CHAPTER 5

MELDING EXTERNAL LAW WITH THE COLLECTIVE BARGAINING AGREEMENT

BONNIE G. BOGUE*

My task is not to revisit the well-argued and ongoing debate about arbitrators applying external law—about whether we should, whether we are competent to do so, or under what circumstances we can or must. I recommend the literature to you for that debate.[1]

In the nearly 40 years since the Supreme Court decided *Enterprise Wheel*,[2] it has been generally acknowledged that arbitrators have the challenge, as well as the authority, to look "to 'the law' for help in determining the sense of the agreement."[3] A dozen years later, in its famous footnote 21 in *Alexander v. Gardner-Denver Co.*,[4] the high court voiced a cautious judicial deference to arbitral interpretation of statutory law, at least of Title VII, but only if the arbitrator "gives full consideration" to the grievant's statutory rights, and if procedural fairness is afforded, if the record is adequately developed, if the arbitrator is competent to decide the issue, and, most importantly, if "provisions in the collective-bargaining agreement . . . conform substantially with Title VII."[5]

---

*Member, National Academy of Arbitrators, Albany, California. The author thanks Arbitrator Katherine Thomson for her assistance.

[1] *Use of Substantive Rules of Law*, in Elkouri & Elkouri How Arbitration Works, 5th ed., eds. Volz & Goggin (BNA Books 1997), 516; 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; Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 42; Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 1; Howlett, *The Arbitrator and the NLRB: II. The Arbitrator, the NLRB, and the Courts*, *id.* at 67; Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 St. Louis U. L.J. 77 (1996); Feller, *Arbitration and External Law Revisited*, 37 St. Louis U. L.J. 973 (1993); Hayford & Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. Disp. Resol. 249; Fleishli, Grenig & Jascourt, *When Can a Grievance Arbitrator Apply Outside Law?* 18 J.L. & Educ. 501 (1989).

[2] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[3] *Id.* at 598, 46 LRRM at 2425.

[4] 415 U.S. 36, 60 n.21, 7 FEP Cases 81, 90 n.21 (1974).

[5] *Id.*

The judicial backdrop for arbitration continues to evolve. We have the added caution of *W.R. Grace*[6] and *Misco*,[7] namely, the standard for judicial enforcement of awards and the exception to the general deference to arbitration when an award creates an "explicit conflict with other 'laws and legal precedents'"[8] or is contrary to public policy expressed in constitutional, statutory or case law.

To that, we add the apparently growing deference to arbitration of statutory matters since the Supreme Court decided *Gilmer*[9] in 1991. Late in 1996, the high court declined to review *Austin v. Owens-Brockway Glass Container*,[10] where the Fourth Circuit took a strong swipe at the holding in *Gardner-Denver* that grievants under a collective bargaining agreement need not exhaust the arbitration forum before filing a statutory discrimination suit. The *Austin* court said *Gilmer* means any agreement to arbitrate, whether in an individual employment contract or in a collective bargaining agreement, is binding, and the union can, through a labor contract, waive a grievant's right to sue for violation of statutory rights. If *Austin* is good law, arbitration may be the only forum for enforcing the employee's statutory rights if the contract contains an express agreement to arbitrate. However, other courts[11] have held otherwise, and the Supreme Court may revisit the question.

A number of Academy members believe this legal backdrop puts the onus on arbitrators to address external law, when raised by the parties, not only to assure that their awards harmonize with the law, but also to assure that the parties to collective bargaining agreements get the benefit of their bargain, namely, arbitration in lieu of litigation, and furthermore, to assure that employees are not deprived of their only "bite at the apple."

But we are charged with putting aside this perplexing debate and instead with looking at what we, as arbitrators and as the parties to arbitration, actually do when we apply external law. How do questions of external law become melded into the contract? What problems are presented as we try to make this dispute-resolution process work effectively and in the best interests of the parties?

---

[6]*W.R. Grace Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

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

[8]*Id.* at 43, 126 LRRM at 3119 (quoting *W.R. Grace Co. v. Rubber Workers Local 759*, *supra* note 6, at 766).

[9]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

[10]78 F.3d 875, 151 LRRM 2673 (4th Cir.), *cert. denied*, 153 LRRM 2960 (1996).

[11]*Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997); *Pryner v. Tractor Supply*, 73 FEP Cases 615 (7th Cir. 1997); *Varner v. National Super Mkts.*, 94 F.3d 1209, 71 FEP Cases 1367 (8th Cir. 1996).

Let's begin by reviewing ways we get into external law. First, there is express incorporation, but it is rare for the contract to state, for example, that Title VII of the Civil Rights Act of 1964[12] is incorporated. However, sometimes statutes are so incorporated, particularly in such highly regulated areas as education.

Second, there are "thou shalt not" clauses—generally worded contract language stating that the parties agree not to discriminate on the basis of race, sex, age, disability, and so forth. Third, while the contract may be silent on any number of substantive rights, it may have a savings clause that says something to the effect that this contract "shall not be construed to violate state and federal law." That may prompt the argument whether the parties agreed, for example, to interpret their overtime provision to comport with the Fair Labor Standards Act (FLSA).

Fourth, either party can raise a statutory claim as a "sword" or a "shield" even though the contract is silent about external law. For instance, in a just-cause disciplinary grievance, the employer may use the law as a sword, asserting that discharge is mandatory because the grievant's conduct, such as sexual harassment, violated the law. Or, the union may use it as a shield, claiming that the grievant was not insubordinate but merely exercising her constitutional right of free speech. Such arguments get the parties and the arbitrator into statutory and case-law definitions, standards, and maybe remedies.

The second aspect relates to the point in the proceeding at which external law becomes an issue. An arbitrator's first inkling as to the application of external law may occur when he or she asks for a stipulated statement of the issue. Opening statements often give a clue, but the first indication may come in the shape of a relevance objection when the offer of proof sounds like a Supreme Court oral argument. It is the lucky arbitrator who is only confronted with the issue in the relative sanctity of the office, with time to deliberate over well-crafted written arguments and with research tools available.

To gain an understanding of what arbitrators in fact do when presented with external law issues, I have searched for examples, published or not. I have focused on five topics to find how external law was brought to arbitration and how the arbitrator fielded the issue.

---

[12]42 U.S.C. §2000e et seq. (1964).

