Arbitration: Back to the Future

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A strong new ideological

current is sweeping through

much of the Western World. At

one extreme it manifests itself

as a deep distrust of big
government. In more modest

form, it is a sense of skepticism

or disillusionment about the

capacity of big government
to
deal effectively with the

problems confronting our

society. In continental Europe
today there is much talk of the

principle

of "subsidiarity," the

notion that social and economic
ills should be treated at the

lowest level feasible, usually the

level closest to the people

directly affected. In the United

States there is much talk of

"privatization," the transfer or

subcontracting of many

traditional governmental

functions to private industry.

These ideas have their
counterpart in our own field of

labor and employment law. In

some respects there is nothing

new about all this. In the earlier
part of this century labor
unions, bruised as they were by

many encounters with a strike-

stopping, injunction-wielding
judiciary, looked upon law and
government as more foe than
friend. Unions responded
warmly to the laissez-faire
philosophy embodied in the
Norris-LaGuardia Act of the
early 1930s. Management as
well as labor came to regard
government involvement as
intrusive; both espoused the
private settlement of
union-
employer disputes through
collective bargaining and
voluntary arbitration. Even
when the federal government
began to intervene more
actively, through the Wagner
and Taft-Hartley acts, Congress
directed the newly reorganized
Federal Mediation and
Conciliation Service to "make its
services available in the
settlement of ... grievance
disputes only as a last resort
and in exceptional cases."

Indeed, so ardent a champion of
collective bargaining and

grievance arbitration as Dean
Harry Shulman decried the very
concept of court litigation over
labor agreements.

In the mid-1960s and continuing
thereafter, the preeminence of collective
bargaining in the governance of the
American workplace began to erode. Certain
ancient problems, like race and gender
discrimination, workplace safety, and
pension and benefit guarantees, proved
intractable. At the same time union density
and bargaining power were declining.
Government had to step in. And it did so
through the whole series of laws with which
we have become so familiar — the Equal
Pay Act (EPA), Title VII of the Civil
Rights Act of 1964 (Title VII), the Age
Discrimination in Employment Act (ADEA),
the Occupational Safety and Health Act
(OSHA), the Employee Retirement Income
Security Act (ERISA), the Americans
with Disabilities Act (ADA), and all the rest. To
add to the onslaught of governmental
regulation, some states during the 1980s
seized upon one legal theory or another
to ameliorate the worst rigors of the traditional
American doctrine of employment at will.
Then came the counterclockwise.
The taxpayers rebelled, Newt Gingrich rode into
Washington, and the underfunded federal
and state judiciaries and administrative
agencies began to buckle under the
avalanche of employee complaints.
The Equal Employment Opportunity
Commission alone was receiving about
100,000 charges of discrimination a year
and its backlog soared past that figure.
Employers, dismayed by seven-figure jury
verdicts in wrongful discharge actions and
the $100,000 costs of even a successful
defense, began increasingly to seek private means of settling disputes with their workers. And Congress, in both the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, expressly encouraged alternative methods of resolving discrimination disputes "where appropriate and to the extent authorized by law." That is where we are today. Once more the tide is turning, this time away from formal governmental procedures and back toward such private, relatively informal processes as mediation and arbitration.

The courts and arbitration

Initially, the courts had been rather unreceptive to arbitrators' handling of employment discrimination cases. Thus, in Alexander v. Gardner-Denver Co. (1974) the Supreme Court held that an arbitral award finding "just cause" for a termination under a collective bargaining agreement did not prevent the discharged employee from seeking a de novo trial in federal court of his claim of racial discrimination in violation of Title VII. The stated rationale was that the arbitrator only applied the contract, not the statute, and that Title VII supplements and does not supplant other rights, leaving the employee free to pursue both claims.

The Court seemed untroubled by Spielberg Mfg. Co. (1955), under which the National Labor Relations Board will "recognize" or "honor" an arbitral award in an unfair labor practice case, as long as certain safeguards are met, even though there too the arbitrator is technically only dealing with contract rights and the Board is dealing with the employee's statutory right under the National Labor Relations Act to be free of antiunion discrimination or coercion.

