

CHAPTER 9

THE STATE OF EXTERNAL LAW'S EFFECT ON THE ARBITRATION PROCESS

Editor's Note: Ted St. Antoine, and Bob Vercruysse and his colleague, Gary Fealk, supplied two formal papers that lead off this chapter in the Proceedings. Their papers are followed by Marilyn Teitelbaum's presentation made at the meeting. The Academy acknowledges a special debt to Ms. Teitelbaum because she served as a last-minute replacement, after the original panelist had to cancel because of illness.

I. EXTERNAL LAW IN ARBITRATION: HARD-BOILED, SOFT-BOILED, AND SUNNY-SIDE UP

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Thirty-seven years ago Bernie Meltzer and the late Bob Howlett squared off at our annual meeting in a classic confrontation on an issue that refuses to die. What should an arbitrator do when there is a seemingly irreconcilable conflict between a provision of a collective bargaining agreement and the dictates of external law? Professor Meltzer was the hard-boiled logician. Arbitrators' proper domain is the parties' contract, said he, and we "should respect the agreement and ignore the law" when the two diverge.¹ Howlett took the softer, more accommodating approach. He reasoned that "every agreement incorporates all applicable law" and so arbitrators "should render decisions . . . based on both contract language and law."² A year later Dick Mittenthal joined the fray, along with this interloper. Dick preferred to look on the bright, practical side

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¹Meltzer, *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, 19.

²Howlett, *The Arbitrator, the NLRB, and the Courts*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 67, 83, 85.

and not follow either Meltzer or Howlett to their rigidly logical conclusions. Staking out a “middle ground,” he would allow an arbitral award to “*permit* conduct forbidden by law but . . . not *require* conduct forbidden by law.”³ After paying all due respect to Mittenenthal’s thoughtful analysis, neither Meltzer nor Howlett budged an inch from his original position.⁴ My contribution as discussant was to side with Meltzer’s hard-boiled stance, and to give priority to the contract rather than to the law.⁵

This paper is going to discuss what a cross-section of today’s Academy members think about this persisting problem. As we shall see, they tend to accept the Meltzer/St. Antoine thesis in theory—but when the going gets tough, most of them move over into Dick Mittenenthal’s corner, if not Bob Howlett’s. If I must declare a winner in this 40-year marathon, I believe it is Dick who gets the palm for the most widely accepted compromise solution. Before setting forth the results of my little survey, however, I shall briefly set forth my reasons for supporting the hard-line Meltzer position.

I start with two basic premises. First, most labor arbitrators in this country are not public tribunals. They are private individuals jointly selected by a union and an employer to tell those parties what their collective bargaining agreement means. Their authority comes entirely from the parties’ commission and they have no power beyond that. Second, labor arbitrators do not, in a technical sense, enforce contracts; courts enforce contracts. The arbitrator’s role is to provide a definitive interpretation or reading of the contract, which a court is obligated to accept absent arbitrator fraud, an exceeding of authority, or a denial of due process in the arbitration. It is often overlooked that in the leading case of *Enterprise Wheel*,⁶ the U.S. Supreme Court seems to have accepted this approach. The Court stated flatly that an arbitral award is legitimate only if it “draws its essence” from the labor agreement, and arbitrators exceed the scope of the submission if they base

³Mittenenthal, *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, 50 (emphasis in the original).

⁴Meltzer and Howlett, *Rejoinders* (two separate papers), in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 58, 64.

⁵St. Antoine, *Discussion*, in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 75.