FLSA and Wage and Hour Clauses

FLSA compliance often surfaces in this very traditional labor arbitration area of wages and hours. Recently reported cases show some arbitrators refuse to interpret the law without an express statutory reference in the contract. However, other arbitrators examine the law, even if it is only to determine that it does not apply because there is no express reference, rather than simply stating that the only issue before them is contract interpretation. Of course, there are the easy calls where the contract states that the employer will comply with the FLSA, giving the arbitrator ample ground for turning to the statute, regulation, and case law.[13]

One award that could serve as a "textbook" case on external law and the FLSA is by Barnett Goodstein.[14] The union claimed the employer's method of calculating overtime pay violated the express terms of the contract. The employer, using the act as a shield, contended its method was justified as an established past practice that was in compliance with FLSA regulations, despite the contract language. The arbitrator declared the FLSA irrelevant, since the contract governed overtime. But that did not mean he ignored it; quite to the contrary. He examined the statute and determined that it set a minimum standard, but one that did not preclude negotiating a higher standard. Therefore, the FLSA provided no shield, since compliance with the contract's higher standard would not violate the act.

That case is noteworthy because the employer cited the 1967 Academy *Proceedings* and Meltzer's[15] formulation of circumstances justifying consideration of external law. Going through that formula, Goodstein found that the contract was not loosely formulated so as to require interpretation of external law to fill in the gaps. Nor was the contract susceptible to two interpretations, one of which should be rejected as repugnant to the FLSA. Rather, he concluded the contract was clear and unambiguous, and he declared that the parties had not asked for an "advisory opinion" on the FLSA. Nonetheless, he offered one when he concluded that while the employer's methods were valid under the FLSA, they were invalid under the agreement, a conclusion that required analysis of the statute.

---

[13] *See City of Jacksonville*, 92 LA 397 (Baroni 1989).
[14] *Potlach Corp.*, 95 LA 737 (Goodstein 1990).
[15] *Supra* note 1.

In a past practice case[16] where the employer used the FLSA as a sword rather than a shield, a school district claimed that its prior practice of capping hours at 48 per week had been prompted by state law that required overtime pay after 48 hours. It changed that practice when the FLSA trumped state law and required the employer to pay overtime after 40 hours. Arbitrator J.C. Fogelberg found that the established past practice for maximum hours could be unilaterally changed in response to external law, since the past practice itself had been based on external law.

Another frequent application of the FLSA is in defining whether employees are "on the clock" and entitled to overtime pay. Arbitrator Donald Goodman[17] flatly refused to consider external law to decide if employees should be paid to wash up after lunch. While acknowledging the union's citation of case law holding that mandatory wash time is work time, he rested on the fact there was no contract language making it paid time.

A contrary approach was utilized by Arbitrator Harry Weisbrod.[18] The contract was silent regarding pay for off-duty, labor-management safety committee meetings, and he declared that the contract standing alone would mean no pay, grievance denied. Nonetheless, he opined that he had been selected because of his known expertise in the FLSA; therefore, he assumed the parties intended that he apply that knowledge. He reviewed the FLSA handbook to find that time spent in safety meetings was similar to other safety activities compensable under the FLSA. Also, under the act, pay for joint labor-management activity is subject to collective bargaining, but if the contract is silent, such time is compensable. Since this contract was silent, he found that the employer must pay overtime because of external law.

The FLSA also comes up in discipline. Where an employee was suspended for not remaining within earshot of the phone while on emergency standby, Arbitrator Mollie Bowers[19] considered the union's defense that the employer's standby rule was invalid under the FLSA. Although she disagreed with the union's interpretation, finding that the employer's policy conformed with the act, she nonetheless reviewed external law to see whether it provided a shield.

---

[16] *Independent Sch. Dist. 197*, 97 LA 364 (Fogelberg 1991).
[17] *George A. Hormel & Co.*, 90 LA 1246 (Goodman 1988).
[18] *City of Lawton, Okla.*, 97 LA 796 (Weisbrod 1991).
[19] *Gulf States Utils.*, 97 LA 66 (Bowers 1991).

Arbitrator David Dilts[20] was asked by both parties, citing the contract's "legal supremacy clause," to apply both the FLSA and Department of Transportation (DOT) drug-testing regulations to find whether employees should be paid for time spent submitting to random drug testing on their day off. He turned to a 1944 U.S. Supreme Court decision[21] for the definition of when employees are "at work." One prong of the Court's test is whether employees are engaged in activity that primarily benefits the employer. The DOT regulations state that the purpose of mandatory random drug testing is to promote public safety. Based on these external law dictates, Dilts concluded that the tests were primarily for the benefit of the public, not the employer, and thus the time spent was not "work" under the FLSA, and not compensable under the contract.

Drug and Alcohol Testing

Of course, drug and alcohol testing may implicate not only the Department of Transportation (DOT) regulations but also constitutional issues. As a result of *Misco*,[22] there are those who see no alternative but for arbitrators to look to external law, perhaps because of the potential for review due to public policy issues involved in drug testing.

Consider this colorful tale.[23] A bored firefighter, in the middle of the night, takes a smoke break in a remote bathroom in the firehouse. The captain later detects the odor of smoke that he suspects is marijuana. He calls the grievant into his office and tells him to wait until the police come to conduct a drug test. The firefighter asks for a union representative, but the captain says it is too late at night to find anyone. The firefighter says he will not do the test without talking to someone. The captain tells him the police will not use it for criminal purposes; it is just administrative. He also tells the firefighter that if he refuses, it is insubordination. He does not allow the employee to leave the room or make a phone call. The police come, the firefighter refuses to comply, and he is fired for insubordination.

---

[20] *Martin-Brower Co.*, 102 LA 673 (Dilts 1994).

[21] *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590, 4 WH Cases 293 (1944).

[22] *Paperworkers v. Misco, Inc.*, *supra* note 7.

[23] *City of Reno*, unpublished (Bogue 1989).

The union claimed violations of the grievant's right to representation, constitutional due process, Fourth and Fifth Amendment rights, and statutory false imprisonment. The union also contended it was an unfair labor practice for the captain to create a drug-testing policy when the parties were still negotiating a policy and there was no past practice of the police administering drug tests. Determining that I could not ignore these external law defenses and decide it strictly as an insubordination case, I found no just cause for the termination.

There are, of course, a plethora of drug- and alcohol-related arbitration awards, most of which deal with some or all of the constitutional issues raised in that case, as well as federal DOT regulations.

In one example,[24] both the union and the employer invoked external law because the contract expressly referenced DOT regulations. Arbitrator Steven Briggs reversed the discharge of a truck driver who was fired when he did not report immediately for a random test, but rather waited until the end of his work day—after any alcohol that might have been in his system would have dissipated. The employer said the driver should have known that the rules, mentioned in the labor contract, required him to report for random testing within two hours. But the arbitrator, examining the rules, found the burden to be on the employer to inform the employee to report immediately, rather than on the employee to be aware of the rules.

The more difficult cases are ones in which DOT regulations are not mentioned in the contract, like the complex drug-testing case before Arbitrator Dennis Nolan,[25] which was based on a deferred unfair practice charge. Arbitrator Nolan was to decide whether adoption of a drug-testing policy was a unilateral action and, secondly, whether the policy itself was "reasonable." First, he refused to consider external law in deciding the unilateral action question, reiterating the classic, although not universal, position that his sole authority was to decide whether the action violated the contract, not the National Labor Relations Act. Instead, he found the adoption of the drug-testing policy was a unilateral action permitted by the management rights clause.