Even under Alexander, however, the Court acknowledged in the now-famous footnote 21 that the arbitral award could be admitted in the court suit and could be accorded "great weight" if supported by an adequate record.

A much more receptive attitude toward arbitration was exhibited by the Supreme Court in Gilmer v. Interstate/Johnson Lane Corp. (1991). A 7-2 majority ruled that an individual employee of a brokerage firm who was subject to a Stock Exchange rule requiring arbitration of all employment disputes could not sue directly on an age discrimination claim under ADEA, but could be ordered to arbitrate instead. The majority emphasized that the Federal Arbitration Act favors arbitration. Alexander was distinguished on the grounds the arbitrator there was only authorized to apply the contract, while the Stock Exchange rules empowered arbitrators to resolve statutory claims as well. Technically, the holding in Gilmer could be treated as just an exhaustion-of-remedies requirement, a requirement that one go to arbitration before seeking a judicial remedy, but the language of the opinion is much broader in its endorsement of arbitration and the finality of arbitration.

The Court stressed that the broker was not losing a statutory right; he was merely being required to use a different forum for the enforcement of that right. As a practical matter, the Court was also affected by the fact that the employee in Gilmer executed the arbitration agreement himself, while Alexander involved "collective representation" and the possible conflicts that might present.

In my opinion, Alexander should be modified and Gilmer extended to authorize the final and binding arbitration of statutory claims when that is provided for in either a collective bargaining agreement or an individual employee-employer contract. There would of course be need, especially in the individual case, for close scrutiny to prevent any possible coercion, surprise, or other overreaching by a more powerful employer. There would also have to be procedural safeguards, as I shall discuss shortly, to ensure the fairness and integrity of the process.
Judge Edwards stressed the speed and cost savings of arbitration as advantages over litigation in the resolving of disputes. The greater informality of arbitration can also be conducive to a lessening of employer-employee hostility, which is especially desirable in the event reinstatement is ultimately ordered.

Guaranteeing due process

If private procedures like arbitration, agreed to by the employer and the employee, are to supersede the administrative or judicial procedures prescribed by a statute, there should be guarantees that customary "due process" standards are applicable. Two prestigious groups have recently set forth their prescriptions for the required procedural safeguards. Those were the Dunlop Commission on the Future of Worker-Management Relations and a task force convened by the American Bar Association, consisting of representatives of the ABA Labor and Employment Law Section, the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution.

The Dunlop Commission strongly recommended the development of private arbitration procedures for handling workplace disputes, including statutory issues. To ensure that the public law rights of individual employees would not be jeopardized, the Commission proposed several "quality standards":

1. a neutral arbitrator who knows the law, jointly selected by the parties;
2. fair and simple procedures, including discovery;
3. cost-sharing to help ensure arbitral impartiality;
4. independent representation if the employee wants it;
5. remedies equal to those provided by statute;
6. a written arbitral opinion giving the rationale; and
7. judicial review to ensure compliance with governing law, but limited with respect to the arbitrator's findings of fact.

The ABA-convened task force, composed of persons from highly diverse organizations, did not reach consensus on a number of issues, although in some respects its recommendations were even more detailed than the Dunlop Commission’s, with special emphasis on the need for the training of arbitrators about statutory law. In any event, the major standards for due process contained in the task force’s "protocol" closely paralleled the Commission’s:

1. an impartial arbitrator with knowledge of the statutory issues at stake, jointly selected by the parties;
2. adequate but limited pre-hearing discovery;
3. cost-sharing to help ensure arbitral impartiality;
4. the right to representation by a person of the employee's own choosing;
5. whatever relief would be available under the law;
6. an opinion and an award, including a statement of the issues resolved and the statutory claims disposed of; and
7. a final and binding award subject to limited review.

Arbitration: A condition of employment?