⁶*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

their decision on their view of the “requirements of enacted legislation.”⁷

I agree with Dick Mittenthal that “[a]rbitrators derive their powers from the contract, not from the [National Labor Relations] Board and not from federal law.”⁸ I further agree with Dick, for this and other reasons, that Bob Howlett was wrong in thinking that all contracts incorporate all law and thus entitle arbitrators to choose the law over the contract when the two conflict.⁹ But I disagree with Dick’s qualification that arbitrators should not *require* conduct they deem contrary to law. Here I believe Meltzer had the better of the argument in saying there is no logical basis for Dick’s distinction.¹⁰ The parties have granted the arbitrator the authority to apply external law or they haven’t. If they haven’t, it makes no sense to say an arbitrator may *permit* conduct contrary to law but not *require* it. Meltzer also observes that in criticizing Bob Howlett’s position, Dick cites the *Enterprise Wheel* statement I have quoted above, but “fails to explain why his formula does not run afoul of the Justice’s unqualified limitation on arbitral authority.”¹¹

There is a highly practical reason that, in the event of an irreconcilable conflict between the contract and the law, I believe an arbitrator should follow the contract and not the law. In many instances the law is simply not that clear or settled. For me the classic example is *Teamsters v. United States [T.I.M.E.-D.C.]*.¹² The U.S. Supreme Court held that Title VII of the 1964 Civil Rights Act was not retroactive and did not affect established seniority rights, and thus the perpetuation of seniority credits acquired under pre-Act discriminatory conditions did not constitute a present violation of the statute. In so ruling, the Court overturned an unbroken string of contrary holdings by six courts of appeals in over 30 cases and the dicta of two other courts of appeals.¹³ Arbitrators who had refused before the *Teamsters* decision to require compliance with clear seniority provisions on the grounds they violated Title VII would have been wrong not only under the contract but also under the law.

⁷*Id.* at 597.

⁸Mittenthal, *supra* note 3, at 53.

⁹*Id.* at 52.

¹⁰Meltzer, *supra* note 4, at 60.

¹¹*Id.* at 60 n.5.

¹²431 U.S. 324 (1977).

¹³*Id.* at 378–79 (Marshall, J., dissenting, joined by Brennan, J.).

Now I must play something of a spoilsport. Despite all the fun this issue of external law has provided Academy members and guests over the years, it may all boil down to a tempest in a teapot. Everyone seems to agree, including the Supreme Court,¹⁴ that an arbitrator may look to the law for guidance in interpreting a contractual provision. That of course is especially true if the language of the agreement closely tracks statutory phraseology, thus deliberately inviting resort to judicial or agency rulings as an aid to contract interpretation. Furthermore, if there are ambiguities in a contract, one possible interpretation most likely being lawful and another most likely not, an arbitrator can certainly indulge in the presumption that the parties intended their agreement to be construed consistent with the law so as to preserve its validity. Finally, the union and the employer may agree, either in the contract itself or in the submission agreement, that the arbitrator is to rule on statutory as well as contractual issues, or is to interpret the contract in the light of the relevant statutes as construed by the courts or administrative agencies. When all the situations are identified in which arbitrators may, *consistent* with the contract, comply with the dictates of statutes or other legal authorities, we have probably accounted for the overwhelming majority of arbitrations involving external law. Truly *irreconcilable* conflicts between contract and law must be relatively rare.

Let me add a couple of practical suggestions for both party representatives and arbitrators. By now the potential for clashes between contractual and legal requirements should be well known, along with the differing arbitrator reactions to them. Why shouldn't the parties spell out, either in the contracts themselves or at least in their submission agreements, how they wish the arbitrator to handle such conflicts? In the absence of such guidance, an arbitrator confronted with what may be a direct conflict between law and contract might ask the party representatives directly how they wish him or her to respond. I have felt I should ask on a few occasions, and the answers and reasons have varied widely. Examples follow:

- Mr. Arbitrator, we know there is a possible conflict, and we disagree with each other about both the contract and the law. All we want from you is a final and binding interpretation of the contract. If that still leaves us at odds, we'll go to court for a final resolution of the legal question.

¹⁴Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-98 (1960).

- Mr. Arbitrator, the last thing we want is to prolong this dispute, or to have you issue an unenforceable award. If you need to take the law into account to decide this matter finally, by all means do so. Otherwise, we know an award contrary to law will be no more enforceable than a contract contrary to law.

