RUAA §6(a).
[10]*Id.* §6(b).
[11]*Id.* §6(c).
[12]*See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

pro-arbitration policy of the FAA by limiting the enforceability of non-negotiated adhesion arbitration agreements between employers and individual employees, franchisors and franchisees, businesses and consumers, and the like.

Figure 2 conceptualizes the contract formation issues as a separate circle that is distant from the universe of topics that can be addressed by arbitration-focused state legislation. Thus, although these matters are appropriate for state regulation, that regulation can only take the form of general contract law rules that apply to all contracts.

It is significant that, in *Green Tree Financial Corp. v. Randolph*,[13] the Supreme Court found that an adhesion arbitration agreement between a financial institution and an unsophisticated consumer was enforceable, without devoting any comment to the non-negotiated, form contract nature of the agreement. Even Justice Ginsburg's dissent paid no heed to the take-it-or-leave basis on which the arbitration agreement was offered to the consumer. Instead, the dissent focused on the fairness of a term in the agreement that failed to specify which party was to bear the costs of arbitration.[14] In a similar manner, neither the majority opinion nor the strongly worded dissents by Justices Stevens and Justice Souter in *Circuit City* make any mention of the adhesion nature of the employment arbitration agreement at issue there.[15]

We must come to understand that the adhesion contract concerns that have for so long anguished us simply are not on the Supreme Court's radar screen. Given the Court's perspective, and in light of its repeated invocation of the equal footing doctrine, in the post-*Circuit City* era nothing short of a statutory exemption of employment arbitration agreements from the FAA will change the status quo that so disquiets us. Until Congress acts, valid adhesion arbitration agreements whose terms are not unconscionable will be enforceable as a matter of preemptive federal law.

Back End Issues. Situated to the right of the front end issues are the "back end" issues that arise at the conclusion of the arbitration proceeding (see Figure 1). Vacatur is the primary back

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[13]121 S.Ct. 513, 84 FEP Cases 769 (2000).

[14]*Id.* at 524. The concern here was whether this omission from the arbitration agreement exposed the consumer claimant to expenses so potentially onerous as to perhaps prevent her from seeking redress for the violation of her statutory rights in the arbitral forum.

[15]*Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1314–22, 85 FEP Cases 266 (2001).

end issue.[16] It presented the drafting committee with a bit of a conundrum. The statutory grounds for vacatur set out in section 10(a) of the FAA are straightforward, centering on party and arbitrator misconduct and acts by the arbitrator in excess of the contractually defined authority of the arbitral office. However, the myriad nonstatutory grounds for vacatur that have emerged in recent years greatly complicated the committee's efforts to coherently delineate the range of legislative discretion remaining to the states.

In the end, the committee resisted the very strong temptation to sharpen and refine the jumbled law of vacatur. It decided that the current disarray in this body of law, coupled with the certainty of preemption if the federal law of vacatur were to eventually stabilize in a configuration different from that set forth in the RUAA, dictated that the Act not depart in any substantial way from section 10(a) of the FAA.

Figure 2 illustrates this assessment by showing less than half of the back end issues oval overlapping into the state regulation realm. That small area of overlap indicates the very narrow latitude accruing to the states. It is clear that the real action in vacatur law will continue to be in the federal arena.

Core RUAA Topics. We are now ready to move beyond the veil of strict FAA preemption and into the two issues categories that lie at the heart of the RUAA. It is important to emphasize that the state law rules proposed in the RUAA are meant to be default standards that will apply in the absence of ascertainable federal law or an express contractual agreement by the parties to govern their arbitration proceedings by different tenets.

Borderline issues. The first category—"borderline issues"—is situated at the midpoint of the preemption continuum (see Figure 1). Here we are concerned with matters like the authority of arbitrators to order the payment of punitive damages or attorneys' fees, standards for arbitrator disclosure, arbitrator immunity from process and civil liability, and the right to be represented by an attorney.

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[16]There are two other back end issues addressed in the RUAA. Section 22 speaks to confirmation of awards by a court on motion of a party. RUAA §22. Section 24 sanctions judicial modification or correction of awards upon motion of a party in a narrow range of circumstances, none of which goes to the merits of the award. *Id.* §24.

Although these borderline issues concern significant dimensions of the arbitration process, none of them is expressly addressed in the FAA, and only a few are the subject of definitive federal case law. In further contrast to the front end and back end issues, the borderline issues do not go to the essence of the agreement to arbitrate or to effecting process results.

These two characteristics prompted the drafting committee to conclude that there is a very substantial role for the states in refining and fleshing out these elements of modern arbitration law. In Figure 2, that conclusion is reflected in an area of intersection between the oval depicting the borderline issues and the state regulation sphere that is larger than for the back end issues.

Procedural issues. The final point on the preemption continuum (see Figure 1) falls close to the right-hand pole. It concerns what can generally be termed "procedural issues," such as prehearing procedure, discovery, consolidation of parallel claims, judicial enforcement of pre-award arbitral orders, as well as the numerous questions as to the nature and scope of the arbitrator's authority at the prehearing, hearing, and post-hearing stages.

The FAA is effectively silent on these procedural issues, and they are of less importance to the viability and integrity of the arbitration process than are the borderline issues positioned at the center of the preemption continuum. Consequently, it is very likely that the Supreme Court would be willing to defer to rules of procedure of this nature set forth in a state arbitration act, provided those rules are intended to further the arbitration process and do not conflict with the prime directive of the FAA, that otherwise valid contractual agreements to arbitrate are enforceable. Figure 2 depicts this state of affairs by its placement of the procedural issues oval completely apart from the FAA preemption sphere.

Major Substantive RUAA Provisions That Affect Employment and Labor Arbitration

In framing the provisions of the RUAA pertaining to borderline and procedural issues, the drafting committee focused its attention on legislative devices meant to ensure that arbitration is a truly adequate surrogate for traditional litigation as a means for vindicating the contractual and statutory rights of those who agree to arbitrate. We sought to strike an appropriate balance that would achieve this goal without transmuting arbitration into a sort of "litigation lite."

I ask that you resist the temptation to quickly conclude that the matters I am about to discuss will never intrude into our comfortable world as labor arbitrators. Granted, *Lincoln Mills*[17] establishes that the substantive law to be applied in suits arising under section 301 of the LMRA is federal law fashioned from the policy of our national labor laws. At the same time, however, in *Lincoln Mills* the Supreme Court made clear that state law consistent with the pro-arbitration public policy it divined in LMRA section 301 "may be resorted to in order to find the rule that will best effectuate the federal policy."[18]

I predict that over time many of the provisions of state arbitration acts modeled on the RUAA will be "absorbed" into the federal common law of labor arbitration in an exercise of the "judicial inventiveness" envisioned by the *Lincoln Mills* Court.[19] Listen carefully as I identify the primary areas where that phenomenon is likely to occur.