There is one important issue on which the Dunlop Commission takes a stand, and which the Task Force sidesteps. May an employer make an employee's agreeing to arbitration a condition of employment? The Commission flatly says "No," at least not "at this time." The Commission declares that "any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract." Although it does not say this in so many words, the Commission would apparently allow an employee to contract for binding arbitration only after a dispute has arisen. At least in a discharge case, the employee would then have little or nothing
The result of this sophisticated scheme is a sensible tradeoff. Employees are guaranteed certain irreducible substantive rights. In return employers are relieved of the risk of crushing legal liability. Both sides are provided procedures that should be simpler, faster, and cheaper than the current jury system.

to lose if he or she offends the employer by refusing to agree to arbitration. I detect a hint of ambivalence within the Commission on this issue, however; it goes on to remark that if private arbitration systems prove themselves in enforcing public rights, then the nation could decide "whether employers should be allowed to require their employees to use them as a condition of employment."

The Task Force reflected its hybrid composition in announcing that it "takes no position on the timing of agreements to arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made" (emphasis supplied). The Equal Employment Opportunity Commission, in a policy statement of July 1995 concerning alternative dispute programs to be developed under Commission auspices, insisted that "parties must knowingly, willingly and voluntarily enter into an ADR proceeding" (emphasis supplied). Moreover, the Commission would permit an employee to opt out of a proceeding at any time before its resolution and to go ahead and file a lawsuit instead.

I don't think this issue is as easy as it may seem to some. We can start with the comfortable premise that no employee should have to give up a statutory right to a particular forum as the price for a job. But there is respectable employer testimony that businesses will often be unwilling to agree to arbitration after a dispute has arisen. At that point in a particular case they may have more to gain by just sitting back and awaiting the lawsuit that in many instances will never materialize.

Thus, as a practical matter, the real choice may be between allowing the employee to agree to arbitration in advance, as Mr. Gilmer did, or greatly diminishing the likelihood that arbitration will ever be used. What does the employee actually lose if required to arbitrate? Statutory forums and jury trial rights sound all very fine in theory, but what good are they if the EEOC is so burdened by a case backlog that it must resort to triage, as it now does with its "A," "B," and "C" classifications of cases, tossing out many charges wholesale after the briefest of investigations? And what good are the statutory rights if the courts are so far behind schedule that the employee must wait three or four years for an enforceable judgment? It seems to me at least arguable that many employees would be much better off with arbitration, even as a condition of employment, as long as there was guaranteed the type of procedural safeguards called for by the Dunlop Commission and the ABA-convened task force. At any rate, I think this is a question that deserves to be fully debated, with less emphasis on abstract theory and more on pragmatic considerations of the sort I have described. So far, incidentally, a court of appeals has simply held that an employee must "knowingly" agree to arbitrate a Title VII claim before forgoing statutory procedures. At most a "knowing" agreement is all I can see in the Supreme Court's Gilmer case.

**Deferring to arbitration**

The birthpains we are witnessing as the courts and the agencies seek a viable system of arbitrating statutory civil rights claims had earlier parallels in the judicial and administrative treatment of other statutory disputes. As I mentioned previously, the National Labor Relations Board, in its Spielberg/Olin line of cases (1955 and 1984), held that it would "honor" or "defer to" an arbitral award in a subsequent unfair labor practice case if certain standards had been met. The arbitration proceedings had to be fair and regular; all parties had to agree to be bound; the decision must not have been "clearly repugnant" to the policies of the act; the contract issue before the arbitrator had to be "factually parallel" to the unfair labor practice issue before the board; and the arbitrator had to be "presented generally" with the facts relevant to
resolving the ULP issue. In Alexander v. Gardner-Denver, the Supreme Court explicitly declined to apply the Spielberg doctrine to Title VII cases, but it did not question the validity of Spielberg in the NLRA context.

