II. THE ROLE OF EXTERNAL LAW IN ARBITRATION AND JUDICIAL REVIEW

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The role of external law in arbitration proceedings has been hotly debated by lawyers, arbitrators, and scholars ever since the Supreme Court affirmed the jurisdiction of federal district courts to compel arbitration under the terms of a collective bargaining agreement in *Textile Workers v. Lincoln Mills*.[1] Traditionally, the debate has centered on the issue of whether the arbitrator exceeds his or her authority by looking to outside law when the authority to do so is not specifically incorporated into the agreement, or whether an arbitrator is required to consider applicable law whenever consideration of such law would impact the award.[2]

This article will open with the present recent case law that supports the conclusion that arbitrators cannot consider outside law unless the parties grant such power to them. We also examine relevant legislation and case law on *individual* employment cases; situations where the parties have granted the arbitrator the right to apply external law; the extent to which an arbitrator's application of external law is subject to judicial scrutiny, and an arbitrator's power to conduct class-wide arbitrations concerning the application of law. We close by addressing the implications of these principles for arbitrators and advocates.

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[1]353 U.S. 448 (1957).

[2]*Compare e.g.*, 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, 14–17; *The Arbitrator, the NLRB, and the Courts*, 67; 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 & Howlett, *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), 58; Birch, *The Arbitrator's Dilemma: External vs. Internal Law? Narrowing the Debate*, Disp. Resol. J., May, 1998, 58, 59–60.

Arbitrators Cannot Apply Outside Law Without an Express Delegation of Authority

The foundations of the debate over the authority of arbitrators to consider outside law were laid by the Supreme Court's dicta in *Steelworkers v. Enterprise Wheel*.[3] In that case, the Supreme Court stated that an arbitration award that is solely based upon the arbitrator's view of the requirements of enacted legislation would exceed the scope of his authority, but an award in which the arbitration is "looking to the law" for help in making sense of the agreement would not exceed his or her authority.[4] This dicta has been cited by proponents on both sides of the debate as supporting their positions.

Proponents of the view that arbitrators may consider external law often argue from this dicta that as long as the parties' agreement is also considered, it is perfectly acceptable for an arbitrator to consider external law in deciding the grievance. Although some argue that the "looking to the law for help" dicta gives arbitrators license to examine contractual language in context with statutory rights *whenever* it is helpful to the arbitrator, we submit that this is far too broad a reading of *Enterprise Wheel* and that subsequent legal precedent supports this conclusion.

The "looking to the law for help" language merely provides the arbitrator with the ability to look at external law when a term in the collective bargaining agreement has a particular meaning under the law *and* where *some evidence shows* that the legal meaning was considered by the parties when they agreed to the contract provision at issue. For example, the "looking to the law for help" exception might be appropriate when determining the meaning of a successor clause, as the term "successor employer" has a particular meaning under that law[5] *and* there is evidence to suggest that the parties considered the legal meaning of this term in formulating the contractual language. In *Zady Natey, Inc. v. United Food and Commercial Workers International Union, Local No. 27*,[6] the Fourth Circuit upheld the district court's refusal to set aside an arbitrator's award interpreting the term "successor" in the collective bargain-

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[3]363 U.S. 593 (1960).
[4]*Id.* at 597–98.
[5]*See, e.g., NLRB v. Burns Security Systems*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB,* 428 U.S. 27 (1987); *Canteen Co.,* 317 NLRB 1052 (1995).
[6]995 F.2d 496 (4th Cir. 1993).

ing agreement to mean *any* subsequent purchaser, not only a "successor" as defined by federal labor law. The arbitrator had held that there was no evidence that the parties intended to restrict the meaning of the term "successor" to a successor employer under federal labor law.[7]

In cases in which there is no evidence that legal definitions or precedent were considered when the parties struck their deal, consideration of outside law by the arbitrator is beyond the arbitrator's jurisdiction. This point is well-illustrated by numerous cases in which arbitrators refuse to rule on issues relating to whether an employer committed an unfair labor practice, even when the NLRB has deferred the processing of the charge pending the arbitrator's award.[8]