As to the stipulated issue of whether the drug policy was reasonable, Nolan first responded to the union's invasion of privacy

---

[24]*Advance Transp. Co.*, 105 LA 1089 (Briggs 1995).
[25]*Stone Container Corp.*, 95 LA 729 (Nolan 1990).

argument, coining a new standard: the "willy-nilly" rule. Acknowledging that the parties had cited case law, but without naming any cases, Nolan declared that, "[b]y any standard, urinalysis is a significant invasion of a person's privacy," and employers must not "willy-nilly" require random testing in the absence of extraordinary circumstances. Using language clearly paraphrasing that found in the unidentified case law, he concluded that the postaccident testing policy was unreasonable when it required urinalysis without any "individualized [reasonable] suspicion" that the employee was under the influence.[26]

As to constitutional questions, a common approach is illustrated in awards by David Concepcion and George Nicolau.[27] Both arbitrators agreed with the employer that they should not attempt to decide whether a work rule is constitutional. They nonetheless declared the union was entitled to cite court precedent to attack the rule as unreasonable, under the traditional tests for just cause. An unconstitutional rule would be unreasonable. Concepcion, without citing any specific cases, performed the same balancing test that the courts apply—weighing the public employer's interests and the individual's right of privacy—under the Fourth Amendment. Just as those uncited cases require, he found the employer must have "individualized suspicion" before it could impose a drug test.

The Right to Privacy

Drug- and alcohol-testing cases often raise the issue of privacy. But defining the right to privacy is a task presented to arbitrators in circumstances not limited to drug testing.

In the public sector, a battle rages between disclosure, mandated by public records statutes, and privacy rights, recognized in those statutes that exempt personnel records from disclosure. There are confidentiality or privacy protections mandated in a range of statutes, such as medical records acts, or as is the case in California, by an express privacy right in the state constitution that applies to both the private and public sectors. Also arbitrators need to be aware when issuing subpoenas that in some states, such as California, there are statutes that significantly restrict subpoenas for employment records.

---

[26] *Id.* at 735.

[27] *Southern Cal. Rapid Transit Dist.*, 92 LA 995 (Concepcion 1989); *Boston Edison Co.*, 92 LA 374 (Nicolau 1988).

There are also federal constitutional protections against unreasonable search that may apply to employer perusal of desk drawers, lockers, and briefcases. And there are electronic communications statutes, federal and state, governing access to electronic-mail and wiretapping. There are also evidentiary privileges and semiprivileges that protect certain communications, such as between, for example, doctor and patient, spouses, attorney and client, and others.

Assuming these protections do apply in the employment setting, the question for arbitrators is how does that affect how they handle and decide cases. What are the nature and extent of these protections, and should they follow the statutory or constitutional dictates? For example, if the employer has reason to require a drug test, should it require the employee to be observed while urinating in the cup? Should it require psychological testing for transfers and promotions, or in response to threatening remarks or violent behavior? Should confidential conversations between the employee and the employee assistance program counselor be admitted into evidence? What about security surveillance cameras? That is certainly not an exhaustive list.

A principal way in which arbitrators are forced to address these issues is when an objection is raised to the admission of evidence. Or, perhaps with a bit more time to deliberate, they may be asked to respond to a prehearing motion to quash a subpoena or to a motion in limine to preclude submission of certain evidence. Or, the arbitrator may be asked to apply the "fruit of the poisonous tree" doctrine and exclude illegally obtained information.

One frequent scenario is when an employer objects to releasing personnel records of other employees relevant to the question of discrimination or disparate treatment in a just-cause case. The employer asserts that release of this information infringes on the privacy rights of the other employees, or perhaps of patients or inmates or other third parties, making the employer liable in potential lawsuits by those individuals.

A common approach is to issue the subpoena or admit the evidence, but with precautions that in most cases will satisfy the concern: Issue a protective order directing that names, addresses, and identification numbers be blacked out; individual files be identified by number; the transcript be sealed; hearings be closed to all but essential participants; files be perused in camera by the arbitrator; and so forth.

Such measures defer to, without actually interpreting, the external law that the employer is citing. But sometimes a more formal

approach is required. For example, in a discipline case that I arbitrated,[28] the union requested a subpoena for the results of an investigation into alleged financial misconduct within the agency, which had yielded no discipline of any employees. The grievant, who was on the wrong side of the political fence leading up to that investigation, was now grieving his discipline for misreporting travel expenses. The evidence was relevant to his claim of disparate treatment and retaliation for union activity.

None of the above pragmatic protective measures would satisfy the employer's desire to keep the investigation out of evidence, claiming release would unlawfully reveal personnel records of individuals who had been investigated. The proceeding ground to a halt. In a formal ruling on a motion to quash the subpoena, I followed the statutes and case law that the parties had exhaustively briefed, used the courts' tests for weighing competing interests, and concluded that my protective measures would satisfy the legal standards and protect the third-party privacy rights. I issued the subpoena. Not inconsequentially, the case settled.

Because these issues usually come up procedurally, very few awards, reported or otherwise, treat such questions. In one reported interest arbitration case,[29] Arbitrator Stanley Michelstetter refused to quash a subpoena that required production of income tax returns of farmers who had testified that the drought-ridden community could not afford a tax increase. Focusing on pragmatic means of maximizing privacy protections while ensuring the availability of the evidence, he limited the subpoena to farm income only. While acknowledging privacy interests, the arbitrator notably did not comment on the nature or source of those interests.

Arbitrators are also faced with substantive, not just procedural, applications of the right to privacy. For example, Arbitrator Patricia Bittel[30] upheld the termination of an employee who was fired because he refused to provide his tax returns to calculate income offsets against a back-pay award from a prior arbitration. Finding his refusal was insubordination, the arbitrator declined to consider whether the demand for tax returns invaded the privacy of the grievant and his family, finding the issue beyond her jurisdiction since the contract granted no privacy right.

---

[28] *Air Quality Mgmt. Dist.*, unpublished interim ruling (1995).

[29] *Deerfield Community Sch. Dist.*, 93 LA 316 (Michelstetter 1988).

[30] *Western Steel Group*, 94 LA 1177 (Bittel 1990). *See also Clare Pub. Sch.*, 97 LA 35 (Lipson 1991), where the arbitrator has no authority to remedy privacy violations caused by school board member disclosing parents' complaints.