Borderline Issues

Of the borderline issues, only arbitral awards of punitive damages, arbitrator immunity, and arbitrator disclosure are the subject of ascertainable federal law. That law is far from complete or systematic.

Punitive Damages. The Supreme Court's 1995 opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[20] makes clear that a state arbitration act or common law rule limiting the authority of arbitrators to award punitive damages is subject to federal preemption if the limitation renders arbitration an inadequate substitute for litigation in a court of law. For this reason, and in order to buttress the remedial authority of arbitrators, section 21(a) of the RUAA provides that "[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under legal standards otherwise applicable to the claim."[21]

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[17] *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 40 LRRM 2120 (1957).
[18] *Id.* at 456–57.
[19] *Id.* at 457.
[20] 514 U.S. 52 (1995).
[21] RUAA §21(a). Section 21(e) provides that if an arbitrator awards relief in excess of punitive damages or other exemplary relief, "the arbitrator shall specify in the award the basis in fact for justifying and the basis in law authorizing the award and state separately the amount of punitive damages or other exemplary relief." *Id.* §21(e).

Arbitrator Immunity. The federal rule regarding arbitrator immunity is clear. Because of the functional comparability of the roles of arbitrators and judges, it has long been held that arbitrators are generally immune both from civil actions arising out of the arbitral office[22] and from process when subpoenaed or otherwise summoned to testify with regard to their neutral role.[23] Section 14(a) of the RUAA codifies the federal common law rule of arbitral immunity from civil liability and extends the same immunity to "arbitration organization[s]" (e.g., JAMS, American Arbitration Association), whereas section 14(b) confirms that the statutory grant of immunity is intended to supplement any immunity afforded arbitrators by any other law.[24] Subject to certain exceptions, section 14(d) renders arbitrators not competent to testify in any judicial or administrative proceeding and shields them from being compelled to produce records pertaining to the arbitration proceeding, to the same extent as a judge of a court of the state.[25]

Arbitrator Disclosure. Although the FAA does not speak explicitly to arbitrator disclosure, the case law pertaining to section 10(a)(2) of the FAA establishes that omission by a person holding himself or herself out as a neutral arbitrator to disclose certain dealings or relationships that cast doubt on the arbitrator's impartiality can warrant vacatur of the award.[26] There is substantial uncertainty caused by the varying standards applied under federal law to ascertain when an arbitrator's failure to disclose warrants vacatur of an award for arbitrator partiality.[27] This diversity of views pre-

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[22]*See Butz v. Economou*, 438 U.S. 478, 511–12 (1978) (establishing that extension of judicial-like immunity to nonjudicial officials is appropriate if there is a "functional comparability" between that official's acts and judgments and the acts and judgments of judges); *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1209 (6th Cir. 1982) (applying the "functional comparability" standard).

[23]*Andros CoCompania Maritima v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978).

[24]RUAA §§14(a) and (b).

[25]*Id.* §14(d). Those exceptions arise when an arbitrator or arbitration organization asserts a claim against a party to the arbitration or when there is prima facie evidence to support a motion to vacate an award brought on the grounds of corruption, fraud, or other undue means; or a claim that there was evident partiality by a neutral arbitrator or corruption or misconduct by an arbitrator. Section 14(e) provides that a person who commences an unsuccessful civil action against an arbitrator or arbitration organization or attempts and fails to compel an arbitrator or representative of an arbitration organization to testify or produce records in violation of §14(d) is subject to a court order to pay reasonable attorneys' fees and expenses of litigation to the arbitrator or arbitration organization. *Id.* §14(e).

[26]*Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145, 149–50 (1968).

[27]This split of opinion under federal law is founded on the diverse standards relied on in Justice Black's four-justice plurality opinion and Justice White's two-justice concurring opinion in *Commonwealth Coatings*. Justice Black opined that "any dealings that might create an impression of possible bias" or create "even an appearance of bias" by a neutral

sented the drafting committee with an important opportunity to channel and sharpen the existing law. Seizing on that opportunity, we took several steps.

First, we included in section 12(a) of the RUAA a statutory standard for arbitrator disclosure that places an affirmative, continuing duty on arbitrators to make a reasonable inquiry and to disclose to the parties "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding."[28] The arbitrator's disclosure obligation is tied to an objective, contextual standard—the subjective views of the arbitrator as to the significance of a relationship or financial interest are not controlling.

Sections 12(c) and (d) of the RUAA also make clear that arbitral failure to disclose in accordance with the section 12(a) standard, or a party's timely objection to continued service by the arbitrator following such a disclosure, may trigger vacatur.[29] Finally, section 12(e) establishes a presumption of evident partiality for purposes of vacatur pursuant to section 23(a)(2) when a neutral arbitrator fails to disclose "a known direct, and substantial relationship with a party."[30]

The disclosure paradigm I just described should cause labor arbitrators to squirm a little. We are not accustomed to making these types of disclosures, and the thought of having an otherwise cogent, properly framed award vacated because the arbitrator failed to reveal that he or she had previously arbitrated several cases with one of the advocates is very alarming to us. The drafting committee decided against an explicit statutory caveat for labor arbitration. Instead, comment 3 to section 12 of the RUAA clarifies that, pursuant to the Act's section 4(a) general waiver provisions, the parties to a labor arbitration agreement may agree to a less demanding standard for disclosure by neutral arbitrators.

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arbitrator constituted evident partiality justifying vacatur. *Id.* at 149. Justice White advocated a narrower standard requiring disclosure of "a substantial interest in a firm that has done more than trivial business with a party." *Id.* at 150.

[28]RUAA §§12(a) and (b). Sections 12(a)(1) and (2) establish that among the facts subject to the inquiry and disclosure requirement are financial or personal interests in the outcome of the arbitration proceeding and an existing or past relationship with any of the parties, their counsel or representatives, a witness, or another arbitrator involved in the proceeding.

[29]*Id.* §§12(c) and (d).

[30]*Id.* §12(e). This presumption is consistent with and builds on §11(b) of the RUAA, which bars an individual with "a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party from serving as a neutral arbitrator." *Id.* § 11(b).

One upside here: the disclosure obligations in section 12 of the RUAA will "smoke out" almost all advocates currently masquerading as neutrals under cover of the dubious qualification standards established by various arbitration organizations for their employment arbitration panels. I am convinced that those rather transparent efforts at client development among employers and the management bar by various arbitration organizations will come to a halt in the face of state adaptations of the rigorous disclosure requirements of RUAA section 12.

Remaining Borderline Issues. The RUAA Drafting Committee identified three other borderline issues not addressed in the FAA that it believed merited statutory treatment by the states. First, section 16 of the RUAA states that any party to an arbitration proceeding that wishes to be represented by a lawyer is entitled to such representation.[31] Before you all come across the table, let me point out that section 4(b)(4) of the RUAA expressly provides that an employer, labor organization, or party to a labor arbitration proceeding may waive the section 16 right to representation by a lawyer.[32]

Next, with regard to remedies beyond punitive damages, section 21(b) of the RUAA sanctions arbitral awards of reasonable attorneys' fees and other reasonable costs of arbitration if pertinent law authorizes them.[33] This provision creates statutory cover for arbitrators who find such orders appropriate in cases where the arbitration agreement is silent.