When an arbitrator actually considers external law without an express delegation of authority, the award may be vacated. For example, in *Roadmaster Corp. v. Production & Maintenance Employees' Local 504,*[9] a Seventh Circuit case, the arbitrator found that the employer violated section 8(d) of the NLRA despite the fact that

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[7] *See also Super Fresh Food Markets, Inc. v. United Food & Commercial Workers Local Union 1776*, 249 F. Supp. 2d 546 (E.D. Pa. 2003) (district court refused to set aside award in which the arbitrator relied on the parties' bargaining history to determine that there was no intent that the term "successor" be limited to the definition of a successor under federal labor law).

[8] *See, e.g., Farmer Brothers Co.*, 64 LA (BNA) 901, 904 (Jones Jr., 1975):

> [I]t is vital to bear in mind that arbitration remains consensual in nature, not statutory, and that the arbitrator's decisional life is tied, not to Congress or the Labor Board, but to the contracting parties. Of course, to the extent that an arbitrator makes explicit the facts, and his contractual views of them, from which emerges his decision, the Labor Board is enabled to make its own judgment of the statutory significance of the arbitral decision. . . . And in no event is the arbitrator statutorily empowered to make the legal conclusion that an unfair labor practice does or does not exist. That is solely the Labor Board's prerogative (one in which it does not purport in *Collyer* to delegate to arbitrators, it is important to note).

See also American Crystal Sugar, 99 LA (BNA) 699, 704–05 (Jacobowski, 1992); *Singer Co.*, 71 LA (BNA) 204, 214 (Kossoff, 1978); *Beecher Peck & Lewis*, 74 LA (BNA) 489, 492 (Lipson, 1980).

[9] 851 F.2d 886, 888–89 (7th Cir. 1988). *See also Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184–85 (7th Cir. 1985) (an arbitrator's opinion fails to draw its essence from the collective bargaining agreement if it is based on "some body of thought, or feeling, or policy or law that is outside the contract"); *Certain Underwriters at Lloyd's, London v. Argonaut Insurance Co.*, 264 F. Supp. 2d 926, 939 (N.D. Cal. 2003); *National Gypsum Co. v. Oil, Chemical & Atomic Workers Intern. Union*, 1997 Westlaw 358048 (E.D. La. 1997) (suggesting that arbitrator cannot base his decision on external law without that power being delegated to him); *Challenger Caribbean Corp. v. Union General de Trabajadores de Puerto Rico*, 903 F.2d 857, 866 (1st Cir. 1990). *But see Ottley v. Sheepshead Nursing Home*, 688 F.2d 883, 888–89 (2d Cir. 1982) (rejecting a "per se rule" against the arbitrator looking to external law in reaching a decision).

there was no contract provision incorporating NLRA law. As a result, the court vacated the arbitrator's award on this point because he exceeded the scope of his authority and cautioned:

> The arbitrator clearly went beyond considering the contract's terms to consider outside 'positive' law, the NLRA. Resolution of NLRA disputes must be left to the NLRB and not to an arbitrator. When a contract, such as the one involved here, specifically limits an arbitrator's subject matter jurisdiction, the arbitrator should restrict his consideration to the contract, even if such a decision conflicts with federal statutory law.[10]

Individual Employment Legislation

Since the *Enterprise Wheel* decision in 1960, Congress has fashioned a panoply of new statutory employment rights. For example, Title VII of the Civil Rights Act (1964), the Age Discrimination in Employment Act (1967), the Americans with Disabilities Act (1990), the Worker Adjustment Retraining and Notification Act (1988), the Family and Medical Leave Act (1993), and the Employee Retirement Income Security Act (1974) all post-date *Enterprise Wheel*. As such, it is not surprising that the debate as to whether and/or when an arbitrator may consider external law has been greatly affected by court decisions considering these statutory rights.