Other arbitrators have considered the right to privacy. For example, Arbitrator James Duff,[31] over objection, admitted into evidence videotapes from surveillance cameras used in a hotel to control theft. While the camera failed to uncover theft, it did capture the grievant having "frolicsome sex" with her supervisor. Without citing any source for the privacy right or any legal standard governing his analysis, the arbitrator simply concluded that any expectation of privacy the grievant may have had was waived when she had sex on company time, on company premises. The termination was invalidated on other grounds. Privacy was again an issue in the remedy when the arbitrator declined to order the tapes destroyed, noting that they were employer property and that precautions had been taken to prevent their dissemination beyond the closed hearing and his own in camera viewing.

In a contrasting approach, Arbitrator Barry Baroni[32] adopted standards enunciated in court rulings interpreting the Louisiana and federal constitutions when he rejected the constitutional defenses of a grievant fired for stealing company property. He found the employer had reasonable cause to search the home of the grievant's ex-wife, and that no privacy or Fourth Amendment rights were violated.

Arbitrator Gerald McKay[33] struggled with the "fruit of the poisonous tree" exclusionary rule in a case involving a discharge for theft. In this case, company property was fortuitously discovered by police when conducting an illegal drug search of the employee's home. After citing the debate on external law, he declined to apply the exclusionary rule drawn from criminal law, and, instead, cited a great deal of external case law, as well as published arbitration awards, in reaching that conclusion.

Privacy defenses drawn from external law have been successful in arbitration. For example, regarding discharge of a guard in a county jail for marrying an inmate in a state prison, Arbitrator A. Christine Knowlton[34] relied on the right to privacy in the California Constitution as well as in U.S. Supreme Court precedent regarding the sanctity of matrimony. She found "no penological reason" for firing the guard for not disclosing her plans to marry a man incarcerated in a different prison, with no connection with the jail or her job responsibilities.

---

[31] *Wyndham Franklin Plaza Hotel*, 105 LA 186 (Duff 1995).
[32] *Exxon Co., U.S.A.*, 101 LA 777 (Baroni 1993).
[33] *Union Oil Co. of Cal.*, 99 LA 1137 (McKay 1992).
[34] *County of Napa*, 102 LA 590 (Knowlton 1994).

Professional Standards

Cases involving "professional standards" are permeated by external law, that is, standards codified in ethics or conduct codes, licensing standards, industry regulations, academic senate rules, education codes, and so forth, all of which are external to the collective bargaining agreement.[35]

Recently reported cases show arbitrators interpreting Federal Aviation Administration regulations (to decide whether an air traffic controller had made a judgment error);[36] medical records protective statutes (to decide if a social worker violated confidentiality standards when she told her mother that one of her clients had AIDS);[37] an elder abuse statute (to decide if an aide abused a nursing home patient);[38] and an education code (to decide if the school's elimination of pluses and minuses from transcripts violated laws prohibiting censorship of teachers).[39]

Such issues are commonly raised in discipline cases as a sword by the employer or a shield by the union. They also arise as contract interpretation issues. For example, a management rights clause, recognizing that the school employer will exercise both the "rights" and the "duties" in state law, probably does not "bootstrap" the education code into the agreement. But it may authorize the arbitrator to look to those statutes in determining whether the employer was acting arbitrarily, capriciously, or in bad faith in the exercise of its reserved rights when the union claims its actions violated state law.[40]

In a lawyer ethics case, Arbitrator Hyman Cohen[41] was called on to apply a state code of professional responsibility in reviewing the discharge of an attorney. The employer, whose rules prohibited in-house attorneys doing any private practice of law, claimed the attorney violated not only that rule but also conflict of interest and client confidentiality rules in the code of ethics, when she helped her husband do a probate case. The union objected to the arbitrator considering the ethics issue. Nonetheless the arbitrator found

---

[35] *See* Rabban, *Problems of Specific Occupations: Part I. Arbitration of Disputes Over Professional Standards*, in Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators (BNA Books 1994), 194.

[36] *Federal Aviation Admin., Northeast Mountain Region, Seattle/Tacoma*, 99 LA 713 (Corbett 1992).

[37] *Michigan Dep't of Soc. Servs.*, 96 LA 46 (Grinstead 1990).

[38] *Montana State Hosp.*, 99 LA 551 (McCurdy 1992).

[39] *San Francisco Unified Sch. Dist.*, 107 LA 465 (Bogue 1996).

[40] *Id.*

[41] *United Auto Workers Legal Servs. Plans*, 102 LA 449 (Cohen 1993).

that the employer's rules required attorneys to "act according to high ethical standards;" therefore, he relied on an expert witness versed in lawyers' professional responsibility to decide that the grievant had violated the state code of ethics and thus had derivatively violated the employer's rules.

There, professional standards were used as a sword against the grievant, but they can serve as a shield to protect the grievant. Arbitrator Mei Bickner[42] encountered such a scenario when a licensed vocational nurse (LVN) was fired for insubordination for refusing to carry out the orders of a doctor. The LVN said she refused the order to administer drugs to a known drug addict because she feared that would place her license in jeopardy. Deciding this justified an exception to the traditional "obey now, grieve later" principle, the arbitrator noted that in the health care professions, the exception should apply if the employee reasonably believes that following orders could imperil her license, cause her to violate professional standards, or make her potentially liable to a lawsuit by the patient. No licensing standards were discussed in the award. Rather, the arbitrator turned for guidance to Mosby's *Pharmacology in Nursing*, which both the union and employer had cited as the authority on professional standards.

The teaching profession is also heavily regulated by statutory professional conduct and credentialing standards. Many contract interpretation issues will draw the arbitrator into studying the interplay between the agreement and the statutory framework governing the education system, which in many jurisdictions is mind-boggling in its complexity and ambiguity. Professional standards is just one of the many issues implicated in this interplay.

An example illustrating the variety of external issues that can enter a teacher discipline case is one involving a teacher-student shoving match, where the school district used the law as a sword justifying discipline of the teacher. It claimed that the teacher had, under law, assaulted the student, and ordered the teacher to accept the student back in her class, claiming that to expel the student from the class would violate her statutory right to an education.[43] The teacher's refusal was deemed insubordination. The union also invoked state law that gave the teacher, standing in loco parentis, the right to administer corporal punishment. It also relied on a contract clause giving the teacher the right to bar a student from

---

[42]*Southern Cal. Permanente Med. Group*, 106 LA 1033 (Bickner 1996).
[43]*Gary Community Sch. Corp.*, 95 LA 744 (Eagle 1990).

her classroom. Arbitrator Warren Eagle, discussing law cited by both parties, concluded it was the student, not the teacher, who committed the assault. Rather than weighing the student's statutory right to an education against the teacher's contractual right to keep the student out of her class, he concluded there was no conflict, since the student could get an education in another classroom.