Section 21(c) is the catchall remedies provision of the RUAA. It confirms the discretion of arbitrators to "award such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding" and specifies that a court may not vacate or refuse to confirm an award because a remedy granted by an arbitrator could not or would not be granted by the court in a civil action.[34]

The final borderline issue addressed in the RUAA is provisional remedies—both judicial and arbitral. This is not a primary area of concern for us, even in the employment arbitration arena. Outside the realm of extraordinary subcontracting or plant closure dis-

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[31] *Id.* §16.
[32] *Id.* §4(b)(4).
[33] *Id.* §21(b).
[34] *Id.* §21(c).

putes, we seldom encounter requests for this type of interim relief.

Procedural Issues

Procedural issues can be divided into two categories: those that concern the conduct of the arbitration proceeding itself, and those that pertain to the role of the courts in making the process work effectively and efficiently. The subject matter addressed in these provisions goes to procedural questions that are not definitively and consistently answered by existing federal or state law. In the course of fashioning this language, the drafting committee was guided by three essential goals. We sought to create a procedural framework that would (1) make arbitration an efficient and fundamentally fair process, (2) secure a broad base of authority and discretion for the arbitrator, and (3) provide for judicial intervention when necessary to back up the arbitrator's authority and to guarantee the righteousness of the process.

Regulation of the Arbitration Proceeding. In the increasingly complex contemporary practice of arbitration, questions often arise as to the scope and depth of the arbitrator's authority and duties—at the prehearing stage, with regard to conduct of the hearing, in deciding the controversy, in framing and issuing the award, and thereafter. Parties seldom address these matters in the arbitration agreement in a systematic fashion. Consequently, default statutory standards like those set out in the RUAA can play an important role in stabilizing and expediting the arbitration proceeding.

Section 15(a) of the RUAA speaks in broad terms of the arbitrator's authority to manage the arbitration process, both before and during the hearing. It asserts that an "arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding," including the authority to hold prehearing conferences with the parties, and "among other matters" at the hearing to "determine the admissibility, relevance, materiality and weight of any evidence."[35]

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[35] *Id.* §15(a). Comment 1 to §15 confirms that subsection (a) is intended to grant arbitrators wide latitude, inter alia, in determining what evidence should be considered, observing that the rules of evidence do not apply in arbitration. The comment notes further that §23(a)(3) of the Act permits vacatur if an arbitrator refuses to consider material evidence in a manner that substantially prejudices the rights of a party.

Among the specific grants of authority to and duties imposed on the arbitrator by the RUAA are the following:

1. Section 15(c) of the Act requires the arbitrator to give not less than 5 days' notice of the time and place of the arbitration hearing, permits the arbitrator to adjourn the hearing from time to time, and further permits the arbitrator to hear and decide the controversy even if a party duly notified of the proceeding does not appear.[36]
2. Section 17(a) tracks section 7 of the FAA by providing that arbitrators may issue a subpoena for the attendance of a witness and for production of documents at the hearing.[37] Section 17(b) goes on to authorize arbitrators, at the request of a party or a witness, to order deposition of witnesses "[i]n order to make the proceedings fair, expeditious, and cost-effective."[38] Sections 17(c) and (d) empower arbitrators to permit such discovery as they decide is appropriate in the circumstances and authorize arbitrators to order a party to comply with arbitral discovery-related orders and to take action against a noncomplying party in the same manner as a court in a civil action.[39] Completing the menu of possible prehearing discovery-related matters, section 17(e) sanctions arbitral issue of protective orders to prevent the disclosure of privileged or confidential information, trade secrets, and other information subject to protection by a court in a civil action.[40]

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[36]*Id.* §15(c).
[37]*Id.* §17(a).
[38]*Id.* §17(b).
[39]*Id.* §§17(c) and (d). The relevant federal court case law pertaining to the question of whether §7 of the FAA empowers arbitrators to issue subpoenas ordering a nonparty to produce documents at the prehearing stage or to appear at a prehearing deposition is uncertain. *See COMSAT Corp. v. National Science Found.*, 190 F.3d 269, 278 (4th Cir. 1999) (holding that FAA §7 does not grant arbitrators the authority to subpoena nonparties to produce documents prior to the arbitration hearing). *Contra Amgen, Inc. v. Kidney Center of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242–43 (S.D. Fla. 1988) (enforcing arbitral subpoenas for prehearing discovery). *Cf. Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 72–73 (S.D.N.Y. 1995) (enforcing an arbitral subpoena to a nonparty for documents and declining to enforce an arbitral subpoena to a nonparty to appear at a prehearing deposition). This uncertainty pertaining to §7 of the FAA propelled the RUAA Drafting Committee in §17(d) to expressly authorize arbitrators to issue discovery-related (prehearing) subpoenas.
[40]RUAA §17(e).

3. Section 15(b) permits arbitrators to decide requests for summary disposition of a claim or a particular issue.[41]
4. Sections 19 and 20 pertain to the arbitrator's fashioning and issuance of the award. Most relevant to our practices, section 19(b) requires that the award be made within the time specified by the arbitration agreement, or if the agreement does not specify a time, within the time ordered by the court.[42]
5. Section 20 establishes a means through which the parties may apply directly to the arbitrator to modify or correct the award. It provides a statutory solution to the dilemma created by the common law doctrine of functus officio. Section 20(a) sets out three circumstances under which postaward arbitral modification or correction of an award is permitted, following the motion of a party:
   a. upon a ground stated in section 24(a)(1) or (3) of the Act, i.e., where there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award, or where the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted;
   b. where the award does not finally and definitely resolve a claim submitted to arbitration by the parties; and
   c. in order to clarify the award.[43]

Role of the Courts in Regulating the Arbitration Procedure. The second category of procedural issues, the ones involving the role of the courts in making the arbitration process work, offer the states less room to maneuver than those dealing with the arbitration proceeding itself. The actions of the courts in this regard are largely mechanical. That fact and the presence of express FAA provisions addressing many of these matters prompted the RUAA Drafting Committee to limit the bulk of its efforts in this area to replicating and sharpening the parallel provisions of the FAA.

It is important to have a basic grasp of the role contemplated for the courts in overseeing the arbitration process and providing a backstop for arbitrators in the exercise of their contractual and statutory authority. However, in the interest of brevity, I will not address these matters here.

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[41] *Id.* §15(b).
[42] *Id.* §19(b).
[43] *Id.* §20(a).