In *Alexander v. Gardner-Denver Co.*,[11] the Supreme Court held that a collective bargaining agreement containing an antidiscrimination clause did not waive an individual's right to litigate statutory discrimination claims. In *Gardner-Denver*, a discharged African-American employee filed a grievance under the collective bargaining agreement between his union and his employer. In the grievance, it was claimed that the employee was discharged without just cause. The union argued that the employee's discharge resulted from racial discrimination and relied on a general nondiscrimination provision in the collective bargaining agreement. This nondis-

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[10] *Id. at* 889. *See also Graphic Arts Int'l Union Local 97B v. Haddon Craftsmen*, 796 F.2d 692 (3rd Cir. 1986) (arbitrator cannot consider statutory violations under the NLRA absent a stipulation by the parties granting him the authority to do so). *But see American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the court upheld an arbitration award based on external law because the parties granted the arbitrator the authority to interpret law.

[11] 415 U.S. 36 (1974).

crimination provision did not mention Title VII of the Civil Rights Act or any other statutory nondiscrimination right. The company maintained that the grievant was discharged for cause for producing too many defective parts. The union, however, argued that a white employee who also produced too many defective parts had been transferred instead of being discharged and that the discharge of the African-American employee was, therefore, based on his race. In arbitration, the employee's claim was rejected and the arbitrator held that his discharge was for cause.

The employee also filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue notice from the EEOC, the employee instituted a lawsuit in federal district court alleging racial discrimination under Title VII of the Civil Rights Act of 1964. The district court dismissed the complaint, finding that the plaintiff was bound by the prior arbitration decision in which it was held that his discharge was not discriminatory. In so holding, the court relied on the fact that the employee voluntarily elected to pursue final and binding arbitration under the nondiscrimination clause of the collective-bargaining agreement. The Court of Appeals for the Tenth Circuit affirmed *per curiam* on the basis of the District Court's opinion.[12]

The Supreme Court, however, reversed the Tenth Circuit, holding that although an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver.[13] In supporting its holding, the Court "consider[ed] the role of the arbitrator in the system of industrial self-government"[14] and stated:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.[15]

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[12] *Alexander v. Gardner-Denver,* 466 F.2d 1209 (1972).
[13] 415 U.S. at 52.
[14] *Id.*
[15] *Id.* at 53. *See also Barrentine v. Arkansas Best Freight Sys.*, 450 U.S. 728, 744 (1981).

Further, citing *Enterprise Wheel*, the Court reiterated that:

> If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. Ibid. Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.[16]

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,[17] the Supreme Court endorsed the arbitration of civil rights claims when the parties agreed to vest arbitrators with the power to adjudicate such statutory claims.[18] In *Gilmer*, a securities representative's application with the New York Stock Exchange contained a broad requirement that he arbitrate any controversy arising out of a registered representative's employment or termination of employment. The plaintiff, who was terminated at age 62, filed a lawsuit alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The employer moved to compel arbitration, relying on the agreement to arbitrate in the registration application and the Federal Arbitration Act. The district court denied the motion, citing *Gardner-Denver*. The Fourth Circuit reversed, holding that nothing in the ADEA indicated that an employee cannot agree to litigate his or her statutory claims in arbitration.

The Supreme Court affirmed the Fourth Circuit, holding that agreements to arbitrate statutory civil rights claims were valid. The Court distinguished *Gardner-Denver* by noting that *Gardner-Denver* did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, it involved the quite different issue of whether arbitration of contract-based claims precluded

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[16]415 U.S. at 53–54. It should also be noted that in *Gardner-Denver*, the Court stated that in some instances it may be appropriate for a court to give some deference to the findings of an arbitrator on an issue of discrimination, but the Court declined to adopt specific standards and approvingly cited *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972), in which the Fifth Circuit held that for deferral to an arbitrator's findings by a court to be appropriate, among other things, the arbitrator must have the power under the collective agreement to decide the ultimate issue of discrimination. *See Gardner-Denver*, 415 U.S. at 54, nn. 20 & 21.

[17]500 U.S. 20 (1991).