Discrimination and the ADA

Perhaps the most frequently visited external law topic is employment discrimination. I have focused on only one aspect—disability discrimination—an active and challenging area for arbitrators, particularly since the Americans with Disabilities Act (ADA).[44]

The principal question in a disability grievance is whether discrimination occurred. In this respect, these cases do not differ theoretically from race or gender discrimination. The questions for arbitrators are the same: what standards, definitions, and burdens of proof should apply?

Arbitrator Howard Block,[45] who accepted the thesis that arbitrators are charged with interpreting the agreement and the courts with interpreting the law of the land, nevertheless wrote in a disability discrimination case:

> The law of the shop and the law of the land are not sealed off from one another into watertight compartments. When . . . the Contract language is ambiguous and the bargaining history does not shed light upon the intent of the parties, an arbitrator in interpreting the parties' Agreement may "look for guidance from many sources" and indeed may look to the "the law" for help in determining the sense of the agreement. . . . As a general rule, arbitrators do not innovate. We are not on the cutting edge of social change. . . . We do consider and often reflect established societal standards. . . . Arbitrators must be mindful of these changing values in the broader society if their decisions are to be realistic.

Then, he interpreted the contract to incorporate the statutory obligation of the employer to make a reasonable accommodation for an employee medically unable to work overtime.

It is that statutory obligation—reasonable accommodation—that sets disability discrimination cases apart. It may not be enough

---

[44]42 U.S.C. §§12101–12213 (1990). *See* Adler, *Arbitration and the Americans with Disabilities Act*, 37 St. Louis U. L.J. 1005 (1993).

[45]*Alhambra Nat'l Water Co.*, unpublished (Block 1993).

to simply say, "You discriminated, cease and desist, and make the employee whole," if the discrimination was the employer's failure to provide reasonable accommodation to enable the employee to perform the essential functions of the job. Rather, arbitrators may be called on to craft innovative remedies in order to assure that an accommodation is considered, is reasonable, and is carried out.

To do that properly, it behooves us to refer to external law—statute, administrative guidelines, case law—or risk holding the parties to some standard that exists only in the mind of the arbitrator. The parties to a collective bargaining agreement that prohibits discrimination need to operate in a realm of reasonable predictability, and that means the standards enunciated in the law that governs their actions and relationships.

Arbitrator Block's answer was to remand to the parties the problem of working out the accommodation and to expressly reject the employer's contention that his jurisdiction should end with issuance of the award. He noted that the parties had come to the arbitrator bent on arguing their positions, without first making any effort to find out what accommodation was feasible.

Arbitrators are often faced with this kind of impasse in which there is no evidence whether an accommodation is reasonable because the employer's refusal to consider any accommodation prompted the grievance. One solution is to remand the question of accommodation to the parties, as Block did.[46] A "conditional reinstatement" is a variation on that theme. Both require retained jurisdiction by the arbitrator to oversee the results.

Arbitrator Barbara Chvany[47] crafted the latter type of remedy in a case in which the employee had been medically terminated. The arbitrator found that a termination would not be for just cause if it violates the public policy grounded in the ADA. Not wanting to rely on differing medical opinions on what the employee could do "in the abstract," that is, based on speculative evidence produced in the hearing, she ordered the employee back to work with a specific set of restrictions for a three-month "assessment period." Only if he completed the period successfully would he be entitled to continued employment or to back pay for the period of his termination.

A more difficult question comes up when there is a conflict between the contract and the ADA, such as when an accommoda-

---

[46]*See also Multi-Clean, Inc.*, 102 LA 463 (Miller 1993).
[47]*Lucky Stores*, unpublished (Chvany 1994).

tion would infringe on other employees' seniority rights. Arbitrators often rest on the time-honored rule: our obligation is to interpret the contract and the contract must prevail if it cannot be melded with the statute. But others defer to the external law in order to avoid putting the employer in a position of violating the law.

Arbitrator Richard Kanner[48] took the latter approach, first holding that it was arbitrable whether an accommodation required by the ADA could override the contract's seniority clause. Then, interpreting the act, he found that the union could not use the statutory "undue hardship" defense to claim that the accommodation would interfere with other bargaining unit employees' seniority rights. Then, he noted that there is no express deference to seniority systems in the ADA. Based on the act's legislative history, collective bargaining rights should only be one "factor" considered in determining whether an accommodation is reasonable. Finally, since the accommodation was reasonable under the ADA and was the only one that could save the disabled police officer's job, he allowed the employer to override other officers' seniority rights. To avoid putting the employer in a position of violating the ADA, he held that the ADA justified a departure from the contract.

The issue may be the seniority rights of the disabled employee, not the rights of co-workers. For example, in a good-faith effort to accommodate a disabled employee, an employer placed the grievant in a modified position, but refused to honor her seniority right to bid for a different position. As the arbitrator, I concluded that the employer violated the contract because it ignored the grievant's seniority rights, even though the ADA would allow the employer to pick which job it will accommodate. The employer had violated the contract for the two years it had refused to honor the grievant's seniority rights and did not provide any analysis to support its conclusion that she could not perform the job for which she bid. But the contract violation ended once the employer did an analysis and substantiated its decision that no reasonable accommodation would enable her to fill the position she desired. As to remedy, I declined the union's request to order an "on the job assessment" of whether she could actually carry out the essential functions of that job, since the evidence supported the employer's reasonable accommodation analysis.[49]

---

[48]*City of Dearborn Heights*, 101 LA 809 (Kanner 1993).
[49]*Santa Clara Transit Dist.*, unpublished (Bogue 1997).

The Challenge

This perambulation has highlighted a number of problems that confront the practitioners when confronted with an external law problem. My question, to arbitrators and parties, is whether there are better ways of approaching external law issues in your practice.

One of the most disturbing problems arbitrators face is when the advocates are, whether by design or simple inexperience, inaccurate in their analysis of external law. Whether advocates or arbitrators are lawyers or laypersons may not be the issue, since a law degree does not guarantee the holder has knowledge or experience in every area of the law, and nonlawyers may have greater expertise in a particular area.

If arbitrators realize one or both parties' treatment of external law is incorrect, should they decide the case based on however the parties presented it, right or wrong? Or, should they familiarize themselves with the cited cases and statutes and attempt to interpret them correctly? Should they do their own research to find cases that were omitted, for whatever reason? Should they rely on cases or statutes of which they already have knowledge, if not cited by either party? Would that inappropriately assist the advocate, particularly when the omission or misunderstanding is one-sided? Or is this merely leveling the playing field, assuring that justice is done? Is failure to provide a correct legal analysis an invitation to review in court?

One suggested approach is to anticipate the problem by addressing the external law issue before the hearing, through prehearing submissions on the issue, and possibly a teleconference in which the issue is defined so that it might be determined whether an external law issue is involved. That may save hearing time that otherwise is consumed by debating the framing of the issue and whether the contract requires consideration of external law. It can also avoid lengthy on-the-record debates over objections to evidence. Such a prehearing conference may also prompt the parties to get legal advice, or even substitute counsel, before they attempt to put on their case or write their briefs.

