

NEW CHALLENGES TO ARBITRATION

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"Today we face developments in practically every aspect of our lives portending changes within the next quarter century as great as any we have experienced."¹ Changes in one's own field, as in society in general, are often imperceptible at the time they are occurring. Yet, in looking back over my thirty years of teaching in the field of arbitration, I am struck not only by the major changes which have affected the concepts and practice of arbitration, but also, and more significantly, by the new challenges which are emerging to the whole profession of arbitration as well as to the continued viability of the institution itself.

The founders of our profession--such men (and I use the term "men" advisedly) as George Taylor, William Leiserson, and Harry Shulman--constantly pointed out that private contract and custom rather than statutes and court decisions had shaped the principal features of arbitration. The function of the arbitrator was that of a private judge interpreting the collective agreement and practices of the parties. Voluntarism, not compulsion, was the hallmark of the process. As Shulman stated in his classic Oliver Wendell Holmes Lecture at Harvard Law School on February 9, 1955:

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the

rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.²

The virtually universal acceptance of these precepts concerning the autonomous and consensual nature of the arbitration process left little room for debate or controversy. Yet, controversy did occur--on one point in particular. This was the dispute as to whether arbitration should be a system of adjudication or one of adjustment, or, to put it more simply, should the arbitrator function as a judge or as a mediator? As some of you probably recall, George Taylor espoused the view that the proper role of the arbitrator was that of a mediator, helping the parties to fill the gaps in their agreement, or, to change the metaphor, to graft flesh on the bare bones of their contract. In his view the major function of the arbitrator was to assist the parties in solving their own problems. On the other side of the argument the chief protagonist was Noble Braden of the American Arbitration Association who took the position that the arbitrator's sole role was that of a judge; under no circumstances was the arbitrator to act as a counselor.

Although this controversy raged with intensity (and some display of bad manners and lost tempers) in the 1940s and 1950s, it was essentially a sham debate, principally because Taylor was addressing himself to the functions performed by a permanent arbitrator, or impartial chairman, whereas Braden was concerned with the system of ad hoc arbitration in which the arbitrator had little or no familiarity with the customs and practices of the industry, let alone with the parties themselves.

Other concerns of the profession at that time, as revealed in the early volumes of the National Academy of Arbitrators' Proceedings, related to the development of principles of decision making in the areas of management rights, discipline and discharge, and seniority and ability, as well as to the more pressing personal preoccupation of the arbitrators with their own job security, an issue more delicately posed by the question: "Are arbitrators expendable?"

A more serious threat to the profession, however, was arising as state courts began to stay arbitration or to set aside awards under either statutory or common law authority. A study by Professor Clyde Summers in the early fifties of some one hundred court cases in New York State revealed that in 60 percent of the decisions the judges either granted stays or modified or vacated awards, leading Summers to query whether arbitrators were becoming pawns, while the judges were the true queens.³

This complaint as to the inferior status of arbitrators was shortly to be redressed, however, starting in 1957 with the Lincoln Mills decision of the Supreme Court which pronounced the primacy of federal over state law, and followed by the Steelworkers' Trilogy in 1960 which exalted the skills of the arbitrator and cautioned the courts to refrain from intrusion into the arbitrator's domain. So glowing was the Court's portrait of the arbitrator's fine features that Robben Fleming was moved to comment that his colleagues would now rush out to purchase new mirrors, while Peter Seitz characterized the decisions as resulting in "The Judicial Canonization of Arbitrators."

Yet, the judicial enthronement of arbitrators did not meet with universal approbation, for as a number of leaders of the

profession noted, it presaged more, rather than less, involvement of the judiciary with the arbitration process--a prophecy which time has amply fulfilled.

The Steelworkers' Trilogy, paradoxically perhaps, has continued to spawn an ever-increasing amount of court litigation involving the arbitration process. At the federal appellate court level alone, the most recent survey shows a 40 percent increase in reported litigation of arbitration cases in 1974 as compared with 1973.⁴ These cases fall into three broad categories: (1) conflicts between federal law and collective bargaining agreements; (2) judicial recognition of the rights of individuals to due process in arbitration; and (3) constitutional restraints on the arbitration process. All of these areas indicate the growing impact of public policy on the hitherto relatively private system of arbitral determination.

The first category--potential conflict between federal law and arbitration--originally was resolved by the NLRB in its Spielberg and its later Collyer decisions in favor of a policy of deferral to arbitration. With the recent approval of this policy by various federal circuit courts of appeal, it is unlikely that litigation in this area will increase. On the other hand, the enactment of the Civil Rights Act of 1964, especially Title VII thereof, posed a major challenge to the arbitration profession. At their annual meetings, starting in 1967, the members of the Academy began a running debate over their role as administrators or guardians of public policy. Although various suggestions were offered to work out a policy of accommodation where there was an irrepressible conflict between the agreement and the law, the dominant view seemed to be that the arbitrator "should respect the agreement and ignore

the law."⁵ Whatever the divergent opinions of the members, however, the Supreme Court in its 1974 Gardner-Denver decision sharply jolted the profession when it unanimously held that the prior submission of an employee's claim of discrimination to arbitration did not foreclose that employee, whether he won or lost the arbitration, from seeking a trial de novo of the same claim in the federal courts.