Fortunately for me, both parties have always agreed on either my considering the law or my ignoring it. If they had disagreed, I would not have felt authorized to consider it.

To determine how today's Academy members would deal with these questions, I conducted a survey in early 2004. I asked the approximately 240 members who are on our unofficial e-mail list to complete the questionnaire that is attached as Appendix A to this paper. A total of 52 members responded and I am deeply appreciative of their cooperation. The full results are tabulated in the Appendix. I cautioned respondents to assume the questions related to arbitrations only in private sector employment, to avoid any special problems related to arbitration in the public sector. A Canadian arbitrator also noted that the Supreme Court of Canada requires arbitrators to apply and enforce all relevant statutory law.

A majority of the responding arbitrators are prepared to cite external law in their decisions, at least under certain conditions. About half will do so only if the parties themselves have interjected legal authorities into the dispute through briefs or argument. Around 30 percent will invoke external law "when it seems especially pertinent" even if the parties haven't cited legal authorities. Reliance on external law seemed most appropriate for some arbitrators when the issue was "discrimination" or of course when the contract plainly incorporated the law. Arbitrators opposed to citing external law declared that labor arbitration "is the creation of the parties" and their intent should prevail. Those relying on external law believed that the parties want "finality, consistency, and legal enforceability."

A solid majority of the respondents—almost 60 percent—took much of the steam out of this great debate by saying they "seldom feel required to deal with the issue of contract versus law because I believe the vast majority of contracts should and can be interpreted as consistent with the law." That reflects a sentiment I have long held. But there surely are cases where a conflict cannot be avoided and this is where I found our members' alignments with the Meltzer, Howlett, or Mittenthal positions, almost 40 years after their initial enunciation, most revealing and to my mind somewhat

paradoxical. In the event of an irreconcilable conflict, almost twice as many arbitrators said they would follow the contract, unless the parties instructed them otherwise, as said they would follow the law. That would be in accord with the Meltzer rather than the Howlett approach. Despite the vote generally favoring the contract over the law, however, another clear majority—again almost 60 percent—stated they would *not* order a party to violate external law as part of their award. While Meltzer and I might rail that this was illogical, the result plainly amounts to a triumph of what I call Dick Mitterthal’s sunny-side-up view: The contract, and logic, prevail—until it really hurts!

There was considerable divergence of opinion about whether arbitrators would ask the parties for their positions on the use of external law when there appears to be a conflict between law and contract. The largest single group, but well short of a majority, would not specifically ask but would decide for themselves, after taking into account any views expressed by the parties in briefs or oral argument. Less than a quarter would ask whether they should consider only the contract or external law as well. At one point in the survey, 35 percent said they had no basis “for invoking external law against the contract unless both parties authorize it.” Somewhat confusingly, however, in answering another question, a mere 15 percent agreed with me that they would apply external law only if both parties accepted that course.¹⁵ But more than a quarter agreed they would feel bound in the framing of the award if both parties were in agreement on giving primacy to either the contract or the law.

As one might expect, arbitrators on both sides of the contract versus law debate had good reasons for their respective positions. Those favoring the contract declared that their authority derives from the parties and the parties’ contract, and absent the parties’ accord, arbitrators have no basis for invoking external law against the contract. They also emphasized that the law is often unclear and unsettled, and that unless the parties agree otherwise, arbitrators should provide a definitive interpretation of the contract and leave issues of external law to the courts. Interestingly, although

¹⁵I may not have been sufficiently clear, however, that I was inquiring here only about *conflicts* between contract and law rather than the use of external law as a guide to the interpretation of, or the resolution of ambiguities in, the contract. I too would simply assume the parties’ assent in the latter situation.

more arbitrators had earlier stated they would follow the contract instead of the law if there was an irreconcilable conflict, the only reason for a position one way or the other that garnered the support of a majority of all respondents was that the parties should be presumed to want their contract to be interpreted consistent with external law. Other favored reasons for a pro-law approach were that the collective agreement almost invariably provides that an arbitral award should be "final and binding" and that it is counterproductive to order a party to take action in violation of external law.