Short of that, the arbitrator may ask at the outset of the hearing whether there is an external law issue, when addressing other preliminaries, such as if there is an arbitrability defense. If unable to gain consensus, the arbitrator may make a bench ruling on the scope of the issue and relevant areas of external law that will guide the remainder of the proceeding.

A possible posthearing procedure may be scheduled in which the arbitrator requests supplemental briefing to assure both sides address crucial points. This could consist of posing a series of questions and asking both sides to "do their homework" and respond. Or, the underprepared party could be asked to respond to arguments raised in the other side's brief, even if that would require getting some assistance and even if the parties did not agree to responsive briefing.

Another problem arises with the question of whether the range of remedies available in court should be available in arbitration. One approach is to bifurcate the case and address the question of statutory remedies only after deciding whether the grievance is granted or whether it rested on external law. The arbitrator may request briefing on the issues of appropriate remedy, perhaps posing questions for the parties to address and issuing a supplemental ruling resolving the legal issues. Only then would the measure of the relief need to be addressed.

As to crafting the award itself, what is the best approach to external law issues? If arbitrators can be second-guessed by the courts for dispensing their own brand of industrial justice when the sole question is contract interpretation, what kind of thin ice are they on when applying the law of the land or public policy? And, what should be done, in light of *Gardner-Denver*'s footnote 21,[50] to demonstrate to a court that the record is fully developed and that the grievant's statutory rights have been fully considered? Do arbitrators owe it to the parties to meet that challenge?

The cases I have reviewed for this paper show that arbitrators tend to genuflect to external law but do not attempt to clone a court decision. When paraphrasing the parties' arguments, arbitrators commonly note their citations to the law, sometimes including names of cases or quoting statutes they have cited. However, in writing their opinions, arbitrators tend merely to restate a generalized version of the rule of law, without being specific as to the source of the language or principle being stated, without quoting court rulings, without identifying with or distinguishing the cases or even footnoting cases they have followed, even though those familiar with the case law will recognize the source of their wisdom. Of course, there are varying approaches, and some awards do provide citations and occasionally include quotations from leading

[50] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, n.21, 7 FEP Cases 81, 90 n.21 (1974).

court cases. Any one arbitrator may approach each case differently, depending on the expectations of the parties.

If awards are subject to judicial scrutiny, will such a generalized, nonlegalistic treatment of external law withstand that scrutiny, or will that invite the courts to second-guess arbitrators on public policy grounds? Or, do arbitrators invite even closer scrutiny and more reason for a court to take exception to their reasoning if they attempt to mimic a court by providing an opinion carefully grounded in legal precedent?

The most important question for arbitrators is this: How can we best serve the interests and meet the expectations of the parties and make this venerable process work efficiently yet effectively and with finality in this era of ever-expanding legislation governing terms and conditions of employment? That question can best be answered by the individual arbitrator and the parties on a case-by-case basis. I hope this discussion helps in that dialogue.

Comment

MAX ZIMNY*

There are, or course, two discrete areas that one is compelled to pay attention to these days when discussing external law and arbitration. One is the collective bargaining area, that is, the union workplace, which Bonnie covered in her presentation, and the other is statutory arbitration in the nonunion workplace which is concerned with public statutes and public policy. The latter casts the arbitrator in a judicial role involving the interpretation and application of external law.

With respect to the collective bargaining agreement, it is my view—and the accepted view as well—that the arbitrator owes complete loyalty to the agreement and to the intention of the parties who created it. It is that agreement and those parties that have authorized the arbitrator to construe their agreement. It is their bargain that the arbitrator is charged to construe. It is their ambiguities arising out of the kind of legislative process that results in the collective bargaining agreement that the arbitrator is called upon to interpret. Arbitration awards under the contract become an integral part of the collective bargaining agreement itself. They

*General Counsel, Union of Needletrades, Industrial and Textile Employees, New York, New York.

become the defined rules of the workplace—the law of the shop. The expiring agreement and awards rendered thereunder play a vital part in the collective bargaining process for a succeeding agreement.

External law unauthorized by the terms of the collective bargaining agreement should not be used in construing that agreement. Of course, the *Misco*[1] decision requires that external law be deemed incorporated into the agreement but only when it constituted a well-defined public policy. And the arbitrator who ignores *Misco* also departs, as a matter of law, from the collective bargaining agreement that, as a matter of law, incorporates such public policy. But *Misco* aside, external law should not govern construction of the collective bargaining agreement unless the agreement requires that it should.

It is rather common to incorporate Title VII of the Civil Rights Act of 1964,[2] the Americans with Disabilities Act,[3] the Age Discrimination in Employment Act,[4] and similar antidiscrimination mandates into collective bargaining agreements that contain broadly stated fair employment practices provisions. One rather well-known example is the one that is described in the Fourth Circuit's *Austin*[5] decision. There we had an agreement that expressly prohibited discrimination and incorporated the public statutes which governed. I think the *Austin* court wrongly construed *Alexander v. Gardner-Denver Co.*,[6] but the *Austin* court, in my opinion, was dealing with an issue that never quite became a *Gardner-Denver*–type dispute. Perhaps that was why certiorari was denied by the Supreme Court. In *Austin*, the employee refused to pursue the grievance and arbitration provision. That was an exhaustion issue. I think the Supreme Court sidestepped the case for that reason. I think that the more recent decision of Judge Posner in the Seventh Circuit in *Pryner*[7] has been petitioned for review by the Supreme Court. It may result in the Supreme Court revisiting the *Gardner-Denver* doctrine.

Returning to external law and the collective bargaining agreement, what I have said is not to deny the use of external sources of

---

[1] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).
[2] 42 U.S.C. §§2000e et seq. (1964).
[3] 42 U.S.C. §§12101–12213 (1990).
[4] 29 U.S.C. §§621 et seq. (1967).
[5] *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 151 LRRM 2673 (4th Cir.), *cert. denied*, 153 LRRM 2960 (1996).
[6] 415 U.S. 36, 7 FEP Cases 81 (1974).
[7] *Pryner v. Tractor Supply*, 73 FEP Cases 615 (7th Cir. 1997).

enlightenment, including external law, in explicating ambiguities, words, and phrases found in a collective bargaining agreement. Such usage should amplify, but not diminish and not replace, the bargain the parties have negotiated. Nor do I believe that the standard savings clauses do anything more than indicate that the parties have agreed that once a court has decided that one or more provisions of the collective bargaining agreement violates the law that the remainder of the agreement continues in effect. This is true of savings clauses not only of collective bargaining agreements, but of commercial agreements as well. It is boilerplate. A savings clause that authorizes the arbitrator to decide what is legal or illegal by virtue of external law is, in my experience, an isolated exception. Now, that is not to say that the Fair Labor Standards Act[8] and certain other labor standards statutes may not be referred to in the proper factual and contractual setting when properly relied upon by the parties. Nor does it mean that an arbitrator can ignore pertinent decisions of the courts, especially federal appellate courts, that bring issues of public safety, gender discrimination, and the like into the *Misco* context. I think some of those decisions are wrong, some overdrawn, but, of course, it creates sensitivity by arbitrators who deal with disputes in such areas, and that is understandable. In terms of the admissibility of evidence, when the lawyers on each side cite the Federal Rules of Civil Procedure, or to their equivalent in public sector state cases, the arbitrator must necessarily pay some attention to it. But unless that illuminates what the agreement requires, the arbitrator should not be governed by the rules of evidence under clearly established doctrine.

