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The Eternal Debate on External Law in Labor Arbitration: Where We Stand Five Decades After Meltzer v. Howlett
By: Philip Baldwin

ABSTRACT

This article details the oft-debated issue of how labor arbitrators should reconcile collective bargaining agreements (“CBAs”) with public sources of law, i.e., “external law,” particularly when the plain meaning of a CBA would lead to an arbitration award in contravention of public law. The article traces the origin of the debate back to 1967, when renowned labor arbitrators Robert Howlett and Bernard Meltzer took opposing views on the matter in front of the National Academy of Arbitrators. Although Meltzer’s traditional view, that arbitrators should respect the CBA and ignore the law when the two diverge, may have been the more dominant and reasoned one in 1967, recent developments in the field of labor and employment law—namely a tremendous proliferation of employment law statutes, a shift in Supreme Court jurisprudence, and an increasingly skilled pool of arbitrators—have rendered Meltzer’s stance untenable. This article lays out four guideposts for labor arbitrators who are confronted with this challenging issue, ultimately articulating an approach that allows for measured consideration of external law to an extent that was wholly unorthodox in 1967.

I. INTRODUCTION

The proper place of external law in labor arbitration has been extensively analyzed since the epic debate between Robert Howlett and Bernard Meltzer brought the issue to prominence in 1967. The basic question can be stated as follows – In this system of quasi-adjudication, private in nature and governed by a collective bargaining agreement (“CBA”), what effect should laws promulgated outside of the private union-employer relationship, i.e., “public laws,” have on the parties to arbitration? Although the question can be simply framed, clear answers have proven elusive in a labor industry that has undergone significant changes since labor arbitration was given an official
The Eternal Debate on External Law in Labor Arbitration

PEPPERNINE DISPUTE RESOLUTION LAW JOURNAL

stamp of approval by Congress in 1947, the Supreme Court in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), and the Steelworkers Trilogy (1960), and even since the Howlett-Meltzer debate in 1967.

Considering the significant evolution that has taken place over the last several decades in the labor industry, a commensurate evolution needs to take place with respect to the inclusion of external law in labor arbitration. I believe that in this day and age, the notion of a distinct “law of the shop” that is wholly independent from public law is becoming increasingly untenable. While not arguing for drastic changes, I do believe that public law has a significant role to play in this private mode of dispute resolution, and I believe that an increased infusion of the law would inure to the benefit of both parties while also allowing labor arbitration to play the role in labor-management relations that it was originally intended to play.

II. THE ROLE OF LABOR ARBITRATORS AND LABOR ARBITRATION

To understand the role that external law should play in labor arbitration, one must first understand the role that labor arbitration and labor arbitrators assume in the world of industrial relations. The Supreme Court has described the labor arbitrator’s role in the following way:

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.


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1 Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C.A. § 173(d) (1996). The Act states that: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” Id.
4 Warrior & Gulf, 363 U.S. at 581.
Labor arbitration is said to be a private process that is governed by the mutually agreed upon terms of the union and employer’s collective bargaining agreement. It is the collective bargaining agreement, then, that is said to empower labor arbitrators to issue orders; this distinguishes labor arbitrators from state and federal judges, who are empowered by publicly created law to issue judgments.

Labor arbitration also goes hand-in-hand with collective bargaining. Arbitration clauses are contained in ninety-nine percent of collective bargaining agreements, typically providing for arbitration as the final step in the union-employer grievance process. The interrelationship between arbitration and collective bargaining has led the Supreme Court to state that “arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.”

In the words of renowned labor arbitrator Theodore St. Antoine, “the arbitrator is the parties’ surrogate, their designated spokesperson in reading and applying the contract,” who must “be faithful to the parties’ manifest intent in the deepest, truest sense.” The arbitrator must preserve the parties’ bargain, and he is tasked with doing so in a variety of factual scenarios that were either not anticipated or not specifically mentioned at the time of collective bargaining.

The courts, as well as respected arbitrators and scholars, correctly note that labor arbitration is a private method of dispute resolution that is to be distinguished from judicial and administrative adjudication. When one considers the strong relationship that labor arbitration has to the public at

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6 Cole, supra note 5, at 873.
7 Warrior & Gulf, supra note 4, at 578.
10 See Warrior & Gulf, supra note 4, at 581 (stating that “Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties”).
11 See St. Antoine, supra note 8, at 1-11.
large, however, questions arise regarding just how “private” labor arbitration is or should be.

III. LABOR ARBITRATION’S CONNECTION TO PUBLIC LAW AND POLICY

Although universally considered to be a private process, one must recognize that there are many elements of public law and policy that have helped give rise to and maintain labor arbitration as a popular and legal mode of dispute resolution.