Later, and more controversially, the NLRB extended the deferral doctrine to situations where the ULP charge had been filed before there was any arbitral award. In Collyer Insulated Wire (1971), the board held that it would defer to the arbitration procedure in those circumstances also, provided the employer’s action being challenged did not undermine the union, the employer’s action was based on a “substantial claim” under the contract, and the arbitral interpretation of the contract would likely resolve the ULP issue as well. Collyer itself involved a charge against an employer for allegedly refusing to bargain by taking certain unilateral action in violation of the collective bargaining agreement. Subsequently, and still more controversially, the board extended the Collyer doctrine to individual cases of alleged discrimination. While Collyer dealt with contract issues that might seem peculiarly appropriate for arbitral resolution, United Technologies dealt with an individual’s statutory rights against antunion discrimination, which some might deem as sensitive as the civil rights at stake in Alexander and Gilmer. Yet the courts have generally gone along.

Finally, I should mention Barrentine v. Arkansas-Best Freight Sys. (1981). There the Supreme Court held, in a 7-2 decision, that employees were not barred from suing on wage claims under the Fair Labor Standards Act by an adverse arbitration award under the collective bargaining agreement. The majority reasoned that statutory rights under the FLSA, like Title VII rights, are individual rights, not collective rights, and are not waivable by a union. Putting Alexander, Barrentine, and Gilmer together, it does appear that the Supreme Court may give individual employees greater power to waive statutory rights and commit to binding arbitration than is accorded their union representatives under collective bargaining agreements. That makes sense if one is skeptical about a union’s capabilities and zeal in safeguarding the rights of the employees it represents; it makes far less sense if one focuses on the relative bargaining power of employers, unions, and individual workers. In addition to the whole range of statutory rights which now seems to be opening up as a new arbitral domain, there is another large area looming on the horizon which may become a fertile source of arbitral practice. It is a further example of the widespread trend in society, of which I spoke at the outset, to seek solutions for its problems outside the formalized processes of government. Beginning in the 1960s, and accelerating rapidly during the 1980s, there was a movement in the state courts of some 45 jurisdictions to modify the once universal principle of employment at will. As bluntly expressed by one nineteenth century American court, that meant employers could “dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong.” Workers could be fired for refusing to engage in illegal price fixing or even for refusing to commit perjury at the behest of the employer.

Benefitting both employers and employees

At-will employment remains a substantial problem today. Professor Jack Steiber of Michigan State University calculates that there are roughly 60 million at-will employees in the United States, of whom about two million are fired annually. Of these, Steiber believes 150,000 or more would have valid causes of action if they had the same “just cause” rights afforded nearly all the union workers under collective bargaining agreements.

The state courts have used three principal theories to modify employment at will. Each has serious deficiencies for employees and employers alike. The first is the public policy exception. But that takes an egregious violation, such as discharging an employee for refusing to commit a crime. Relatively few employees will find that modification useful.

Second is the contract exception. An employer may be held liable for an arbitrary dismissal if it has included a guarantee of no discipline except for good cause in an employee handbook. But an employer can avoid that restriction by simply refraining from any such assurances, or even by excising any existing protections from personnel manuals with adequate advance notice.

The third and potentially most expansive theory, the notion that every contract contains an implied covenant of good faith and fair dealing that forbids an unjust discharge, has doctrinal infirmities and has been accepted by only a handful of states.

Finally, the employees who win in court are rarely rank-and-file workers. Only professional and managerial employees are likely to have large enough claims to attract the attention of lawyers operating on the basis of contingent fees.

On the other hand, when an employer becomes enmeshed in a common-law wrongful discharge action, the results can be a heavy financial blow. Several studies of California cases showed that a plaintiff employee who can get to a jury will win about 75 percent of the time, with the average award around $450,000. Multimillion dollar verdicts for single individuals are not uncommon across the country.

Even the successful defense of a jury case may cost $100,000 to $200,000. And two years ago a RAND study estimated that the “hidden costs” of the common-law regime — for example, keeping on inefficient employees out of a fear of expensive lawsuits — amount to 100 times as much as the court judgments and other legal expenses.
Alternative dispute resolution procedures are needed for the benefit of everyone, employers as well as employees. In August 1991 the prestigious National Conference of Commissioners on Uniform State Laws adopted, by the resounding vote of 39 state delegations to 11, the Model Employment Termination Act (META). META prohibits the dismissal of most full-time employees after one year of service unless there is "good cause." The preferred method of enforcing META is through the use of professional arbitrators. The remedies are similar to those under the NLRA, the original Title VII, and the usual labor contract, namely, reinstatement with or without back pay. General compensatory and punitive damages are expressly excluded.