There are, of course, certain doctrines, like the adverse inference rule, that an arbitrator is free to utilize. Many of them derive from the law that lawyers are brought up on, and provide a sound and meritorious basis for declining to hear evidence that a recalcitrant party has refused to produce. This is a useful device for compelling the production of evidence rather than suffering through a long adjournment of the arbitration while court proceedings to enforce a subpoena are undertaken. It is a rather well-established way of proceeding utilized not only by arbitrators and courts but by federal and state agencies as well.

When dealing with a just-cause provision, there are additional opportunities, as Bonnie has indicated, for analogous reasoning from external law. And to the extent that judicial decisions,

[8]29 U.S.C. §§201–219 (1938).

external law, if you will, provides intelligence for properly construing the agreement, I think the arbitrator may look to it. He or she should not, however, be governed by it where the agreement or the law of the shop provides the answer. My own feeling is that external law is valuable to illuminate, to define, to fill out what the collective bargaining agreement has left vague or absent or where expressly incorporated. But if external law is used to change, alter, or diminish the bargain of the parties, I suggest that the law of the *Steelworkers Trilogy*[9] is undermined. I think arbitrators leave themselves open to judicial intervention and reversal and provide an excuse by courts to bypass deference to the arbitrator which the Fifth Circuit decided to ignore in its *Bruce Hardwood*[10] decision. Arbitrators may also find that the National Labor Relations Board will not defer to an arbitral ruling under its *Spielberg*[11] doctrine. If arbitrators construe external law in a manner found by a reviewing court to be violative of well-established law, they not only exceed their authority under the agreement, but they also undermine the law of arbitration of the *Steelworkers Trilogy* that, inter alia, substitutes arbitration for strikes and that holds that the arbitrator's award is an extension of the grievance procedure and an integral part of the agreement itself and that maintains peace, harmony, and democracy in the workplace. I think arbitrators seriously jeopardize all of that. Arbitrators are not brought into the collective bargaining process to impose external law solutions on the bargain at which the parties have arrived.

When, however, we come to the nonunion workplace, we deal with a much different ball of wax. We deal there with what those who advocate alternative dispute resolution in statutory disputes describe as merely a change of forum. And if that be true—see the *Mitsubishi*[12] and *Gilmer*[13] decisions and the recent *Cole*[14] decision—then arbitrators in that area are construing external law. If arbitration in that area is to survive and prevail, then close attention must be paid to due process standards and to the substantive statutory law. Incidentally, the new American Arbitration Association rules

---

[9]*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).

[10]*Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers Local 2713*, 103 F.3d 449, 154 LRRM 2207 (5th Cir. 1997).

[11]*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

[12]*Mitsubishi Motor Corp. v. Solar Chrysler-Plymouth*, 473 U.S. 614 (1985).

[13]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

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

expressly authorize arbitrators to use statutory remedies in deciding these cases and not to respect agreements in which statutory law and remedial power are substantially curtailed. Such arbitrators, to function effectively—and you can go back to the *Alexander v. Gardner-Denver Co.*[15] decision itself—must be well-versed in the external law that they are to construe. If that is not the case, arbitrators will invite a degree of judicial intervention that will decimate the system. Such arbitration systems work if they are fair, efficient, and expeditious. More substantial judicial review—and we are not talking about *Steelworkers*-type review—should be minimized, and it will be minimized, I predict, if arbitrators are well-trained in the substantive law, if arbitrators behave ethically and refuse to handle cases that depart from due process standards, for example, the Due Process Protocol you have heard about, of which Chris and I were co-chairs with Arnold Zack. If arbitrators will not become involved in disputes in which employees are compelled, involuntarily, to have their Title VII rights adjudicated in an arbitration procedure (and perhaps where even the choice of the arbitrator is procedurally tainted), then the system will flourish. But in the first area of collective bargaining, external law should be used sparingly—to elucidate, to shed additional light, or to more precisely define what the parties have agreed to and what the arbitrator is, under well-established law, authorized to do.

Comment

CHRISTOPHER A. BARRECA*

Bonnie has detailed the legal framework and Max has briefly talked about some of the critical considerations. From my perspective, a real problem that arbitrators face in this area—even under a rather stringent contract dealing with discipline or upgrading—is when a claim of discrimination by the individual employee is raised with respect to either the disciplinary decision or other issue. It is difficult to separate external law from the law of the contract.

In any event, I would like to set forth very briefly what I believe are the five current realities of the arbitration of employment disputes involving external law that I think can help set a framework for this discussion.

---

[15] *Supra* note 6.

*Partner, Paul, Hastings, Janofsky & Walker, Stamford, Connecticut.

Reality No. 1, in my judgment, is that Mr. Justice Douglas was right 37 years ago when, in the *Steelworkers Trilogy*,[1] he opined that not even the best federal judges were as qualified as established labor arbitrators to decide employment disputes. I was pleased to hear George Nicolau reiterate and reemphasize that proposition in his luncheon speech today.

Reality No. 2, in my judgment, is that the U.S. Supreme Court was wrong 24 years ago when, in *Alexander*,[2] the Supreme Court essentially concluded that labor unions could not be trusted to represent their members fairly when employment disputes, even a discipline case, involved a claim of discrimination. Ironically, in my view, the labor movement, and certainly its lawyers, were the principal drivers in the social agenda that resulted in many of these discrimination statutes that we are talking about. Indeed, the evidence is that the reward for that social agenda was a substantial decrease in union membership because individual employees no longer had to pay union dues to receive some of the protections that were involved. That is probably proof of the adage that "no good deed goes unpunished."

Reality No. 3, in my judgment, is that the U.S. Supreme Court was right six years ago when in *Gilmer*[3] it affirmed the *Trilogy* concept that knowing and voluntary agreements to arbitrate future employment disputes are enforceable. That, of course, is one of the battlegrounds of today. Significantly, when Arnold Zack was president a few years ago, this National Academy was very much involved in the development of the Due Process Protocol that Max alluded to earlier. Arnold, Max, and I were co-chairs of the diverse Task Force that developed the Protocol on Due Process for these types of disputes. Quite frankly, we have been overwhelmed by the reception it has received. As the current Chair of the Labor and Employment Law section of the American Bar Association, my greatest satisfaction in this role was when, as George Nicolau reported at lunch, the House of Delegates of the American Bar Association in its midwinter meeting in San Antonio endorsed that Protocol. That Due Process Protocol is now part of the policy of the American Bar Association.