For one thing, labor arbitration serves an important public function in helping to maintain industrial peace, a public utility that initially earned it the endorsement of Congress in the Taft-Hartley amendments to the National Labor Relations Act,12 the endorsement by the Supreme Court in Lincoln Mills,13 and the continued Supreme Court endorsement in the Steelworkers Trilogy.14 Additionally, although labor arbitrators are given the power to issue final orders, their orders are only enforceable by courts of law;15 courts that also have the power (albeit a narrow one) to review arbitral decisions for violations of public policy.16 Finally, labor arbitration in many cases serves as an alternative to public adjudicative forums—and oftentimes this alternative is legally imposed upon a party—barring access to the preferred public forum.17

Labor arbitration serves as a mechanism that is significantly intertwined with public law and policy, a fact that counsels strongly favor in allowing public law to play a significant role in its operation.18 As Theodore St. Antoine

15 Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C.A. § 185(a) (2012); Lincoln Mills, supra note 2, at 455.
18 Even Bernard Meltzer, who argued for a particularly limited role of external law in arbitration, see infra pp. 5–6, admitted the strong connection between labor arbitration and the public interest, stating: (1) “[A]rbitration is an adjunct of a bargaining system shaped by the compulsion of law;” (2) “both the courts and national and state legislatures have endorsed arbitration;” (3) “arbitration constitutes an alternative and an obstacle to the use of official machinery;” and (4) arbitration is designed primarily as an instrument of justice for the industrial community, rendering states heavily reliant upon it. 298
once said in his presidential address to the National Academy of Arbitrators:
“[W]here a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation.”); Theodore J. St. Antoine, External Law in Arbitration: Hard-Boiled, Soft-Boiled, and Sunny-Side Up, 57 PROC. OF THE NAT’L ACAD. OF ARB. 185, 188 (2004) (“Everyone seems to agree . . . that an arbitrator may look to the law for guidance in interpreting a contractual provision.”).


22 See generally Robert G. Howlett, The Arbitrator, the NLRB, and the Courts, 20 PROC. OF THE NAT’L ACAD. OF ARB. 67 (1967); Meltzer, supra note 18.

23 Howlett, supra note 22, at 83, 85 (emphasis in original). Howlett noted one caveat to his approach: where both parties tell the arbitrator not to consider the legal issue, he must comply or withdraw. Id. at 87.

24 Meltzer, supra note 18, at 16.
this issue has been regarded as the “orthodox” or traditional position, and it is arguably still the most popular view amongst labor arbitrators. Howlett has his share of supporters as well, however, and those in his corner may be gaining in number.

Although Howlett and Meltzer’s positions on the matter are the most well-known, many other prominent labor arbitrators have chimed into the debate. Prominent labor arbitrator David Feller took an exceedingly restrictive view towards external law, seemingly condemning its use even for interpretive purposes. He once wrote:

My view is that an arbitrator under a collective bargaining agreement is normally limited to questions of interpretation and application of the collective bargaining agreement. External law is irrelevant even where the collective bargaining agreement has terms that look very much like a statute. For example, external law is irrelevant where an arbitrator is authorized only to interpret a contract, even if the contract contains language such as: “there shall be no discrimination on the basis of sex, race, religion, etc.,” identical to the anti-discrimination provision of Title VII.

For Feller, then, external law would be irrelevant even where the parties have purposefully tracked specific statutory language, a position that is extremely anti-external law, even compared to Meltzer’s position.

Richard Mittenthal’s self-proclaimed “middle ground” position is perhaps the most well-known of the alternative theories. According to Mittenthal,

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25 Ware, supra note 21, at 720.
27 See Martin H. Malin, Revisiting the Meltzer–Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?, 24 LAB. LAW. 1, 3, 26 (2008) (“It is time for courts to declare Howlett the winner. . . . Regardless of whether or not Howlett was correct in 1964, he surely is correct today that the law is implicitly incorporated into every collective bargaining agreement.”); see also William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration, 55 EMORY L.J. 609, 624 (2006) (“[A]rbitration could and should be reformed so as to incorporate the employment discrimination prohibitions contained in statutes as part of the common law of labor contract . . . ”).
29 Feller, supra note 28, at 975.
30 Feller, supra note 28, at 975.
31 See generally Richard Mittenthal, The Role of Law in Arbitration, 21 PROC. OF THE NAT’L ACAD. OF ARB. 42 (1968). Mittenthal described Howlett and Meltzer’s positions as “extreme” and spoke of a middle ground as being between those two approaches. Id. at 42. It is safe to assume, then, that Mittenthal would regard Feller’s theory as something akin to really extreme.
an “award may permit conduct forbidden by law but sanctioned by contract, [but] it should not require conduct forbidden by law even though sanctioned by contract.”\textsuperscript{32} Importantly, Mittenthal argues that refusing to require violations of law would actually be in accordance with contractual construction.\textsuperscript{33} Therefore, Mittenthal makes clear that he is not, in theory, elevating the law above the contract.