[18]*See also Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998); *Metz v. Merrill-Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991).

subsequent judicial resolution of statutory claims. In so holding, the Court remarked again as to the "limited" power of arbitrators to address issues of statutory law. Specifically, the Court stated:

> In holding that the statutory claims there were not precluded, we noted, as in *Gardner-Denver*, the difference between contractual rights under a collective bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.
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> Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.[19]

After *Gilmer*, there was an explosion in pre-dispute arbitration agreements relating to statutory claims. Following *Gardner-Denver*, however, courts continued to treat enforceable individual waivers different from unenforceable collective waivers.[20]

The Supreme Court revisited the issue of whether an individual could be forced to litigate statutory rights in arbitration based upon a collectively bargained agreement to arbitrate in *Wright v. Universal Maritime Service*.[21] In *Wright*, the plaintiff sued his employer alleging violations of the Americans with Disabilities Act. The employer argued that because the collective bargaining agreement contained a general nondiscrimination clause and a broad arbitration clause that called for arbitration of all matters under dispute, but did not expressly limit the arbitrator to interpreting and applying the contract, the plaintiff's statutory claim was subject to arbitration. The Court rejected this argument, holding that a general antidiscrimination clause combined with a broad arbitration clause did not provide a valid waiver of the right to pursue statutory claims in court. In so holding, the Court again held that

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[19] *Gilmer*, at 35.

[20] *See, e.g., Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997); *Bristentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). *But see Austin v. Owens Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996). For a more in-depth discussion see Employment Discrimination Law, 2002 Cumulative Supplement (ABA; BNA), pp. 734–35.

[21] 525 U.S. 70 (1998).

issues of statutory rights are not subject to arbitration absent a specific agreement to arbitrate such issues.[22] The Court left unresolved whether a provision in a collective bargaining agreement can ever mandate arbitration of individual statutory claims.[23] The *Wright* and *Gardner-Denver* decisions, which struck down collective deferrals of statutory civil rights to arbitration, suggest that arbitrators should not to be examining outside law absent a specific grant of power by an individual employee.

As the above-cited authority shows, federal law today prohibits an arbitrator from considering or applying external law in arbitration proceedings absent an agreement by the parties to delegate that authority to the arbitrator. The Supreme Court has time and time again cautioned that issues of law are not be decided by arbitrators absent an agreement by the parties allowing him or her to do so. Arbitrators who take issues of law into consideration without the delegated authority to do so are subject to having their awards vacated by federal district courts. In practice, however, litigants are delegating the authority to interpret and apply outside law to arbitrators more today than ever before. This includes not only individual pre-dispute arbitration agreements, but also express delegations of the power to apply law in collective bargaining agreements.[24]

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[22]*Id.* at 80–81. The Court distinguished the agreement at issue in *Wright* from the agreement in *Gardner-Denver*, which limited the arbitrator to interpretation of the agreement. The Court noted that in *Gardner-Denver* the contractual limitation actually prohibited the arbitrator from considering outside law, while absent such limiting language "[i]t may well be that ordinary textual analysis of a CBA will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration." *Id.* In either event, we submit, that there must be some basis in the agreement for delegating authority to an arbitrator to apply outside law, otherwise an arbitrator is prohibited from doing so.

[23]The Fourth Circuit, in *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001), expanded *Wright* by finding that a collective bargaining agreement containing a provision stating that the employer will not discriminate against any employee with regard to race, color religion, age, sex, national origin or disability and they will abide by all the requirements of Title VII of the Civil Rights Act of 1964 provides a clear and unmistakable and enforceable waiver of the right to litigate civil rights claims in court. *But see Bratten v. SSI Services, Inc.,* 185 F.3d 625, 630 (6th Cir. 1999) (collective bargaining agreement that did not explicitly require arbitration of statutory claims did not preclude employee from pursuing claims in court).