Our brief tour of the most important dimensions of the RUAA is complete. I am convinced that codification of its provisions by the states will accelerate the process of making employment arbitration a fairer and more balanced vehicle for adjudicating workplace disputes. I am also certain that, in the future, competent practice in both the labor arbitration and employment arbitration venues will demand a mastery of these matters.

Conclusion

None of us can afford to ignore the change signaled by the interface of the RUAA, the FAA, the federal common law of labor arbitration, and the Supreme Court's opinion in *Circuit City*. Employment arbitration is here to stay—we cannot wish it away. There simply is no doubt that the law and practice methodologies pertinent to employment arbitration and the remainder of commercial arbitration will continue to intrude on our once cloistered guild. This stark reality presents all of us with a challenge that commands a thoughtful response.

Employees who find themselves obliged to submit their employment-related disputes to arbitration deserve competent, objective, and truly neutral adjudication of those claims. That will transpire only if the process is entrusted to competent, right-headed, true neutrals, and we are those neutrals. If we hesitate at this moment of truth because of our well-placed loyalties and our fear of the unknown, we will fail to fulfill what I believe is our duty to the employees and employers we serve to guide development of the employment arbitration process in a direction that will ensure the due process and substantive rights of the parties.

Even if the Academy chooses to remain passive, the forward looking among us must assume leadership roles in ensuring that, as these employment arbitration mechanisms proliferate, they take on a character of obvious fairness, unquestioned neutrality, and decisional and procedural rigor that will make them truly adequate surrogates for litigation in a court of law. If we do not pick up that mantle, it will be assumed by the many eager "wannabes" and imposters who aspire to this work but do not adhere to the same high standards we in the Academy are pledged to honor.

My point is this, and I want to make it emphatically: If in the coming years we mainline labor arbitrators and the Academy remain on the employment arbitration sidelines, the employees whose interests have to date propelled us to demur will not benefit

from our well-intentioned boycott of the process. To the contrary, I am convinced that passivity on our part will leave those employees much worse off because, having been legally "dragooned" into arbitrating their employment claims, they will often be left without assurance that those cases will be heard and decided by competent, truly neutral arbitrators.

In *The Art of War*,[44] Sun Tzu teaches that when confronted with a conflict—like the one we now face as to the future direction of our profession—wise, effective leaders do not resist the tide of natural events, especially when that force is relentless and unavoidable. Instead, they identify the nature and extent of the phenomenon overtaking them and attempt to use its momentum to their advantage, ever alert to opportunities for gain, progress, and victory, all the time conserving their energy for important matters by not fighting hopeless, futile battles.

If, as the *National Law Journal* recently predicted, *Circuit City* actually creates an "arbitration heaven" in the employment field,[45] it seems certain that the Academy will be obliged to once again revisit its position on employment arbitration. I love this Academy, and I revel in being a part of the proud tradition of labor arbitration in North America, but "the times they are a changing," and changing at a drastically accelerating pace. We cannot stand still when our world is in such incredible flux.

In the not too distant future we must find a way, individually and organizationally, to reconcile our longstanding fidelity to collective bargaining and the parties to that process with the new arbitration reality created by *Gilmer* and *Circuit City*. If we fail to effect this necessary paradigm shift and do not find a way to become a force in this rapidly evolving dimension of the employment dispute resolution sphere, I fear we will be left behind.

Should we choose to lead this change process, I believe the opportunity exists, through a combination of traditional labor arbitration among unionized employees and righteous employment arbitration systems elsewhere, to create an arbitration environment that provides more workers with more access to workplace justice than exists today. We are the leaders of the arbitration profession and, despite the uncertainty and the complexities so

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[44]*See* Sun Tzu, *The Art of War*, Griffith trans. (Oxford Univ. Press 1963).

[45]Coyle, *Arbitration Heaven Ahead: Three High Court Rulings Give Business Upper Hand in ADR*, Nat'l L.J., Apr. 2, 2001, at B1.

ubiquitous in this new environment, we have no real choice but to lead. I urge you all to be brave, to be hopeful. Let's watch each other's backs and move forward.

However, before we can devise a strategy for effectively coping with change, we must first understand it. I hope I have provided you with some insight as to what that will entail.

II. EMPLOYEE PERSPECTIVE

JANET HILL*

On behalf of the National Employment Lawyers Association, I would like to congratulate the Academy for its courageous and ethical amicus support of employee rights in the *Circuit City*[1] case. As an employee advocate I would like to say that the Academy's stance has enhanced its standing in our community, and we thank you for it. I would also like to congratulate President Kagel for his remarks that arbitration should be voluntary, should be a fair process, and should be entered into between parties of equal footing. That doesn't seem to be the law of the land right now, but I disagree that the battle is over. I think there are still some battles to be fought.

We have lost so far. I do think that, as arbitrators who are coming mainly from a labor perspective, you should be aware of the distrust that employees and their advocates have of mandatory arbitration outside of the union setting, where it is not a negotiated term with real standards. I would also like to reiterate that, if the employees do not feel that they have a fair system for the hearing of their grievances, then the system is going to break down.

I think the Revised Uniform Arbitration Act (RUAA) goes a long way toward making the system more fair for employees in a setting without the negotiated agreements that one has in the labor setting. I do not know how the RUAA is going to affect Georgia law, because Georgia has not adopted the Uniform Arbitration Act.

The other issue is that Georgia is an employment-at-will state—we have no state law remedies to speak of. So far, employers have

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[1] *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 85 FEP Cases 266 (2001).

not been including mandatory arbitration agreements as a routine matter. That is increasing, and certainly national corporations who have those agreements in other states are including those agreements.

Turning to the RUAA, I know some of you will disagree with this, but I do believe that the availability of discovery, even if it is limited in scope, is essential in employment arbitrations. Typically, employees and their advocates cannot speak directly with witnesses who are employees of the company. The documentation to prove the claim is usually going to be in the possession of the employer. In a union setting there is a grievance process where certain disclosures are made. Discovery is perhaps not needed there.

For example, this morning I was trying to settle a case in which our client says she was terminated because of her race. The employer says she was terminated as a result of a downsizing. Our client says she was replaced by another employee. They say she wasn't. The only mechanism we have to get that information is to be able to obtain records and information from the employer

The RUAA does provide for depositions. I don't want to see an era where there are all-day depositions in employment arbitration. However, I think that having the ability to take depositions, to find out who the witnesses are, to find out the reasons for the employer's adverse action, is essential to guaranteeing that there is a fair hearing.

The RUAA also allows the arbitrator discretion as to the extent of the discovery allowed. It is my hope that arbitrators will recognize the value of prehearing discovery and allow sufficient discovery for there to be a fair hearing, but without the undue arguments and disputes that seem to be inherent in the discovery process in a judicial setting. I would note that the RUAA does allow the arbitrator to, in effect, compel production of documents, and sanction parties for not complying with discovery. It remains to be seen how arbitrators, if these provisions are adopted, will handle these disputes. I urge you to keep in mind the need to balance the need for discovery for a fair hearing against the expeditious disposition of a proceeding. If arbitrations are not going to be efficient and speedy, then the primary reason to have arbitrations over judicial intervention has been lost.