Although Mittenthal gamers much credit for this middle ground position, renowned labor arbitrator Archibald Cox pressed a similar theory on external law long before Mittenthal’s views were publicly espoused.\textsuperscript{34} Cox shared his views before the National Academy of Arbitrators in 1952, fifteen years before the Howlett-Meltzer debate:

The parties to collective bargaining cannot avoid negotiating and carrying out their agreements within the existing legal framework. It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids—futile because if the employer challenges the award the union cannot enforce it; unjust because if the employer complies he subjects himself to punishment by civil authority.

... [A]n arbitrator should not make an award which requires violation of a statutory command or defined public policy. Nor should he make an award based upon a contract which the courts would call void because against public policy.\textsuperscript{35}

An example might help illustrate the different arbitral approaches to handling external law. \textit{Evans Products Co.},\textsuperscript{36} arbitrated by David Feller, presented an interesting fact pattern in which the relevant collective bargaining agreement forbade discrimination “on the basis of age.”\textsuperscript{37} After a seventeen-year-old applied for a position requiring him to clean a mechanical saw, the company refused employment citing child labor provisions of the Fair Labor Standards Act (FLSA) that prohibited minors from cleaning woodworking machines.\textsuperscript{38} Feller, noting that the FLSA was not clearly incorporated into the parties’ agreement, found for the child and required the

\textsuperscript{32} Mittenthal, \textit{supra} note 31, at 50 (emphasis in original).
\textsuperscript{33} \textit{Id.} at 49.
\textsuperscript{34} See Archibald Cox, \textit{The Place of Law in Labor Arbitration}, \textit{5 Proc. of the Nat’l Acad. of Arb.} 76, 78 (1952).
\textsuperscript{35} Cox, \textit{supra} note 34, at 77–78.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
employer to hire him in spite of the FLSA. Feller opined that this was a clear case of age discrimination under the collective bargaining agreement and assured the parties that his award would be subject to nullification in the courts.

How would other arbitrators have decided this case? Howlett, believing that all collective bargaining agreements incorporate all applicable law, would find for the employer. Mittenthal, similarly, would find for the employer since the alternative would be to require illegal action in violation of the FLSA. Meltzer would have been more willing to reconcile the contract with the law, for example, by finding that the applicant, under these circumstances, was not covered by the anti-age discrimination provision in the contract. If he could not reconcile the two, then Meltzer would also find that the contract trumps the law, thereby finding for the grievant.

Arbitrators, as the foregoing shows, vary considerably in their handling of external law. The traditional view, championed by Meltzer, was quickly endorsed in the Supreme Court’s 1974 opinion in Alexander v. Gardner-Denver Co., and seems to continue to be the proclaimed view of many labor arbitrations. However, times have changed rather significantly since the Howlett-Meltzer debate, leading one to question if and how analysis of the issue should change.

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39 Id. at 530.
42 One notable arbitral opinion, representative of the Mittenenthal approach, is International Paper Co., 69 Lab. Arb. Rep. (BNA) 857 (1977) (Taylor, Arb.). In International Paper Co., arbitrator Jay Taylor denied the union’s grievance declaring that although the company’s actions in promoting a black employee over a more senior white employee violated the collective bargaining agreement’s seniority provision, the action was necessary in order to avoid serious repercussions under an executive order that required federal contractors to adopt an affirmative action plan. Id. at 862.
43 See Bernard Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 34 U. CHI. L. REV. 545, 560 (1967) (“[W]here a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation.”).
45 See infra St. Antoine, supra note 8, at 11–12.
V. A CHANGING DISCUSSION

Much has changed in the labor world since 1967. Many employment statutes have been promulgated, the Supreme Court has changed its tenor with respect to labor arbitration, and labor arbitrators have grown more familiar with and willing to take on legal issues.

Of significant relevance to this discussion, many of the laws that now permeate the work force had either just been promulgated, or had not yet been promulgated, at the time of the 1967 debate.66

At the time of the initial Meltzer/Howlett debate, many of the current laws that may affect the subjects covered by collective bargaining agreements had yet to be enacted. While Title VII of the Civil Rights Act and the ADEA had recently taken effect, OSHA, ERISA, FMLA, the Americans with Disabilities Act (ADA), the Heath Insurance Portability and Accountability Act (HIPAA), and most recently, the Genetic Information Nondiscrimination Act (GINA), not to mention a multitude of state laws, have since magnified the intersections of law and contract.67

As a result of this booming legalization of the workplace, labor arbitrators, originally tasked with enforcing a distinct “common law of the shop,” have faced a variety of grievances that implicate legal issues in very significant and conspicuous ways.68 Most typically, external law and the collective bargaining agreement can be reconciled.69 In some instances, however, the two simply cannot be reconciled—at least not without some arbitral creativity or equity70—forcing the arbitrator to decide whether or not to issue an award that is contrary to the mandates of public law.