[24]*See, e.g., Apcoa, Inc.* 107 LA (BNA) 705, 711 (Daniel, 1996) (parties incorporated FMLA into the agreement thus providing the arbitrator the authority to apply the FMLA); *William Penn School Dist.,* 99 LA (BNA) 815 (Zirkel, 1992) (agreement expressly incorporated state law); *International Bhd. of Teamsters v. Washington Employers, Inc.,* 557 F.2d 1345, 1348–50 (9th Cir. 1977) (parties requested arbitrator to apply state law); *United States Postal Serv. National Ass'n of Letter Carriers*, 789 F.2d 18, 19–20 (D.C. Cir. 1986) (collective bargaining agreement required management decisions to be exercised "in accordance with applicable law"); *Challenger Caribbean Corp., supra.*

Judicial Review of Arbitration Awards When the Arbitrator Has Been Granted the Power to Apply External Law

The increasing popularity of private agreements to arbitrate employment disputes involving the adjudication of statutory rights and the substantial number of employers and unions delegating the power to apply external law to arbitrators begs the question of what recourse the parties have if they are aggrieved by the arbitrator's interpretation or application of law. It is well-established that courts must give deference to an arbitrator's interpretation of a collective bargaining agreement and may not substitute their own interpretation of the contract for that of the arbitrator.[25] On the other hand, an arbitrator's decision should not be enforced if it does not "dra[w] its essence from the collective bargaining agreement."[26] The arbitrator "is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[27]

In 1995, in *First Options of Chicago, Inc. v. Kaplan,*[28] the Supreme Court reaffirmed prior precedent holding that parties are not bound by an arbitrator's decision that is in "manifest disregard of the law."[29] Thus, the awards of arbitrators who have been granted the authority to interpret and apply external law will be subject to scrutiny pursuant to the "manifest disregard of law" standard. In applying the "manifest disregard of law" standard, circuit courts of appeals have interpreted it as highly deferential to arbitrators.

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[25]*See, e.g., W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 764, (1983); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

[26]*Enterprise Wheel*, 363 U.S. at 596.

[27]*Id.* at 597. *See also United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). In *Misco*, the Court held that arbitration awards may also be vacated in limited situations where the contract as interpreted would violate "some explicit public policy" that is well-defined and dominant; such a public policy must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *See also W. R. Grace & Co. v. Rubber Workers*, 451 U.S. 757, 766 (1983); *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000).

[28]514 U.S. 938 (1995).

[29]Citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953), *overruled on other grounds; Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *See also Shearson/American Express v. McMahon*, 428 U.S. 220, 259 (1987). Prior to *First Options*, the Eleventh Circuit had refused to acknowledge the manifest disregard of law standard for vacating arbitration awards. *See Brown v. Rauscher Pierce*, 994 F.2d 775, 779, n.3 (11th Cir. 1993). *But see Montes v. Shearson Lehman Brothers*, 128 F.3d 1456 (11th Cir. 1997) (a post–*First Options* case in which the Eleventh Circuit vacated an arbitrator's award that was contrary to clearly established legal principles relating to the interpretation of the Fair Labor Standards Act).

Despite this default deferential standard, however, the parties may provide for expanded court review of the law by agreement.[30]

In applying the "manifest disregard of law" standard, the tests employed by the circuits vary. For example, the Second Circuit has required a reviewing court to find that (1) the arbitrator knew of a governing legal principle and refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit, and clearly applicable to the case.[31] The First Circuit, however, utilizes a three-prong test in which the party challenging the award must show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."[32]

On the other hand, the Sixth Circuit requires a showing that (1) the applicable legal principle is clearly defined and not subject to reasonable debate, and (2) the arbitrator refused to heed that legal principle in order to overturn an arbitral award based on a manifest disregard of law.[33] The Seventh Circuit, however, requires a court to find that the arbitrator ordered the parties to violate the law before it can overturn an arbitration award under the "manifest disregard of law" standard.[34]

Despite the different iterations of the test for determining a "manifest disregard of law," it is uniformly recognized across the circuits that a mere error of law by an arbitrator is not enough to justify vacating an award.[35]

The cited cases illustrate that parties who delegate the power to interpret law to an arbitrator may challenge the arbitrator's ruling

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[30] *See G.C. & K.B. Investments v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003), *citing Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997).

[31] *Banco de Seguros Del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003), *citing Greenberg v. Bear, Sterns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000).