In addition to answering my specific questions, respondents offered a variety of worthwhile observations. A number of arbitrators commented that external law is now an integral component of the arbitration process, and that it would be futile to resist this development. There was disagreement over whether this would adversely affect nonlawyer arbitrators. Some believed well-qualified nonlawyers would have no difficulty handling the sort of statutory issue that is typical in arbitration. Several others insisted that in any event "our province is contract, not law." Some examples of other provocative and often contrasting remarks are as follows:

- "Importing external law into arbitration has furthered its 'legalization,' mostly because lawyers often lose sight of the parties' relationship."
- "Clinging to the old ways will result in a perceived 'illegalization' of arbitration, to the general detriment of the institution."
- "I prefer to limit myself to contract interpretation but the courts are pushing more and more legal questions into arbitration."

A group of thoughtful and experienced professionals have demonstrated a wide range of attitudes on the perennial question of law versus contract. Overall, most seem to say that they will follow the contract and not the law if a conflict is unavoidable. But a larger number of respondents support rationales that would favor the law. And when it comes to the ultimate test, namely, whether one should issue an award ordering action that seems contrary to external law, the majority say, with perhaps more practicality than logic, "No." Like Dick Mittenthal, they would permit, but not require, conduct in violation of law. Perhaps it simply appears more unseemly for arbitrators to get directly involved in unlawful

conduct than for them merely to let such conduct stand because the contract calls for it.

I shall now turn for a few words about how external law most forcefully affects the arbitration process. That is when the courts are asked to enforce an arbitration agreement or an arbitral award. In *AT&T Technologies v. Communications Workers*,¹⁶ the U.S. Supreme Court reaffirmed and refined four principles set forth in the famed 1960 *Steelworkers Trilogy*¹⁷ concerning the judicial enforcement of an executory agreement to arbitrate:

- Arbitration is a matter of contract and a party need not arbitrate unless it has so agreed.
- The court, not the arbitrator, is to decide whether a party has agreed to arbitrate, unless the parties clearly provide otherwise.
- The arbitrator, not the court, is to decide the claim under the collective bargaining agreement, even if the claim appears frivolous to the court.
- If the contract contains an arbitration clause, there is a presumption of arbitrability. Arbitration should not be denied unless the clause cannot be interpreted as covering the dispute. Doubts are resolved in favor of coverage.

Some parties, most often employers, balk at the application of these standards in certain extreme cases. That is an understandable human reaction but both logic and policy are on the side of the Court. A typical arbitration clause covers “all disputes arising under the contract,” with rare exclusions, and is not limited to “meritorious” or “nonfrivolous” claims. And as a practical matter, even the arbitration of frivolous claims may serve a therapeutic function, clearing the air and letting the parties get on with their business.

¹⁶475 U.S. 643 (1986).

¹⁷*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The first two cases dealt with the enforcement of an agreement to arbitrate; *Enterprise* dealt with the enforcement of an arbitral award once issued. Generally, *Enterprise* held that a court should not review the merits of an award and should confine itself to such questions as whether there was any fraud or corruption, denial of due process, or exceeding of the arbitrator’s commission.

Probably the most controversial issue of recent years has been the authority of a court to set aside an arbitration award on the grounds it violates “public policy.” In *Paperworker v. Misco, Inc.*,¹⁸ the Fifth Circuit had refused to enforce an arbitrator’s reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”¹⁹ The Court naturally recognized the general common law doctrine that a contract will not be enforced if it violates the law or public policy. But it cautioned that there must be “‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”²⁰

Not all the lower courts seemed willing to accept this message. The Supreme Court had to reinforce the lesson in *Eastern Associated Coal Corp. v. United Mine Workers District 17*.²¹ This time an arbitrator had ordered the reinstatement of a truck driver who had twice tested positive for marijuana. A three-months’ suspension was substituted for the discharge, however, and the employee had to undergo drug treatment and testing and to accept “last chance” terms in his reinstatement. The employer argued that the award was contrary to public policy but the Court disagreed. It first emphasized that the award should be treated as the equivalent of an agreement by the parties on the meaning of “just cause.” It then applied *Misco*, pointing out that the relevant federal statute and Department of Transportation regulations contained both anti-drug and rehabilitation provisions for safety-sensitive positions and nothing that would specifically prohibit the grievant’s reemployment. Justices Scalia and Thomas, concurring, would have gone even further. They would refuse to enforce an agreement or award only on the grounds it violated some positive law, and not any other “public policy.”²²

¹⁸484 U.S. 29 (1987).