The portrait of the arbitrator as sketched by the Court in Gardner-Denver was similar to the one delineated by the Court in the Steelworkers' Trilogy, but the features which elicited the Court's admiration in the Trilogy cases were the very ones which the Court in Gardner-Denver found unattractive for cases involving Title VII:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. [Citations omitted.] Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary

with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.⁶

Although the Gardner-Denver opinion conceded that an arbitrator's award might be given some, or even great, weight by the trial court, this concession was so guarded and so hedged about by procedural and substantive qualifications as to leave most arbitrators in the dark as to their future responsibilities and competence to decide Title VII issues.⁷

The second category of cases concerns the rights of individual grievants vis-à-vis one or both of the contracting parties. In Vaca v. Sipes the Supreme Court held that a union's failure to carry a case to arbitration, or to drop or settle a grievance, would breach its duty of fair representation if it acted in a manner that was "arbitrary, discriminatory or in bad faith."

While Vaca poses more problems for the parties than for the arbitrators, the Second Circuit's recent decision in Holodnak v. Avco raises a new issue of constitutional restraints on the arbitral process. For in Holodnak the court reversed an arbitrator's award upholding a discharge, on the ground that the arbitrator had ignored the grievant's First Amendment rights and had himself expressed views which were biased and prejudicial. In substance the court held that an arbitrator is not a mere private person, but an agent of government responsible for enforcing the legal and constitutional rights of individuals.

In addition to these major challenges to arbitration emanating from the judiciary, there are some other significant substantive, procedural, and institutional changes on the horizon.

Two instances of substantive change deserve brief mention. One is the recent expansion of interest arbitration, both voluntary and

compulsory. Especially noteworthy is the growth of interest arbitration in the public sector, the Postal Service, and in hospital and health care institutions. Whether arbitrators whose major experience has been in grievance arbitration can develop the knowledge and expertise to handle interest arbitration remains to be seen. The second substantive change relates to new issues arising in grievance arbitration, such as safety, pension plans, health care, and insurance plans.

Procedural changes involve the expansion of expedited arbitration procedures in a variety of occupations, both private and public, with a special emphasis on short opinions and bench awards.

Finally, some marked changes are beginning to emerge in the arbitration establishment itself. The Academy and the designating agencies have worked together on a new Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. As a result of a growing number of lawsuits brought against arbitrators, there is now some current interest in malpractice insurance for arbitrators. Sensitive to allegations of discrimination in its own ranks, the Academy has also been developing or sponsoring training programs to qualify more women, youth, and members of minority groups for admission to the profession.

In thirty years the profession of arbitration has changed significantly. Arbitrators are no longer supreme monarchs or saints. Nor are they mere "private persons" deciding only matters of contract interpretation. Instead, they are surrounded by constraints imposed by law, public policy, and affirmative action. The arbitrator is no longer--if he or she ever was--a heroic figure, but rather a humble servant laboring in the vineyards, responsible

now to a larger public, not a private, constituency. What all these changes signify I have expressed earlier as follows:

As more and more contract issues--once regarded purely as matters of consensual law--become subject to overriding public regulation and control, the once tight little ship of private adjudication is indeed becoming a leaky vessel. More and more we are witnessing challenges to vested institutional arrangements. Not only the civil rights movement but also the youth movement and the women's "lib" organizations are "pressing the industrial relations system to accommodate to [their] demands." If the institution of arbitration is to survive and to be "relevant" to the emerging needs of a new social and economic order it cannot afford simply to remain as a part of "the Establishment."

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There remains the question of expertise or competence. Here the profession has either been unduly modest--or to put it more starkly --too specialized. Many who are experts in the law of the shop shy away from the notion of learning more about the law of the land. But this merely means that like every profession, arbitrators are in need of continuing education. In addition to worrying about the training of new arbitrators, perhaps arbitrators should be concerned about retraining themselves to face the challenge of accommodating an old and valuable institution to the new movements for social change. In other words they should mind their BFOQ's!⁸

Notes

1. Law and a Changing Society II, Final Report of The American Assembly, Stanford Law School, Stanford, California, June 26-29, 1975 (St. Paul, Minn.: West Publishing, 1975).
2. Harry Shulman, "Reason, Contract, and Law in Labor Relations," Harvard Law Review 68 (April 1955):999.
3. Clyde Summers, "Judicial Review of Labor Arbitration, or Alice Through the Looking Glass," Buffalo Law Review 2 (Winter 1952):1, 13.
4. James P. Kurtz and William P. Murphy, "Arbitration and Federal Rights under Collective Agreements in 1974," Appendix B, 28th Annual Proceedings of the National Academy of Arbitrators (Washington, D.C.: BNA, in press).
5. B. Meltzer, "Ruminations About Ideology, Law and Labor Arbitration," in Dallas L. Jones, ed., The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators (Washington, D.C.: BNA, 1967), p. 1.
6. 7 FEP Cases 89.
7. This concession was set forth in the final footnote of the opinion (7FEP Cases 90): "21. We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined if the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it

great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." A similar conflict between law and contracts involving seniority, layoffs, and affirmative action is now before the Supreme Court. The issue here, however, is one of statutory interpretation rather than of arbitral competence.

8. Jean T. McKelvey, "Sex and the Single Arbitrator," Industrial and Labor Relations Review 24 (April 1971):352-53.