It is also essential to employee advocates that a party can receive punitive damages and attorneys' fees if the statutory claims provide for this. I know that allowing attorneys' fees is perhaps a foreign concept to people in the labor arbitration arena, but the fact is that,

under discrimination statutes, the federal statutes, and most state statutes, attorneys' fees and expenses are an item of damages if the employee prevails.

Without those provisions for attorneys' fees, employees could not have representation; they could not have advocates who could protect their interests. In addition, I doubt that the average arbitrator is going to award punitive damages. But again, it is essential that, if there is a factual and legal basis for punitive damages, an employee forced against his or her will into arbitration will be allowed to recover the same damages they could have recovered had they gone to court.

The part of the RUAA that I do not agree with is the allowance for summary disposition of arbitration disputes. Perhaps there may be some statute of limitations issues that would be appropriate for summary disposition of claims. But if employees are not going to be allowed to have their full legal remedies, they should at least have a hearing in which they can be heard, can call their witnesses, and that they go away from feeling—even if they lose—that they've had their day in court. Summary disposition deprives employees of this.

Another reason why I feel that summary disposition is not appropriate in the arbitration setting is that discovery is limited. All of the documentation that would be necessary to defeat a summary judgment motion cannot be obtained before the hearing. I cannot go out and talk with the employees of the company, I cannot take statements from them in most jurisdictions, and so there is no way that I can present my case on a summary disposition posture, because I do not have the ability to compel those witnesses to give me a statement. The employer has more control over getting statements and obtaining witnesses in that manner.

A final reason why I am strongly opposed to summary disposition is that it only adds cost and time to what is supposed to be a beneficial and fast process. I think it causes more work for everybody, and I think it will result in more work for arbitrators. I just don't see that there is any benefit to it. In addition, arbitrators can make their decisions based on many factors. The law is one of the factors, but there are areas where they can deviate from what a judge might be able to do. The concept of summary disposition implies that an arbitrator would no longer have that ability.

The RUAA also calls for more disclosure proceedings than perhaps arbitrators are used to. That employees have a deep distrust of this entire process should be kept in mind—if they feel

like they can't find out whether a person is truly a neutral, then they are not going to feel like they had a fair hearing.

I think most arbitrators are neutral, and most arbitrators are fair. But the disclosure requirements allow a checking up—they allow the employee to be assured that the person who is hearing the claim is going to be impartial and fair.

The other issue that arises with employee distrust is that many plans have the American Arbitration Association (AAA) as the sole provider. Employees rightfully feel that the AAA wants the business, the AAA makes money off of this process, and, in their minds, therefore, it must mean that the AAA is going to side with the employer more than the employee. That may be true; that may not be true. But if there is the perception that it is not a fair process, employees are not going to be satisfied with the awards that come out of that process. So, I would agree with the enhanced disclosure requirements, and indeed perhaps I could advocate for more disclosures than the RUAA actually provides.

There are still many issues in the mandatory arbitration arena. There is legislation being proposed at both the state and federal levels. I think this is a battle that is going to continue. I agree with other speakers today that it is a battle that arbitrators will have to be involved in. I think that arbitrators have a collective experience and knowledge superior probably to any other group in the country, and that they cannot sit idly by and just let the process go on.

An interesting phenomenon that several of my colleagues have noted in states where mandatory arbitration provisions have become more common is that when they represent line employees in a nonunionized setting, the companies are all too willing to have a mandatory arbitration provision as part of the many documents that employees enter into when they come to work with the company. But when these colleagues represent upper-level executives—people who are truly negotiating their contract and are actually in a give-and-take setting—increasingly companies are saying, "Oh no, we do not want arbitration. We do not want mandatory arbitration. We want to have our right to go to the court system."

Perhaps I am cynical, but that leads me to believe that employers are not interested in arbitration as a fast and expedient way to resolve disputes—they only are interested in it when they feel they have the upper hand in mandating the process that will take place.

I applaud your hard work—I do not think I could be an arbitrator. I think that on a full-time basis I could not serve as an arbitrator—it is tough. I appreciate all of the hard work and effort that has gone into the RUAA to make it better. I am sure that, as the process continues, there will be refinements, there will be changes, and there probably will be problems that crop up that nobody ever thought about when they were putting it into effect. But that is why there are smart people who can sit down and try to figure it out. I thank you for your time.

III. EMPLOYER PERSPECTIVE

WEYMAN JOHNSON*

I've been a big fan of *Gilmer*[1] ever since I read the decision. I am sure there are a lot of people saying, "Well, of course a management lawyer will love it." But clearly there are a lot of management lawyers who think the *Gilmer* and *Circuit City*[2] line of reasoning is pretty much a dumb idea. That is because of something that Janet Hill mentioned: Management lawyers in some parts of the country have at times had a great deal of success getting summary judgment in the courts, and they are fearful that if they go before arbitrators, it is going to be a more costly process.

Frankly, while I am in the pro-*Gilmer* camp, we do not have enough experience yet throughout the country with "Gilmerized" arbitration for the management bar to reach a consensus about whether this is a good idea. I suspect that over the next 5 and certainly 10 years we will start to get that kind of experience. But that will hinge on a couple of things: the initiative of organizations like the Academy and on state legislation.

I am fortunate to have a colleague who is a member of the Georgia General Assembly, and that has caused me to stop telling jokes about the Georgia General Assembly. But he is also a member of the judiciary committee. Because of my interest in *Gilmer*-related issues, I try to stay up to date on whether anything is coming on the

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[1] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[2] *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 85 FEP Cases 266 (2001).

radar screen at the Georgia General Assembly and the judiciary committee regarding arbitration.

I checked with him again earlier this week because I knew I would be here to meet with the Academy, and he said, "No, there's still not anything that is raised, but please talk to me after the Academy meeting, because we may be more interested than people think."

The Georgia General Assembly might change if you read the stories about the changes in the census, especially those affecting "sunbelt states" like Georgia. Perhaps things will change for our grandchildren at least, and we may see some activity out of the Georgia General Assembly and other sunbelt state general assemblies in the wake of *Circuit City*.

How do I as a management employment and labor lawyer think about the Revised Uniform Arbitration Act (RUAA)? I hope it has next to little effect on labor arbitration, because it seems to me that it does not need to be tinkered with very much. When labor arbitration works, and it often does, it works because employees feel that their rights are being attended to and that the common law of the shop is being effectuated. It works for both sides, and I am an employer advocate. Clearly it works for the employer, and it works for the union and for the employees in large part because it results in manageable costs.

That speaks to the other side of the equation, the employment law side, because the RUAA is going to be a success. There will be more *Gilmer* and *Circuit City* arbitration if it starts to appear to be cost effective for both sides, if it discharges the rights of employees, and if employees feel that they're being heard by fair people who are true neutrals. I have heard a lot of comment about how some people who parade as neutrals really are not, but if people like Academy members take part, we will see a lot more trust in this.