¹⁹*Id.* at 38.

²⁰*Id.* at 43, quoting from *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

²¹531 U.S. 57 (2000).

²²*Id.* at 68.

One should think that with a unanimous Supreme Court sustaining the award in *Eastern Associated Coal*, and with two of the most conservative Justices its most ardent champions, the final stake would have been driven through the heart of nebulous public policy challenges to arbitration. But the objectors have shown remarkable resilience over the years, and there is still available the claim that an award does not “draw its essence” from the collective bargaining agreement or that the arbitrator has attempted to “dispense his own brand of industrial justice.”²³

Nonetheless, a review of courts of appeals’ decisions over the past year is encouraging that the Supreme Court’s words have finally got through to the lower courts. Thus, courts enforced arbitration of claims that an employer violated an agreement with a union concerning the parties’ conduct during an organizing campaign,²⁴ that an employer had improperly made unilateral changes in job categories so it could fill vacancies without regard to contract procedures,²⁵ and that a truck driver had been discharged unjustly for urinating in public.²⁶ During the same period arbitral awards were sustained that reinstated a monitor at a natural gas facility who left his post for more than three hours to look for a missing and possibly injured son,²⁷ that conditionally reinstated an employee who forged customers’ names to public assistance checks,²⁸ and that granted a union \$1.6 million in damages because an employer failed to pay union-scale wages to nonunion workers performing off-site sheet metal work in violation of a disincentive provision in a project labor agreement.²⁹ Courts have also been ready to uphold arbitrators’ clarification of awards following their initial issuance.³⁰

²³*Enterprise Wheel*, 363 U.S. at 597–98. For a pessimistic view of the likelihood of keeping the courts’ hands off labor arbitration awards, see Feller, *Presidential Address: Bye-Bye Trilogy, Hello Arbitration!* in *Arbitration 1993: Arbitration and the Changing World of Work*, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994) 1, 9–14.

²⁴*SEIU v. St. Vincent’s Medical Center*, 344 F.3d 977 (9th Cir. 2003). See also *SEIU v. NYU Hospital Center*, 343 F.3d 117 (2d Cir. 2003).

²⁵*PaperWorkers Local 5-857 v. Conoco, Inc.*, 320 F.3d 1123 (10th Cir. 2003).

²⁶*Teamsters Local 767 v. Albertson’s Distribution, Inc.*, 331 F.3d 485 (5th Cir. 2003).

²⁷*MidAmerican Energy Co. v. IBEW Local 499*, 345 F.3d 616 (8th Cir. 2003).

²⁸*Shaw’s Supermarkets, Inc. v. UFCW Local 791*, 268 F. Supp. 2d 115 (D. R.I. 2003).

²⁹*Eisenmann Corp. v. Sheet Metal Workers Local 24*, 323 F.3d 375 (6th Cir. 2003).

³⁰See, e.g., *Sterling China Co. v. Glass & Pottery Workers Local 24*, 357 F.3d 546 (6th Cir. 2004); *Brown v. WITCO*, 340 F.3d 209 (5th Cir. 2003).