---

[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).

[2] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

[3] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

Reality No. 4 is that the District of Columbia Circuit Court of Appeals was right this year when, in the *Cole*[4] case, Chief Judge and former arbitrator Harry Edwards, who I understand is here today, ended the National Academy debate over the application of external law. It is rather noteworthy that about 20 years ago, when Ann Miller, who is a member of the Academy, Max Zimny, and I were co-chairs of a labor arbitrator development program, Judge Edwards was one of the speakers. When the issue of external law was raised at that time, Judge Edwards understandably questioned the qualification, or lack of qualification, of arbitrators at that time. One of the current challenges for the Academy as we go forward is to help arbitrators to be able to deal more effectively with external law. In any event, I do not believe that a claim of discrimination can be separated from "just cause."

Reality No. 5 is that today, in the absence of arbitration of statutory discrimination claims, *few* employees, as George Nicolau pointed out at lunch, will ever have their statutory claims definitively decided. One could say, "So what?" The "so what" is that very few of the claims that go before the Equal Employment Opportunity Commission, or that go before state statutory groups, are found to have merit. Then, "so what" if employees do not have an opportunity to have them decided definitively by someone. Well, I think most of you will recall that another aspect of Mr. Justice Douglas's decision in the *Steelworkers Trilogy* included the fact that one of the reasons to justify arbitration of such disputes is the therapeutic value of the process. If one thinks about some of the claims that are being made in the workplace today and the long-term process involved when these cases go to court, and if one recognizes that some of them are never actually decided, you are aware that the sores fester in the workplace. The concept of a swift resolution through the arbitration process, which in my view has always been one of the major values of arbitration, is then a very critical factor.

Finally, if those so-called "realities" that I have just gone through are anywhere near accurate, I submit that we are close, perhaps, to another Golden Age of Arbitration. Back some 21 years ago, Dave Feller,[5] in a meeting of this group, talked about the end of the Golden Age of Arbitration. Some of the things he talked about

---

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

[5]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.

continue to be debated today. But, I think we really could be on the threshold of a Second Golden Age of Arbitration. I think the Academy can play a principal role in that age by preserving the concepts of fairness and due process that we all hold dear. George Nicolau talked about those considerations in his luncheon speech.

This, in my view, is what it is all about in terms of the future of employment arbitration. As we go forward in this area, it is not possible, in my view, to separate external law as we have tried to do over the years because these claims are now so much a part of the statutes of our country.

Discussion

Max Zimny: The labor movement was part of the group of organizations that fought very hard for the enactment of Title VII of the Civil Rights Act of 1964[1] and for the enactment of the 1991 amendments to Title VII. But neither the original statute nor its amendment modified resort to judicial adjudication of such disputes. That is not to say that arbitration that is knowingly and voluntarily agreed to by employees under circumstances that permit a free choice to utilize arbitration should not be encouraged. What should, in my opinion, be discouraged is imposing upon employees, especially employees of limited income who need a job, continuation of a job, or improvement on the job, as a condition thereof, surrender of their right to court intervention in Title VII–type disputes in favor of an arbitration procedure that they do not understand and cannot freely choose to utilize. I think that is a serious mistake, and I think that Harry Edwards' *Cole*[2] decision in coming to that conclusion—even with its added fillips consisting among other things of having the employer pay the fees and expenses of arbitrators and with adherence to our Due Process Protocol—is an inadequate substitute for the right of an employee who feels aggrieved to freely utilize the courts rather than arbitrators. I think that is a mistake, that, I think will not lead to a Golden Age of Arbitration. I think it will continue to be an embarrassment, and I am hopeful that the courts will see their way to reversing Judge Edwards's decision.

---

[1] 42 U.S.C. §2000e et seq. (1964).
[2] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).

Christopher A. Barreca: Those of you who are familiar with the Protocol and who have gone through it know that the one issue that we could not agree upon was the question of the agreements to arbitrate future disputes. As Max knows, I believe that is one of the major issues that was involved in the original *Steelworkers Trilogy*.[3] The question really is not, in my judgment, whether or not you agreed to arbitrate future disputes, but rather whether or not that agreement is knowing and voluntary. For many years there have been employment agreements in which the parties have agreed that disputes arising under that employment agreement would be subject to arbitration. I will not speak for Max, but I think what Max is concerned about is the individual employee coming in and signing up for a job. The concept of knowing and voluntary is a factual issue. It is a factual issue that has to be decided by the trier of facts, whoever that trier of fact is, be it a court or an arbitrator. Was that agreement knowing and voluntary, and if you look at *Gilmer*[4] and its progeny, that is an issue that is subject to resolution on a case-by-case basis.

Max Zimny: Let me suggest that "knowing and voluntary" as a condition of employment for the $30,000, $40,000 a year type folks that I represent is, it seems to me, a contradiction in terms. I know of no employee who wants a job, who likes the job, and who at that point must agree to arbitration to obtain or retain the job, who would pay any attention to the use of arbitration rather than a court should he or she ever be confronted with a statutory violation at some indefinite time in the future. What would clearly be voluntary and informed is a postdispute agreement by that employee to use arbitration rather than court proceedings because of his or her belief in the many benefits that arbitration offers for such an employee. Generally, I happen to favor postdispute arbitration rather than court proceedings for many of the same reasons you have heard Chris talk about. But it seems to me that the strong public policy embodied in the Act requires that people make a real unpressured free choice when they are confronted by the dispute, confronted by the facts, and not be subject to any intimidation or coercion in a basic economic sense.

Christopher A. Barreca: I would only submit that management made the same argument back at the time of the *Steelworkers Trilogy*,

---

[3] *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).

[4] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

that the decision about whether an issue should go to arbitration should be at the time of the dispute. There are a lot of good reasons for the position that Max has taken. On the other hand, there are a lot of good reasons for saying there are many things that an employee decides when deciding to take employment. Frankly, what convinces me is, I will repeat what I said during my brief comment, that very few individuals who file claims of discrimination will ever have an opportunity to have their cases definitively decided. Many of these cases are "wiped out" by the agencies. I forget what the last statistic was in Connecticut, but I think only about 17 percent of the cases get past the initial merit determination stage. And look at what arbitration can do in a situation apart from the merits of the case, the therapeutic value, and all of these other considerations, and the good that that kind of situation can do in the workplace. As long as the decision is knowing and voluntary, in my judgment, it should be enforced.