It may be that this creates more rights for employees, and, although I will not theorize too much on this, that it creates the kinds of rights that seem to be absent in states like Georgia, which are strongly employment-at-will. But, as a management advocate, for some time I have been advocating adoption of the types of due process that we see in the RUAA.

Partners in my firm who are on the pro-*Gilmer* side have been saying that you get better decisionmakers than you get in front of a jury if you have a good arbitrator. You are less vulnerable to absurd verdicts that do not vindicate anybody's rights and just cause costs to go up, and you get much faster results.

It is important to make sure that some kind of discovery is ensured. We have been urging that for a long time, to not yield to the temptation to set aside and not have an arbitrator hear punitive damages. I think the RUAA is right on that point.

The RUAA encourages lawyer representatives. And I like the footnote observing that, in labor arbitration, that might not be something that is absolutely required.[3] But what we are trying to accomplish if *Gilmer* and *Circuit City* are going to work is that somehow it replicates what it could take the place of. Clearly, the encouragement of lawyer representatives is important.

We have always advised our clients to try to put in their arbitration processes certain procedural niceties. That includes the possibility that the arbitrator could issue something that might at least smell like summary judgment.

If there is arbitration with a competent, strong arbitrator in charge of the proceeding, the employee and the employee's advocate are going to get their hearing, which they often do not get in federal court. But that should not preclude the arbitrator, where there is insufficient evidence once the employee has put on his or her case, from saying, "Well, I am authorized to say just as if I were a judge or magistrate under the Federal Rules of Civil Procedure that I am authorized here to give a judgment as a matter of law." I know the management bar will find it absolutely necessary to have the kinds of procedural niceties that the RUAA has that would call for things like summary judgment. Those are the kinds of things we have been advising for some time.

Another important thing that we have been advising for some time is, if you are trying to argue that the matter should be arbitrated, to plead both the FAA and the applicable state statute. There was a decision very recently from the Ninth Circuit, *Harden v. Roadway Package System, Inc.*,[4] that does encourage this. In places like California it becomes more and more important to plead under both theories.

Finally, in terms of whether an agreement could be unconscionable, I think you will probably find that most large employer *Gilmer* arrangements are working because they do ask for neutral arbitrators, for a mutual promise to arbitrate, and for full remedies; they do provide for full remedies, for discovery, and for a

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[3]Rev. Unif. Arb. Act §4(b)(4), cmt. c.
[4]249 F.3d 1137, 85 FEP Cases 1604 (9th Cir. 2001).

written decision; and, as the law in California would require, they provide that there be no burdensome costs imposed on the employee. I think we will continue to see more and more large employers moving toward *Gilmer* and *Circuit City* and setting up these systems.

One obstacle that might stand in the way are some employment liability insurance plans that, for reasons I still cannot understand, do not cover arbitration, even though they would pay the hideous cost of taking a matter all the way through federal court. But for employers who are EPLI users, they can negotiate an agreement with their insurance carrier that will cover arbitration.

I think we will see more large employers looking in that direction. Again, the Academy is going to have to take some action, and both the Academy and the Georgia legislature will have to get off the sidelines. Thank you.

IV. UNION PERSPECTIVE

MAX ZIMNY*

The Revised Uniform Arbitration Act's (RUAA) primary thrust fits commercial, employment, and statutory arbitration much better than it fits labor arbitration. There are many essential differences between both systems. To deal with the elementary, in labor, as we know, arbitration is a substitute for industrial strife—it is not simply another forum that substitutes for court litigation, which is true of both commercial arbitration and employment arbitration.

The common law of labor arbitration is the law of the shop. There is no common law of commercial or employment arbitration, except, I suppose, in a particular situation if you are dealing with a commercial-type dispute and with an industry that has its own type of usage, but that is hardly the same as the law of the shop as that term has evolved over the years, both before and after the *Steelworkers Trilogy*.[1]

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[1]*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).

Labor arbitration is pervasive—it exists in about 97 percent of collective bargaining agreements. It deals not only with a particular dispute or class of disputes, but essentially with all disputes arising during the life of the contract. It also exists for the entire life of a collective bargaining agreement, and when successive collective bargaining agreements are negotiated, it exists there as well. If there are changes, they are minor, but the essentials of the system of arbitration remain the same. The parties on the union side represent the collective as well as the individual interests of a body of employees whose interests can be diverse as well as interactive.

It is in light of these differences that the various provisions of the RUAA must be considered. What I will try to do is to comment on certain sections of the Act.

As we know, arbitration of disputes arising under collective bargaining agreements was commonplace even before *Lincoln Mills*.[2] *Lincoln Mills* involved a collective bargaining agreement between the textile union and a textile employer in Alabama. Dave Feller[3] argued *Lincoln Mills* before the Supreme Court.[4]

It was *Lincoln Mills*, rather than the Federal Arbitration Act (FAA), that brought labor arbitration under federal substantive or federal common law, as has been explained, although the FAA had then been in effect for more than 30 years. Today, however, both the law of arbitration under the FAA and *Lincoln Mills*, plus the *Steelworkers Trilogy*, are essentially indistinguishable as applied to labor-management arbitration. The relationship between the parties and the role of grievants and arbitration procedures in that relationship is a continuum rather than an ad hoc type of arrangement, as is commonplace in commercial or employment arbitration.

In light of those generalized comments, I am going to discuss certain sections of the RUAA and discuss labor arbitration in light of those sections.

Under section 4 of the Act, the parties may not waive the right to be represented by a lawyer. As Steve Hayford has pointed out, the

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[2] *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 40 LRRM 2120 (1957).

[3] President, National Academy of Arbitrators, 1992; Professor Emeritus, University of California, Berkeley, California.

[4] As attorney for the United Steelworkers of America, Feller also argued the *Trilogy* before the Supreme Court. *See* Feller, *How the* Trilogy *Was Made*, in Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 327.

Act does recognize the rights of an employer and a labor organization to waive this right.

For reasons that I do not fully understand, the word "and" in the conjunctive rather than "or" in the disjunctive is used there. It is the right of either party rather than the concurrence of both parties that I think is being referred to, so that either side can, as indeed they commonly do without resort to the views of the other side, decide whether a lawyer, a business agent, or a human resources person will represent the case.

Under section 6 of the Act, the court decides arbitrability, as is the case under the FAA and the *Trilogy*, but it is not uncommon under collective bargaining agreements for the parties to agree to leave arbitrability to the arbitrator, especially where disputes are determined by a designated rather than an ad hoc arbitrator.

I can tell you that this has been true under Ladies' Garment Workers agreements for time immemorial. We have industry arbitrators who, on an ongoing basis, determine arbitrability.