Over the past several decades a heated debate has raged over so-called "mandatory arbitration." An employer makes it a condition of employment for individual employees that all workplace disputes must be taken to arbitration for final resolution rather than be made the subject of an employee's court suit. Or, more rarely, the employer seeks to apply the arbitration clause in a union contract to the same end. The purpose, of course, is to avoid the time, cost, and presumably more damaging remedies resulting from trial by judge or jury. One effect is to put even sensitive civil rights claims in the hands of arbitrators instead of the courts. Most scholars, at least at the outset, strongly condemned these arrangements.³¹ The National Academy of Arbitrators also adopted a statement opposing the practice.³²

Nonetheless, in *Gilmer v. Interstate/Johnson Lane Corp.*,³³ the U.S. Supreme Court approved a mandatory arbitration agreement between an employer and an individual employee as a bar to a court suit by the employee, claiming age discrimination. The theoretical arguments against such an agreement are very powerful. Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the vindication of those statutory rights. The specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights themselves. No employer, acting either alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum and procedures as the price of getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy.

³¹ See, e.g., Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1 (1996); Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denver U. L. Rev. 1017 (1996). But cf. Estreicher, *Pre-dispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1182 (1997).

³² National Academy of Arbitrators, *Statement on Condition of Employment Agreements*, in *Arbitration 1997: The Next Fifty Years*, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 312.

³³ 500 U.S. 20 (1991). Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (employee who lost arbitration under union contract could later sue for alleged racial discrimination). The Court has since held that an individual's agreement to arbitrate employment disputes does not preclude the EEOC from seeking victim-specific relief in court, including reinstatement, back pay, and damages. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Yet facts often trump theory. Highly pragmatic considerations indicate that the ordinary rank-and-file worker may be better off with the actuality of arbitration, even of the mandatory variety, than with the beguiling, but often illusory, possibility of a court suit. Experienced plaintiffs' attorneys have estimated that only about 5 percent of the individuals with an employment claim who seek help from the private bar are able to obtain counsel.³⁴ Of course, some of those who are rejected will not have meritorious claims. But others will be workers whose potential dollar recovery will simply not justify the investment of the time and money of an experienced lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse. It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum.

Several studies show that employees actually prevail more often in arbitration than in court. The American Arbitration Association in one study found a winning rate of 63 percent for arbitral claimants.³⁵ In a much-criticized system operated by the securities industry, employees still prevailed 55 percent of the time, according to the U.S. General Accounting Office.³⁶ By contrast, claimants' success rates in separate surveys of federal court and EEOC cases were only 14.9 percent and 16.8 percent, respectively.³⁷ Even if the latter figures are somewhat skewed because they may omit pretrial settlements, the relative attractiveness of arbitration for claimants cannot be denied.³⁸ As might be expected, *successful* plaintiffs obtain larger awards from judges or juries. But claimants as a group recover more in arbitration.³⁹ All these statistics reflect the situation before the American Bar Association's Due Process Protocol⁴⁰

³⁴Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 58 (1998).

³⁵*Id.* at 46.

³⁶*Id.* at 50.

³⁷*Id.* at 49.

³⁸*Cf.* Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399, 418-62 (2000).

³⁹Maltby, *supra* note 34, at 54.

⁴⁰Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Disp. Resol. J., Oct.-Dec. 1995, at 37. The Task Force consisted of management, union, and plaintiffs' attorneys from the ABA and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

was adopted, when many flawed systems were in existence. Arbitration procedures should be even more favorable for employees now. In short, for me the key is not the mandatory nature of the agreement but the accessibility and fairness of the arbitration system in actual operation.

As an arbitrator, I am quite satisfied with the current relationship between arbitration and external law. Arbitrators can ordinarily take public law into account in their treatment of collective agreements. The parties generally wish their contracts to be interpreted so as to preserve their validity. In the relatively rare instance of irreconcilable conflicts between contract and law, the parties have the right to determine which takes priority in the arbitral process. Being a hard-boiled purist in these matters, I would require both parties, expressly or impliedly, to authorize me to override the contract on the basis of law. Otherwise I would follow the contract, which I consider the sole source of the arbitrator's power in the private sector, even if that meant directing a party to take action I might consider unlawful. Other arbitrators will differ, especially on that last point. I find their sunny-side-up approach illogical, but maybe it is more practical. The courts, of course, will have the final say on what can be enforced.