Over the last forty years, the Supreme Court has also grown far more accepting of labor arbitrators taking on legal issues. In the 1974 case of Alexander v. Gardner-Denver Co., the Court took a hostile view towards the settlement of legal issues in labor arbitration, suggesting that labor arbitrators

67 Hodges, supra note 46, at 26-27. Other relatively recent federal statutes of potential relevance include The Employee Polygraph Protection Act (EPPA) (enacted in 1988) and the Worker Adjustment and Retraining Notification Act (WARN Act) (enacted in 1988).
68 See Hodges, supra note 46.
70 Hodges, supra note 46, at 27-28.
were insufficiently versed in the study of law, and adding that the machinery of arbitration, which emphasizes informality and quickness, rendered the arbitral forum inadequate for dealing with legal matters.

The Court's skepticism towards the capacity of arbitrators evaporated over the next several decades, however, leading the Court to finally recognize that several of the premises it relied upon in *Gardner-Denver* were no longer tenable. "That skepticism," held by the Court in *14 Penn Plaza v. Pyett*, "rested on a misconceived view of arbitration that this Court has since abandoned." The Court noted that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims . . . [and] [a]n arbitrator's capacity to resolve complex legal questions of fact and law extends with equal force to discrimination claims . . ." Thus, to the extent that arbitral incompetency is a premise supporting the "traditional" approach to dealing with external law, this premise is no longer endorsed by the Supreme Court.

Since 1967, it seems that labor arbitrators' willingness to consider external law has increased. At the time of the Howlett-Meltzer debate, most labor arbitrators were averse to considering external law, feeling incompetent to handle the nascent statutory issues and believing that the arbitral forum was inappropriate for legal questions. Interestingly, while it seems that the majority of labor arbitrators today claim to adhere to a Meltzer-like ideology, studies have shown that most, in practice, share the beliefs of

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51 *Gardner-Denver*, supra note 44, at 57.
52 *Id.* at 52.
54 *14 Penn Plaza*, supra note, at 268–69.
55 See, e.g., Bernard Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 558 (1967) ("There is . . . no reason to credit arbitrators with any competence . . . with respect to the law.").
56 See, e.g., Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 PROC. OF THE NAT'L ACAD. OF ADR. 59, 79–81 (1975) (survey of National Academy of Arbitrators in 1975 revealed that two-thirds "believed that an arbitrator has no business interpreting or applying a public statute in a contractual grievance dispute," and only fourteen percent had a familiarity with basic Title VII terminology such as "bona fide occupational qualification"); see also Gould IV, supra note 25, at 624 ("Subsequent to the 1967 debate . . . many, if not most, members of the National Academy of Arbitrators complained that the question of employment discrimination law was beyond their competence and that they did not view the process as appropriately established to address discrimination.").
57 It should be noted, however, that the bulk of the research on arbitrators' ideologies with respect to external law was gathered prior to *14 Penn Plaza* in 2009. One might well argue, then, that the "traditional" ideology is no longer adhered to by a majority of labor arbitrators.
Mittenthal, if not Howlett. In 2004, Theodore St. Antoine polled members of the National Academy of Arbitrators on this very issue, and the results he obtained were fascinating. While most of the arbitrators said that they would enforce the contract over the law where the two diverged, sixty percent, rather anomalously, said “they would [not] order a party to violate external law as part of [an] award[,]” as Mittenthal would suggest. “Today’s academy members,” St. Antoine said, “tend to accept the Meltzer/St. Antoine thesis in theory—but when the going gets tough, most of them move over into Dick Mittenthal’s corner, if not Bob Howlett’s. If I must declare a winner in this 40-year marathon, I believe it is [Mittenthal] . . . .”

In light of the significant changes that have taken place in the labor industry since 1967, this debate on external law has unquestionably taken on a new form. Although it seems that events over time have added force behind Howlett and Mittenthal’s theories, there are still strong arguments on both sides of the debate, making this issue particularly challenging to resolve.

VI. REASONS FOR AND AGAINST CONSIDERING EXTERNAL LAW

Before forming any opinion on the matter, it is instructive to review the arguments in favor of, and those in opposition to, considering external law in labor arbitration. This section will objectively review the main arguments underlying the opposing sides to the debate, focusing on the arguments’ strengths, as opposed to their weaknesses. Further, this section, as well as the rest of the paper, will focus primarily on how an arbitrator should handle external law when it seemingly comes into conflict with the collective bargaining agreement, as opposed to situations where external law could be helpful in interpreting the contract.