The result of this sophisticated scheme is a sensible tradeoff: Employees are guaranteed certain irreducible substantive rights. In return employers are relieved of the risk of crushing legal liability. Both sides are provided procedures that should be simpler, faster, and cheaper than the current jury system.

META has been introduced in over a dozen state legislatures. Despite its overwhelming endorsement by the Uniform Law Commissioners, however, its prospects for early enactment anywhere are bleak in the current political climate. In the longer term, I have high hopes. The United States is the last major industrial democracy in the world without legal protections for workers' jobs, and I cannot believe we shall remain such an outcast indefinitely. When we do see the light — some time in the next millennium — it will mean, directly or indirectly, a dramatic expansion in arbitration practice. The most thorough study to date found that in the mid-'80s arbitrators were handling approximately 65,000 union grievances in a year. With less than 15 percent of the American work force currently organized, one could anticipate at least a four- or five-fold increase in employee coverage if laws like META became universal. Even if we assume that only a third or so of the existing arbitration caseload consists of the kind of discharge or disciplinary issues that would be subject to legislative protections, the result could still be some 100,000 new arbitration cases annually.

In the meantime, many employers across the country, deeply disturbed by the large jury verdicts returned in wrongful discharge actions, have instituted their own private programs for the arbitration of disputes with their employees. In some respects this development is highly salutary; at least it may recognize some modification in at-will employment and the existence of some worker rights in their jobs. But in other respects it can be a cause for concern. Employers, for example, may exercise excessive control over the choice of the arbitrator. Subconsciously, arbitrators may be influenced, or they may be perceived to be influenced, by the fact the employer is a "repeat player" in unilaterally established plans and the one often paying the bill. Some arbitrators may be deterred from participating in these plans because of fear they may be used as union-avoidance devices. For all these reasons employer-promulgated arbitration systems call for special scrutiny and the erection of due-process safeguards to ensure the fair treatment of employees. Yet on balance, with appropriate shields in place, I consider them better than nothing. Some employees who are unfairly fired will get their jobs back, and I think that is worth the extra trouble on the part of arbitrators operating under these novel arrangements. In 1986 arbitrators handled about 2000 non-union grievances during the year — about 3 percent of the total.

Court-sponsored arbitration

A final phenomenon of recent times, and a final example of the "privatization" that has been an underlying theme of this paper, is the referral of employer-employee disputes to an arbitrator by a court. I do not know how widespread this practice is, or how much jawboning by a judge it takes to get the parties to go along. But it represents one more way in which the venerable instrument of union-management arbitration is undergoing transformation to meet a new set of needs in society.

Two decades ago that peerless labor lawyer and scholar, David Feller, spoke poignantly of the passing of what he called the "golden age of arbitration." By that he meant a time when the parties' system was essentially autonomous, concerned primarily with contract self-enforcement, and unsullied by a preoccupation with external law. Being somewhat younger then than I am now, I had the temerity to take issue with David on the ending of the golden age. Today I have a better sense of what David was driving at. There was a purity, an appealing simplicity about arbitration in the two or three decades following World War II, when unions and employers were pretty much unchallenged lords of their own process. Ours is a much more untidy world, where arbitrators must often look over their shoulders to see whether their work is squaring with the dictates of "the law." Yet I still do not feel quite the same sense of loss as Professor Feller. There are golden ages and there are golden ages. Simplicity has its attractions; so does complexity. In David Feller's cherished era, private parties ruled both the substance and the procedure of employment regulation. Then government took over a large swath of the two areas. Today private parties are regaining a significant share of the procedure, but substantive legal regulation remains intact. Arbitrating in this complex new milieu should be seen as an exciting challenge rather than as a dispiriting setback. As I said twenty years ago, if it is true in any sense that we have lost a golden age of arbitration, it may just be akin to leaving behind the simple nobility of ancient Greece, and moving on to the sophisticated glories of the High Renaissance.

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