I am happy to report that since *Misco* and *Eastern Associated Coal*, the lower federal courts seem to have fallen into line with the Supreme Court's teachings on the enforcement of both executory agreements to arbitrate and arbitral awards. A judge's personal notions of public policy, not closely related to statutes or decisional law, should not be the basis for refusing to enforce an otherwise valid award. Finally, the much-maligned mandatory arbitration agreement is apparently turning out to be a blessing in disguise for rank-and-file employees. They can get their cases heard and they generally do better in arbitration than they would in court. My hope is that employers will find that the employees' success rate is outweighed by the savings in time, litigation costs, and psychic wear and tear on everyone, which have long been the advantages of arbitration over court suits.

APPENDIX A

QUESTIONNAIRE ON EXTERNAL LAW

1. In handling grievances, arbitrators often deal with issues in which contract rights may overlap statutory or other legal rights, e.g., anti-union discrimination, “status” discrimination (based on race, sex, age, disability, etc.). In such situations, what comes closest to reflecting your general approach (please assume all these cases involve private sector employment)?:

8 I rarely if ever cite external legal authorities, such as statutes, court decisions, etc., even if the parties have cited them.

26 I would cite external legal authorities if but only if a party interjected them into the dispute.

16 I cite external law when it seems especially pertinent or persuasive on a particular point, even if the parties haven’t cited legal authorities.

_____ Other (please explain). Individual arbitrators said they would cite external law “if it was controlling”; if the parties had “alluded to the law,” even without citing specific authorities; if “discrimination” was the issue or the contract plainly incorporated the law.

Optional—My reasons for such treatment of external law in arbitration decisions are:

Arbitrators opposed to citing external law declared that “labor arbitration is the creation of the parties”; the parties’ intent should prevail; any use of external is “up to the parties”; the arbitrator “has no authority outside the contract”; and the job is “to apply the CBA, not to provide a comprehensive legal analysis.” Several arbitrators who rely on external law stressed that “the parties want finality, consistency, and legal enforceability,” with one adding that it’s basic to contract law to void illegal bargains. Two arbitrators would answer a *losing* party who raised legal arguments. A couple of arbitrators mentioned the importance of writing an opinion that would “withstand judicial scrutiny.” Another would advise counsel in the corridor that the award “would not be in conflict with the law.” A Canadian pointed out that use of external law is mandated by the courts in Canada.

2. Arbitrators may encounter cases where there seems a conflict between a statute or other external law and the provisions of the parties’ collective bargaining agreement. This of course presents the classic Howlett-Meltzer-Mittenthal debate of the late ’60s (NAA

Proceedings, vols. 20 & 21). What is your general approach (check all that apply)?:

12 I ask the parties whether they wish me to consider only the contract, or external law as well.

14 I consider myself bound as to the AWARD if both parties agree on one course or the other.

4 But I may express my own views in the OPINION if I disagree with the parties—or even recuse myself if I feel strongly.

17 If the parties disagree on whether I should apply external law, I decide for myself what course to follow.

8 I apply external law only if both parties agree on that course.

22 I do not specifically ask for the parties' views on the question of external law but decide for myself what course to follow, taking into account any position the parties may have expressed in briefs or oral argument.

30 I seldom feel required to deal with the issue of contract versus law because I believe the vast majority of contracts should and can be interpreted as consistent with the law.

21 In the event of an IRRECONCILABLE conflict between the contract and the law, I would follow the contract unless the parties instructed me otherwise.

30 Although I would generally follow the contract in the preceding situation, I would NOT order a party to violate external law as part of my Award.

12 In the event of an IRRECONCILABLE conflict between the contract and the law, I would follow the law.

_____ Other positions (please explain). At least half a dozen arbitrators commented that they had never encountered a situation where they felt there was an “irreconcilable” conflict between the contract and the law. Two stated their position would depend on just how clear the law was. One arbitrator would tell the parties, if there was a perceived conflict, that he would make every effort to reconcile and apply both contract and law.