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59 St. Antoine, supra note 20, at 190.
60 Id.
61 This finding is not so anomalous, however, if one believes that an arbitrator can “read into” a contract a provision to not require the violation of external law. Hodges, supra note 46, at 25-28.
62 Id. St. Antoine, supra note 20, at 186.
63 How the arbitrator should consider external law when it does not conflict with the collective bargaining agreement, but rather could potentially be helpful in coming to a just decision, is a highly context-specific inquiry that does not lend itself to any clear answer. Hopefully, however, the views expressed in the coming pages could help shed some light on this “middle ground” scenario.

305
A. ARGUMENTS IN FAVOR OF CONSIDERING EXTERNAL LAW

The arguments in favor of considering external law in labor arbitration are manifold. Four general arguments, addressed below, are commonly proffered by those in the Howlett and Mittenthal camps.

1. UNFORESEEABLE CONFLICTS BETWEEN CONTRACT AND LAW LEAD TO UNFAIR RESULTS

As discussed above, labor arbitration now exists within a labor industry that is governed by an incredibly large amount of governmental laws and regulations. Many such laws have been created, and the effect of established laws can fluctuate considerably because of changing governmental interpretations. The result is that, inevitably, labor arbitrators will confront situations in which the collective bargaining agreements before them will seem to demand results in contravention of external law. To ignore the law in such a case could subject an employer to an order requiring him to break the law, or alternatively, could permit an employer to continue violating his employees’ legal rights.

Many argue that by ignoring the law, the arbitrator risks ordering an unfair award that effectively punishes one of the parties for failing to foresee fundamental changes to labor and employment law or for failing to explicitly incorporate each pertinent statute into the labor contract. Collective bargaining agreements are vaguely worded and relatively concise on purpose, as they need to be malleable enough to govern a workplace over a lengthy span of time. Justice Douglas recognized this fact in United Steelworkers of America v. Warrior & Gulf Navigation Co., stating that the collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases, which the draftsmen cannot wholly anticipate.”

Forcing parties to explicitly incorporate each pertinent law into the contract would lead to a myriad of questions about which parts of the relevant statutes are being incorporated; further, this would create an adverse inference against all laws not explicitly incorporated, i.e., that those unincorporated laws are not to be given any consideration in the course of arbitration, no

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matter the relevance. It is true that there are potential provisions parties can include in their agreements that state, generally, that arbitral awards should be in compliance with law; but such a broadly worded provision would risk giving too much legal authority to arbitrators, rendering the arbitral forum too similar to a court of law and stripping labor arbitration of some if its basic advantages, such as informality, affordability, and quickness.

(2) “FINAL AND BINDING” LANGUAGE

The vast majority of collective bargaining agreements provide that arbitral awards should be “final and binding.” For an arbitrator to issue an award that he knows is likely to be overturned by the courts is inefficient, doing a disservice to the parties and to the “final and binding” clause of their contract.

By issuing an award that will likely be overturned, the arbitrator costs both parties time and money. Arbitral awards are subject to reversal if they violate public policy that is “well defined and dominant” as ascertained “by reference to the laws and legal precedents.” Where the arbitrator issues an award he knows to be illegal, the result is that the parties will need to expend precious resources to continue litigation of the issue in the courts. Not only will this lead to added expense of time and resources, but it will also leave the parties in a state of limbo while waiting for a reversal in the courts, stunting

66 See, e.g., Oldham, supra note 27, at 32–33 (discussing “global incorporation,” which is “general contract language obliging the parties to behave in accordance with law.”).

70 It is no secret that many labor unions are suffering tremendously from a lack of resources. See, e.g., Alan Hyde, Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them, 25 Ohio St. J. on Disp. Resol. 975, 1013 (2010) (“Unions are beleaguered and can hardly maintain competent levels of processing grievances. . . .); see also Josh Levs, Analysis: Why America’s Unions are Losing Power, CNN (Dec. 12, 2002), http://www.cnn.com/2012/12/11/us/union-power-analysis/.