[32] *Advest v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990).

[33] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

[34] *Butler Mfg. Co. v. United Steelworkers of America*, 336 F.3d 629, 633 (7th Cir. 2003), *citing George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

[35] *See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 194 (4th Cir. 1998) (a mere misinterpretation of the law by the arbitrator is not enough to justify setting aside an award); *Williams v. Cigna Financial Advisors, Inc.*, 197 F. 3d 752 (5th Cir. 1999) (under the manifest disregard of law standard, an award will be overturned when the failure to do so would result in significant injustice, taking into account all the circumstances of the case).

on an issue of law in federal district court, but face the onerous burden of showing that the arbitrator's decision was in "manifest disregard of law." Clearly an arbitrator's error of law is much less likely to result in a reversal than the same error by a federal district court judge. Appeal rights are severely limited when the parties give arbitrators the right to apply external law, unless they agree otherwise in their arbitration agreement.

Class Action Arbitrations

Although agreements to arbitrate that include the delegated power to interpret and apply law have been on the rise, few such agreements speak to the issue of classwide claims. The extent of an arbitrator's power to deal with class claims, however, was recently addressed in *Green Tree Financial Corp. v. Bazzle.*[36]

In *Green Tree Financial,* a lending company's agreements with its customers provide that all disputes relating to or arising out of the lending contract were subject to arbitration.[37] Two consumers who had disputes with Green Tree filed separate lawsuits in South Carolina state court, alleging violations of the South Carolina Consumer Protection Act and requesting class certification. Green Tree Financial requested the court to compel arbitration in both cases. In both cases, the court granted Green Tree Financial's motion to compel arbitration, but also certified a class. Both cases were arbitrated by the same arbitrator in a classwide arbitration. Both plaintiffs prevailed in arbitration and, together, were awarded more than $19 million in damages plus attorneys' fees.[38]

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[36]123 S. Ct. 2402 (2003).

[37]The arbitration clause at issue provided: "ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U. S. C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." *Green Tree Financial*, 123 S. Ct. at 2405.

[38]In one case the arbitrator awarded damages of $10,935,000 and in the other the arbitrator awarded damages of $9,200,000. *Green Tree Financial*, 123 S. Ct. at 2405–06.

Green Tree Financial sought to vacate the award in the trial court on the basis that the arbitrator was not empowered to address classwide issues. The court, however, confirmed the arbitration award. After an appeal to the South Carolina Court of Appeals, the South Carolina Supreme Court assumed jurisdiction and ruled that because the agreements were silent as to the issue of class arbitration, the broad nature of the arbitration clause authorized classwide arbitration.[39] The Supreme Court subsequently granted certiorari on the issue of whether the holding of the South Carolina Supreme Court was consistent with the Federal Arbitration Act, which permits courts to compel arbitration in accordance with the parties agreement.[40]

The Supreme Court, in a plurality opinion, held that the issue of whether an arbitration agreement authorizes classwide arbitration is an issue for the arbitrator to decide. As such, it vacated the decision of the South Carolina Supreme Court and remanded the case to the *arbitrator* to decide the issue of whether the agreement permitted classwide relief. In so holding, the plurality opinion, which was authored by Justice Breyer, noted that the issue in this case was not whether the parties agreed to arbitrate their claims; the issue was what kind of arbitration proceeding the parties agreed to and, therefore, it was an issue for the arbitrator to decide.[41] Accordingly, courts faced with the issue of classwide arbitration claims must defer to the arbitrator's interpretation of the agreement as to whether class claims are subject to arbitration once they decide that the claim is subject to arbitration.[42]

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[39]*Id.* at 2405–06.

[40]*See* 9 U.S.C. § 4. The holding of the South Carolina Supreme Court in *Green Tree Financial* was inconsistent with the Seventh Circuit's holding in *Champ v. Segal Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995), which held that the Federal Arbitration Act forbids a court from compelling classwide arbitration when the parties' arbitration agreement does not address the issue of classwide claims.