My reasons for the above positions are (check all that apply):

18 My only authority derives from the parties and their contract and I have no basis for invoking external law against the contract unless both parties authorize it.

14 The courts are the proper forum to resolve conflicts between the contract and external law; my expertise relates primarily to contract interpretation, not external law.

17 The law is often unclear or unsettled; unless the parties agree otherwise, they are entitled to the arbitrator's definitive interpretation of the contract standing alone before they decide on whether to sue over issues of external law.

30 The parties should be presumed to want their collective bargaining agreement, like other contracts, to be interpreted and applied consistent with external law.

20 The collective bargaining agreement almost invariably provides that the arbitrator's award is to be "final and binding"; it will not be such if the arbitrator's decision flies in the face of external law.

17 The public policy that places arbitration in such a preferred position is based to a large extent on the desire for an early, nonlitigated resolution of disputes; that policy is flouted if arbitrators decide cases contrary to law.

22 It is futile, counterproductive, and an open invitation to further litigation for an arbitrator to order a party to take action that is a violation of external law.

_____ Other (please explain). One arbitrator cited his decision in *Duraloy*, 100 LA 1166, 1172 (1993), which reasoned that absent the parties' authorization, or the incorporation of law into the contract, an arbitrator's reliance on external law would be improper because it would constitute adding to, or subtracting from, the contract. (What might the Howlett group, which follows the law, say it is doing?) Others emphasized that the integrity of the arbitral process presupposes obedience to law; a decision contrary to law frustrates the process by being unenforceable; and an illegal award does not constitute an appropriate remedy. A Canadian noted that the Supreme Court of Canada requires arbitrators to apply and enforce all relevant statutory law.

3. Please add any general comments you may have about the whole topic of the effect of external law on labor arbitration. Is it, for example, another factor furthering an unhealthy, excessive "legalization" of the arbitral process? Has it or has it not reduced the acceptability of highly qualified arbitrators who don't hold law degrees—or deterred nonlawyers from entering the field? What about such heretofore supposed prized attributes of arbitration as speed, cheapness, and relative informality? Etc., etc., etc.

A number of arbitrators declared that external law is now an integral component of the arbitration process, that statutory issues must often be addressed, and that it would be futile to resist this development. Law is said to be "a seamless part of the practice."

There were differing views about whether this adversely affects nonlawyer arbitrators. Some thought well-qualified nonlawyers were as capable as lawyers to resolve the sort of statutory dispute that is typical in arbitration. Even those who felt lawyers may be favored believe many nonstatutory, purely contractual issues still remain for nonlawyers to handle. And several arbitrators were ready to sound the traditional theme that "our province is contract, not law."

Those responding were reassuring that closer adherence to law should not destroy arbitration's attractive informality, and one remarked that good briefing on the law ought to prevent problems of an undue lengthening of the process.

A few arbitrators worried that the increasing complexity (discovery, etc.), and accompanying high cost, of *employment* arbitration could spill over into labor arbitration. This might be especially hurtful, they feared, for smaller unions and employers.

Miscellaneous comments or admonitions follow (some have been reworded):

- "The parties' contract is the jurisdictional basis [for arbitration] but interpretation in light of the law is a basic principle."
- "The parties intend to follow the law whenever possible."
- "Importing external law into arbitration has furthered its 'legalization,' mostly because lawyers often lose sight of the parties' relationship."
- "Clinging to the old ways will result in a perceived 'illegalization' of arbitration, to the general detriment of the institution."
- "It's dangerous to enter an area that the parties haven't briefed or argued."
- "Applying external law promotes the 'speed, cheapness, and relative informality of arbitration' by expediting a final resolution of the dispute."
- "I prefer to limit myself to contract interpretation but the courts are pushing more and more legal questions into arbitration."
- "Don't put arbitration in disrepute by issuing awards contrary to law."
- "Lower courts are too ready to overturn an arbitration decision despite the 'final and binding' language of the contract."