307
productivity and precluding closure in the meantime.\textsuperscript{71} As Robert Howlett stated, “This would result in a procedure contrary to the recognition and encouragement of the settlement of disputes by arbitration as enunciated by the Supreme Court in the \textit{Steelworkers} trilogy.”\textsuperscript{72} Not only would it be contrary to the Supreme Court’s preferences, but it would also be contrary to the “final and binding” language within the collective bargaining agreement, a result that could hardly be in accordance with the parties’ needs or preferences.\textsuperscript{73}

\textbf{(3) THE “POOR EMPLOYEE” ARGUMENT}

Many proponents of the Howlett position argue that employees will be unfairly disadvantaged if external laws are not considered in arbitration. In support of this argument, they cite employees’ inability to afford litigation, questionable representation by unions in arbitration, and the \textit{res judicata} effect that arbitration decisions can have in subsequent litigation.\textsuperscript{74} Although \textit{Gardner-Denver}\textsuperscript{75} made clear that employees will have a “second bite” at the apple\textsuperscript{76} in litigation to vindicate their separate statutory rights (to be distinguished from their contractual rights), the vast majority of employees who have viable employment law claims will not be able to obtain counsel for such lawsuits. It is estimated that only five percent of individuals with employment claims who seek representation from private attorneys are successful in obtaining counsel.\textsuperscript{77} Additionally, government agencies charged

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{71} Ware, supra note 21, at 722–23 (1999) ("The confidence parties have in the finality of arbitration encourages parties to agree to arbitration in the first place; if more awards were vacated, arbitration would become more costly in terms of time and money.").
\item Robert G. Howlett, \textit{The Arbitrator, the NLRB, and the Courts}, 20 Proc. of the Nat’l Acad. of Arb. 67, 85 (1967)
\item See Mittenthal, supra note 31, at 50 ("If the arbitrator ignores the law and orders the employer to commit an unlawful act, he invites noncompliance and judicial intervention. He knows that his award . . . is not going to be ‘final and binding’ . . . That could hardly be what the parties intended . . . .")
\item See Howlett, supra note 22, at 82 n.107.
\item \textit{Gardner-Denver}, supra note 44, at 47-49.
\item But see Ariana R. Levinson, \textit{What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims}, 46 U. Mich. J.L. Reform 789, 854 (2013) ("[R]ealistically, given that the contract claim is arbitrated, and the statutory claim is litigated, there are not two bites at the same apple.").
\end{enumerate}
\end{footnotesize}
with vindicating employee rights are inundated with complainants each year, rendering the agencies incapable of helping many employees who are in search of justice. Therefore, for most employees, there is no legitimate possibility of a “second bite” at the apple, rendering labor arbitration their only hope for justice.

Howlett proponents also argue that many unions, which are governed by “majority rule,” fail to adequately support minorities in both collective bargaining and arbitration. With that in mind, many Howlett supporters advance a policy-based argument that arbitrators should ensure that these minority employees are given a fair opportunity for justice; this may require arbitrators to refer themselves to existing discrimination laws that both the employer (to protect itself from an adverse ruling) and the union (to protect “the majority” within the workforce) may purposefully avoid referencing during the proceedings.

Finally, Howlett proponents argue that employees will be disadvantaged if laws are not considered in arbitration because many courts, in effect, give arbitral decisions res judicata effect in subsequent litigation. In Gardner-Denver, the Supreme Court noted the distinction between statutory and contractual rights, making clear that employees are permitted to litigate, de novo, statutory claims arising out of the same facts that gave rise to preceding arbitration. Nonetheless, the Court stated, “[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems professional or managerial and that, as of 1991, plaintiff’s counsel would not take an employment discrimination case unless it involved an average of $60,000 in provable damages).

See, e.g., Floyd D. Weatherspoon, Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union, 38 Del. J. Corp. L. 1025, 1053 (2014) (“In addition to the EEOC, other federal agencies lack the resources to bring federal lawsuits on behalf of employees.”).

See Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975) (“In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.”). See Deborah A. Widiss, Divergent Interests: Union Representation of Individual Employment Discrimination Claims, 87 Ind. L.J. 421, 422–23 (2012) (“[T]here is a real danger that union leaders may themselves hold discriminatory bias and accordingly fail to support individual employees adequately in the grievance and arbitration process; although a union, like an employer, is prohibited from discriminating, it may be quite difficult for an employee to prove a union’s actions were motivated by discriminatory animus.”).

appropriate."82 According to labor arbitrator Martin Malin, the preceding dicta from the Court has proven troublesome for employees hoping to vindicate their statutory rights in court after failed arbitration efforts.83 "Subsequent lower court decisions . . . have substantially eroded Gardner-Denver's holding that an employee who loses the grievance is entitled to de novo review on the statutory claim,"84 writes Malin. Since it seems that some employees will be negatively affected in court by unfavorable outcomes in arbitration, arbitrators should not be so willing to ignore the law if their justification for doing so is that the aggrieved employee can vindicate his rights in court.

(4) LABOR ARBITRATORS HAVE THE ABILITY TO HANDLE LEGAL ISSUES.