[41]Although the opinion made no mention of the *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643 (1986), line of precedent, which requires a court, not an arbitrator, to decide issues of substantive arbitrability, the analysis employed by Justice Breyer made clear that the issue of whether classwide relief is permissible is procedural in nature, thus requiring an arbitrator to decide the issue. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991).

[42]*See, e.g., Pedcor Management Co. v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 359 (5th Cir. 2003).

Implications and Advice for Advocates and Arbitrators

As discussed above, there are two major principles that should be considered by advocates and arbitrators concerning the use of external law in arbitration proceedings. First, an arbitrator may not apply external law unless the parties have granted the arbitrator the power to do so. Arbitrators should be careful not to exceed the authority granted by the agreement by actually applying external law when that power has not been granted. An arbitrator who does so is subject to having his or her award overturned. Further, while any arbitrator's decision is likely to leave at least one of the parties dissatisfied in some regard and is part and parcel of making the difficult decisions that arbitrators are employed to make, an arbitrator who exceeds his or her delegated authority is likely to leave at least one party extremely upset and less likely to utilize the arbitrator's services in the future. Parties and advocates understand the risk of adverse results, but are extremely sensitive to decisions by an arbitrator that they perceive to be beyond the arbitrator's authority.

Advocates should be careful to counsel their clients about the consequences of delegating power to an arbitrator to apply external law, which is that they will have a very limited right of judicial review of that arbitrator's interpretation of law unless the parties explicitly agree upon judicial review rights. If an arbitrator merely misapplies the law, it is unlikely that the award will be overturned; only grievous and clear legal errors will serve as a basis for overturning the award. Also, given the limited judicial review of arbitration awards, arbitrators should be extraordinarily careful in accepting appointments to serve when they will be called upon to apply external law; they should serve such cases only if the law they will be called upon to apply is within their experience and expertise.

Parties who delegate the power to an arbitrator to interpret law vest arbitrators with a great responsibility. In a typical lawsuit, a trial judge will rule on issues of law, but if he or she makes a mistake, the parties have the opportunity to have a panel of a court of appeals judges review the trial judge's decision. There is also a mechanism for placing issues before the entire court of appeals, and/or the nine-member Supreme Court. As such, the parties are less susceptible to legal errors in judicial rulings because of the opportunity for review of the judge's findings of law. In arbitration, however, as stated above, there is very limited opportunity for review of the arbitrator's findings of law.

Moreover, in light of the Supreme Court's holding in *Green Tree Financial*, parties must carefully consider whether they want classwide claims heard by an arbitrator and must explicitly address that subject in arbitration agreements; otherwise, arbitrators will be called upon to decide if classwide claims are subject to arbitration. Although some arbitrators who have served as former trial judges and who have experience managing class actions may be well-equipped to manage class action arbitrations, other arbitrators who may be skilled in interpreting and applying collective bargaining agreements may lack the experience necessary to manage classwide arbitration effectively. When potential classwide claims are at issue, the parties must be extraordinarily careful in selecting an arbitrator. Likewise, arbitrators must be careful to accept appointments involving potential classwide claims only if they have the necessary experience in managing classwide litigation.

Selection of an arbitrator by the parties takes on increased importance in an arbitration in which the parties have delegated the power to interpret law to the arbitrator. While traditional labor law arbitrators are highly experienced in ascertaining the intent of a contract provision or determining whether a discharge was for just cause, such arbitrators may lack expertise in the issues of law that the parties seek to arbitrate. It is highly desirable for parties who are seeking a ruling concerning a right or remedy under the law, or who are asking the arbitrator to analyze external law in determining the parties' intent, to carefully choose arbitrators experienced in dealing with the legal concepts at issue. Given the highly deferential "manifest disregard of law" standard for overturning an arbitrator's decision concerning the application of law, the parties should take great care to select an arbitrator who is less likely to make an error in his or her legal analysis. In such cases, law professors, former judges, or practitioners with *experience in the particular legal issues in your case* are desirable. Careful selection of an arbitrator will help mitigate the risk of arbitrating statutory issues, from which an appeal on the basis of a legal error is unlikely to succeed.