You may remember that in the *Steelworkers Trilogy* there was a footnote that said the parties can of course agree to have the arbitrator decide the question of arbitrability.[5] That is precisely what we do, and I think in many other industries where the relationship is mature and the arbitrators are designated, even on a rotating panel basis, that it is left to the arbitrator.

Under section 6 of the Act, after the court decides the threshold question, all other questions, such as waiver, termination, and statute of limitations are for the arbitrator to decide—the comments to section 6 point this out. And that is as it should be under all forms of arbitration. There certainly is no difference in the labor area.

Apparently to placate concerns of the parties, section 6 emphasizes the due process that should be inherent in these systems. It also points to the Due Process Protocol[6]—of which I am happy to have been a co-chair—and to the well-known Edwards[7] decision in *Cole*.[8] I might also point out that the same group is now considering a due process protocol for mediation in order to overcome some

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[5]*See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 574 n.7, 46 LRRM 2416, 2416 n.7 (1960).

[6]Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, May 9, 1995, available at <http://www.bna.com/bnabooks/ababna/special.htm>.

[7]Chief Judge Harry T. Edwards, U.S. Circuit Court for the District of Columbia Circuit.

[8]*Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).

of the unfair mediation systems that have become apparent in certain companies.

Under section 7 of the Act, the court may not refuse to order arbitration nor to confirm or vacate an award because it lacks merit. Well, that is fine. That is the law, and it was recently reiterated by the Supreme Court in *Garvey*.[9] However, some circuit courts can be expected to continue to depart from this, the Supreme Court notwithstanding.

Section 8, dealing with provisional remedies, authorizes the arbitrator to grant provisional remedies, including interim awards. Not many arbitration agreements in collective bargaining situations expressly give the arbitrator such authority; it is, however, highly desirable.

It is often essential, as it is under the National Labor Relations Act (NLRA),[10] to have provisional remedies so that when the final award issues it becomes realistic and meaningful. I am very much in favor of this. Some examples might be runaway shops or contracting out, but one can give additional examples.

Section 9 deals with the initiation of an arbitration proceeding in various formal written manners. However, in labor-management arbitration it is not at all unusual among parties who have provided for designated arbitrators to also provide for less formal notice, sometimes even 48 hours of oral notice, as we have in some of our agreements in very mature situations.

Section 10 deals with consolidation of separate arbitration proceedings. Various circuit courts have, in fact, granted consolidation when there are separate collective bargaining agreements; the same employer; and different unions, but with the rights of a particular union not involved in a particular dispute to be adversely affected by the outcome of a bilateral rather than a trilateral arbitration.[11] This certainly is a highly desirable type of provision.

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

[10] The Act is codified at 29 U.S.C. §141 et seq.

[11] *See, e.g., United States Postal Serv. v. National Rural Letter Carriers' Ass'n*, 959 F.2d 283, 286–87 (D.C. Cir. 1992); *Columbia Broadcasting Sys., Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328–29 (2d Cir. 1969); *Retail, Wholesale & Dep't Store Union Local 390 v. Kroger Co.*, 927 F.2d 275 (6th Cir. 1991); *Machinists Local 850 v. T.I.M.E.-DC, Inc.*, 705 F.2d 1275, 1277 (10th Cir. 1983). *But see Emery Air Freight Corp. v. Teamsters Local 295*, 185 F.3d 85, 92 (2d Cir. 1999) (district court did not abuse its discretion in refusing employer's request for order requiring three-way arbitration in jurisdictional work dispute with two unions where two collective bargaining agreements used incompatible arbitration procedures, neither union had agreed to follow the procedure in other union's agreement, no immediate intervention was necessary to keep the peace because both agreements had no-

Section 14, arbitral immunity, is a comprehensive provision equal to that applying to a judge. That is certainly desirable.

Section 15 deals with the arbitration process. It provides for broad powers of arbitrators and comports with the rules and practices in labor-management arbitration. It also provides for summary disposition, already commented on by the two preceding speakers. Although arbitrators may have the authority to summarily resolve disputes, I think it is most undesirable to do so.

I think in most cases the parties expect to be fully heard and to receive a full and fair opinion and award. If the arbitrator nevertheless feels that summary disposition is appropriate, I would advise the arbitrator to swallow hard and have the case completely heard, and then issue a decision and an opinion that persuades the parties, particularly the losing party, that all issues have been fully litigated, fully heard, and fairly decided. I think summary disposition in arbitration, though available, should be the rarity. Indeed, I can hardly think of an appropriate case for it. I would caution against it.

The subsection also deals with ex parte disposition, if a party fails to appear after due notice and when evidence is produced. Some collective bargaining agreements expressly provide for such a contingency. It would, in my opinion, be better to expressly require a prima facie case before an arbitrator who then renders an award in favor of one of the parties in the absence of the other. It may be that the section intends that to be the result. It would be better if the section said it more clearly, in my opinion.

There is also a provision here about the admission of evidence. Ordinarily, evidence and its admissibility is left to the arbitrator. There is something in section 15 that bothered me a little bit: it says that if the arbitrator refuses to consider material evidence that prejudices the rights of a party, it is grounds for vacatur. I think the section would be better without that provision, because it is conducive of mischief. If the parties designate an arbitrator to hear a dispute, the admissibility of evidence should be subject to the discretion of the arbitrator without reservation.

Discovery is fine. I will not comment on it.

Modifying or correcting an award is rather controversial within the labor bar, so do indulge me a little bit. Section 20 provides that

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strike provisions, an award in the pending bipartite arbitration might conflict with obligations resulting from previous arbitration, and the international union had an internal arbitration process for settling jurisdictional disputes between its locals).

the parties have 20 days to make the motion, and 10 days for filing a response to the motion.

I think it would be most desirable if there were a time limitation on the arbitrator reaching a determination in this area. The labor bar is most concerned with inordinate delays in finally receiving a final award. Those concerns would be ameliorated if at least the time were limited in which the arbitrator must determine this kind of postaward exception to functus officio.

Just one final comment on remedy. There is a provision in section 21 for remedies that deals with punitive damages and attorneys' fees. In labor-management arbitration, if the parties have not provided for it in the arbitration agreement, the arbitrator who would award attorneys' fees or punitive damages would find very unhappy parties, especially on the union side. Can you imagine the small union with limited resources having to worry about attorneys' fees and the effect that would have on the union's pursuit of arbitration on behalf of the bargaining unit? Although it might be quite appropriate for commercial arbitration, and clearly appropriate for statutory arbitrations because many statutes authorize it, I think it is quite inappropriate for labor-management arbitration.

V. QUESTIONS

Janet Hill: I have one question for Mr. Johnson. If you are in the middle of an arbitration hearing, why would you stop it for summary disposition?

Weyman Johnson: If as a matter of law everything that has been put on by the claimant is accepted as true and then you accepted all as true factually, then as a matter of law you sort of shrug the way you do under Rule 56. Then I think, Why not stop and everybody go home?