Howlett proponents, and even traditionalists,85 argue that concerns over arbitral competency are no longer tenable and that labor arbitrators are equally as competent as judges to handle legal questions.86 Indeed, studies

82 Gardner-Denver, supra note 44, at 44. The Court elaborated further on this point in footnote 21, listing relevant factors for courts to consider in assessing how much weight to give the arbitral decision. Id. at 60 n.21.
84 Malin, supra note 27, at 3, 20 (citing cases establishing that, in some jurisdictions, arbitral decisions have in effect been given res judicata effect in subsequent litigation); see also Hodges, supra note 46, at 56 n.223 ("Early evidence regarding application of Gardner-Denver indicated that subsequent litigation seldom resulted in a decision that differed from the outcome of labor arbitration.").
85 See, e.g., Theodore J. St. Antoine, Presidential Address: Contract Reading Revisited, ARB. 2000, WORKPLACE JUSTICE AND EFFICIENCY IN THE 21ST CENTURY PROCEEDINGS OF THE 53RD ANNUAL MEETING OF THE NAT’L ACADEMY OF ARB. 1, 18-19 (Steven Briggs & Jay E. Grenig eds., 2001). ("I am confident no member of this Academy lacks the capacity to handle most of the applicable statutes and other law and policy. Take, for example, the concept of ‘discrimination’ under federal law. It is subtle and elusive. But it is not the Internal Revenue Code.").
86 See, e.g., Ariana R. Levinson, What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims, 46 U. MICH. J.L. REFORM 789, 854 (2013) ("To the extent that labor arbitrators are required to specialize in employment law and understand the workplace, it is conceivable that they are better qualified than generalist judges to decide employment-discrimination claims."); Bonnie G. Bogus, Melding External Law With the Collective Bargaining Agreement, ARB. 1997: PROCEEDINGS OF THE NAT’L ACADEMY OF ARB. 82, 98 (1997) ("Whether advocates or arbitrators are lawyers or laypersons may not be the issue, since a law degree does not guarantee the holder has knowledge or experience in every area of the law, and nonlawyers may have greater expertise in a particular area.").
tend to support this proposition.\textsuperscript{87} Arbitral incompetency to handle legal issues was a significant premise underlying Bernard Meltzer’s external-law theory in 1967.\textsuperscript{88} Whether or not Meltzer was accurate in 1967, it seems his assessment is much less supportable today, as labor arbitrators have grown quite accustomed to dealing with legal questions, rendering them just as capable as judges to interpret labor and employment law.\textsuperscript{89}

B. ARGUMENTS OPPOSING CONSIDERATION OF EXTERNAL LAW

Arguments opposing the consideration of external law generally fall into two groups: the first group focuses on the role of the labor arbiter, emphasizing that he is charged with enforcing the parties’ collective bargaining agreement above all else; the second group focuses not on the arbiter, but on labor arbitration as a system, emphasizing that labor arbitration is not suited for robust consideration of the law.

1) THE ROLE OF THE LABOR ARBITRATOR

Self-proclaimed traditionalists emphasize that the labor arbiter is selected to perform a private function in interpreting the parties’ collective bargaining agreement. As a result, the agreement has an existence that should be considered independently of public influences, including public law.

Although this argument has strong theoretical underpinnings, it is also strongly reinforced by Justice Douglas’ oft-quoted dicta in United Steelworkers of America v. Enterprise Wheel & Car Corporation:

[An] arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement . . .\textsuperscript{90}

\textsuperscript{87} See Levinson, supra note 76, at 844 (“[T]he cases indicate that in most instances, arbitrators have the ability to apply the law to the facts, not only to interpret CBA’s.”); Cole, supra note 5, at 865 (“Today’s arbitrators are capable of interpreting the law, are experienced with discrimination claims, and are as accurate as judges in interpreting the law.”).


\textsuperscript{89} Meltzer, supra note 18, at 558.

Douglas continued, declaring that if the arbitrator’s opinion at issue could “be read as based solely upon the arbitrator’s view of the requirements of enacted legislation . . . [then] he exceeded the scope of the submission.”

Simply put, the arbitrator, it is said, serves a role that is entirely private in nature. He owes nothing to the public at large, nor does he possess the ability to pass upon legal issues within the province of trained jurists.

(2) THE ROLE OF LABOR ARBITRATION

The second argument opposing the consideration of external law is that labor arbitration is not, as a system, adequately equipped to handle such issues, and further, that modifying labor arbitration to make it more equipped would move labor arbitration away from the system’s greatest advantages.