Janet Hill: Why not just finish? That is the question. I'm sorry.

David Feller: Assuming wide prevalence of *Gilmer*-type agreements and the consequent demise of class actions, what does the RUAA say on the question of class actions in arbitration, if anything?

Stephen Hayford: It really says nothing about it, David. I think it was an issue we decided to demur on.

David Feller: As I see it, that is the next big issue.

Stephen Hayford: I think our feeling was there was danger of federal preemption there. It is going to be an issue decided, I think, under the FAA.

Norman Brand: Two things about summary disposition: One of the great dangers is that where summary disposition is requested during the course of the arbitration, it can easily be a tactic to raise the stakes for the party with the less deep pocket. I think that there are some real dangers that an arbitrator has to be aware of.

Second, summary disposition has been available in California for about 4 years.[1] One of the fears of the plaintiffs' bar seems to me to not be well founded in that arbitrators do not have a docket-clearing motive. As a consequence, they are not as likely as a federal judge to just say, "Oh, I don't want to be bothered with this case." Hearing cases is why they are in business.

Theodore St. Antoine: I may have misunderstood something. You said you use contract formation issues as the prime example of an area of no preemption. One of those issues of course is consent. But I also thought that I heard you say that the Supreme Court simply had been so clear on the question that as long as an employee was knowing in his or her recognition of a provision requiring arbitration that you had no doubt that it would take a congressional act to change that position. Did I hear that correctly?

Stephen Hayford: Well, that is one of those things you say and you realize as it comes out of your mouth extraneously that it sounds a little broad so you'd like to take it back. The answer is knowingness and voluntariness. However, that shakes out under the common law of contracts if the state is going to control enforceability. That is what I meant to say. In terms of the way the Court sees this, just because you would rather not enter into the agreement, just because you feel trapped, just because you feel it is unfair but you have no choice, like when you sign your checking account agreement, your not wanting to waive the right to go to court does not make the arbitration agreement unenforceable. Requiring negotiated contracts as a matter of contract law would bring commerce to a grinding halt, and I mean immediately.

When you take it out of that general commercial context and put it in the employment context, it makes for a very cold result. But I

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[1] *See, e.g., Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650 (Ct. App. 1995).

guess the point I am making here is that a grumbling acceptance is still an acceptance.

As long as the employee is fully informed of the terms of the agreement and as long as those arbitration agreement terms are not unconscionable, I believe that they will be enforced and it will take a congressional act exempting employment arbitration agreements from the FAA, which would gut the basis for the pro-arbitration public policy and then leave the states free to enact these arbitration-specific measures to protect little guys.

Mitchell Goldberg: I would like to hear your comments about the payment of an arbitrator in an employment case, because it bothers me a great deal. Was that ever discussed?

In every commercial case I have ever heard, both parties share the fee. That can be a little business, a small guy, whatever. They pay. That way the arbitrator doesn't have any concerns about favoritism.

If I were a plaintiff employee and *X* arbitrator came up for the third time in a year in my company and I were forced to go before this arbitrator, I would be very concerned that this guy is making a living off this company.

Stephen Hayford: Why don't I answer it from the drafting committee's perspective. Clearly unreasonable allocation of costs can render an arbitration agreement unconscionable and therefore unenforceable.

We do not know where that law is going to go. We have federal law in *Cole*. Frankly, I have always felt that it is a matter to be determined by the state courts under common law principles, but I think it is enough of a specialized issue under arbitration that we are going to get federal law on it.

Janet Hill: I think the employee advocate bar is conflicted on this issue because of exactly what you have said. The average employee does not have the same money that the employer has. To them, $1,000 or $2,000 seems like $1 million. So I think that it is fair that they not have the equal burden with the employer. But then if the employer is paying the bill, it sure is going to look like the arbitrator has an incentive to favor the employer. I do not believe that arbitrators usually act that way, but it certainly creates that appearance.

I do not know what the answer to that is because arbitrations are not expensive in many arenas.

Mitchell Goldberg: What about the creation of a trust fund that is contributed to by all the employees and money for the employees' half comes out of this trust fund?

Stephen Hayford: That is an interesting idea. I guess we expect a lot of experimentation. Anybody else have a thought?

Weyman Johnson: I would just say most gung-ho employers, *Gilmer* gung-ho employers, are also *Cole* gung-ho employers, and a lot of them are paying the whole thing. But a lot of them also are running into what you say. It happens also in the labor-management side that if the employer starts to win too many, then you get a new panel. That is usually what ends up happening.

Max Zimny: The Due Process Protocol suggests that employers should really help finance employees in the course of arbitration. Some companies have done it with great success. Others say that it induces arbitration. The fact is, it does not induce arbitration at all based on considerable experience in the area.

It also depends on the class of employees you are talking about. Are you talking about the executive, are you talking about the higher echelon supervisor, or are you talking about the guy on the assembly line? The fellow on the assembly line can hardly afford the costs of an arbitration. If that employee is lucky enough to get a plaintiff's attorney who will take the case on a contingency, that is fine. But if that employee cannot find such an attorney, that employee will be without the ability to vindicate his or her rights.

Stephen Hayford: Seems to me, Mitch, that one of the cures for that might be repeat player effect. My colleague, Lisa Bingham,[2] and I think the cure for that is a broad universe of arbitrators from which to select. I am troubled by the idea of a permanent panel of employment arbitrators.

Norman Brand: It seems to me the so-called repeat player syndrome really is a disguise for two other issues, one of which is addressed by the RUAA. The two other issues are disclosure and transparency. The disclosure requirements of the RUAA[3] are similar to California's disclosure requirements.[4] The person who is choosing an arbitrator gets to know a fair amount about the arbitrator. This enables both sides to make informed choices about arbitrators. Knowledge about arbitrators is also disseminated by organizations. The California Employment Lawyers Association meets every February to talk about neutrals who may be used for

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[2]*See* Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998); Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189 (1997).

[3]Rev. Unif. Arb. Act §12 (2001).

[4]Cal. Code Civ. Proc. §1281.9.

arbitration. I applaud that. With disclosure (and experience) organizations can provide their members with the information needed to choose arbitrators.

Transparency means simply that the arbitrator's awards are available to everyone. We had a major issue in California with the Kaiser Permanente arbitration system because nobody knew what an arbitrator had done. If we redact arbitration awards to preserve privacy and then make them available in the employment context, then whatever an employment arbitrator does is available to both sides, just as it is in the labor-management context, so each side has equal intelligence and the ability to say, "Oh, I don't want to use that person."

Stephen Hayford: I had some pretty edgy comments in my paper about the impact of section 12 disclosure requirements on what I feel are some pretty transparent efforts of client development by some of the arbitration organizations that I think will gut it if you have to make a full disclosure. But I took it out of the normal comments.

Max Zimny: I think the AAA, beginning later this year, will be publishing those decisions with appropriate redacting.