First, those in the Melzer camp argue that some of arbitration’s greatest attributes—speed, informality, and cost-effectiveness—would be threatened if external law started serving a bigger role in arbitral decision-making. Typically, there are no rigid rules of evidence or procedure in labor arbitration. Along those same lines, lawyers are often not needed in labor arbitration, and indeed, they commonly are not present in the proceedings. Entangling labor arbitration with issues of law would have the effect of complicating the proceedings, causing delays in progress, and making the overall process more expensive for both parties. Unions, subject to a statutory duty of fair representation, could be forced to hire additional legal support to remain competitive in the proceedings, a policy consideration worthy of special notice considering the increasingly scarce resources of many unions.

91 Steelworkers, supra note 90, at 597.
92 See, e.g., Steven K. Birch, The Arbitrator’s Dilemma: External vs. Internal Law? Narrowing the Debate, 53 Disp. Resol. J. 58, 61 (1998) (“The feared consequence of creeping legalism is that it will undermine the cost-effectiveness of the arbitration process as compared to traditional litigation, thus defeating the primary reason for its existence.”).
93 Levinson, supra note 76, at 800–01.
95 For example, burdens of proof under certain statutory schemes are quite different from those applied in traditional arbitral settings. See, e.g., Richard I. Bloch, The Changing Face of Just Cause: One Standard or Many?, 53 Proc. of the Nat’l Acad. of Arb. 20, 26 n.18 (2000).

312
Second, Meltzer supporters note that aggrieved employees and employers can always turn to courts or government agencies to vindicate their statutory rights.98 Thus, the argument goes, there is no need for arbitrators to worry themselves with legal issues when they are not called upon to do so, as the arbitration of contractual rights will not preclude litigation on those same facts.99

Third, arbitral awards carry no force of law by themselves. Courts are charged with enforcing arbitral awards.100 Thus, if an arbitral award is truly contrary to law, aggrieved parties will always be able to appeal the award to the judiciary to right the perceived wrong.

A fourth point attacks the ability of the labor arbitrator to handle legal issues. Although many modern-day scholars posit that labor arbitrators do have the competence to handle legal issues,101 there is still a contingent that believes arbitrators simply lack the same ability as judges to understand and apply the law.102 More commonly, scholars have faith in arbitrators’ ability to apply the law, but note that the law is so often in flux or so unclear that arbitrators should be advised to leave those issues to the courts.103 This point is particularly compelling with respect to NLRB law, because the Board has been known to vacillate on major issues with each change in administration.104 Considering the narrow judicial review standards for labor arbitration, many legal errors by arbitrators could be etched into stone as between the parties—
another point cautioning against the consideration of external law. David Feller notes a related point:

Once arbitrators go beyond the collective bargaining agreement, they lose the justifications for their immunity from review. Arbitrators have special expertise, they are chosen by employers and unions because of their familiarity with industrial relations and their ability to solve these problems. When arbitrators start interpreting statutes, however, there is no reason why their interpretations of the proper application of statutes should be given greater weight than that of the district courts.

In other words, labor arbitrators were originally given so much insulation from judicial review because of their perceived expertise in the “common law of the shop.” Once arbitrators start deciding issues of public law, however, these lax standards of judicial review lose their justification.

VII. GUIDEPOSTS FOR LABOR ARBITRATORS

In light of the foregoing, it is clear that there are strong arguments on both sides of this debate. It is also clear, however, that the labor industry has undergone significant change in the last several decades, fundamentally altering the factors involved when one considers how a labor arbitrator should reconcile the collective bargaining agreement with external law. Although the issue is highly complex and context-specific, I will now advocate for four basic principles to serve as guideposts for labor arbitrators confronted with this question.

(1) A STRICT “FOUR CORNERS” APPROACH TO CONTRACT INTERPRETATION HAS NO PLACE IN LABOR ARBITRATION

Right off the bat, it is important to note that a strict “four corners” approach to contract interpretation would be highly imprudent in the collective bargaining context. Once one accepts this proposition as true, then it should be much easier to accept the idea that external law can play a significant role in labor arbitration, regardless of whether or not it was explicitly incorporated into the agreement.

105 See Martin H. Malin & Jeane M. Vanhof, The Evolving Role of the Labor Arbitrator, 21 OHIO ST. J. ON DISP. RESOL. 199, 238 (2005) (“The generally lenient standards of judicial review may place even greater pressure on arbitrators to get the law right, as no higher authority is likely to correct their mistakes.”).

The Supreme Court made clear in *Warrior & Gulf* that in interpreting collective bargaining agreements, arbitrators are to look beyond the terms of the contract: “The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally part of the collective bargaining agreement although not expressed in it.”107 Douglas quoted esteemed labor arbitrator Archibald Cox to further elucidate this point:

There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.108

Arbitrators, respecting the instruction of Douglas and Cox, have commonly looked beyond the plain meaning of collective bargaining agreements in a number of ways.

First, many arbitrators are willing to let past practices between the parties override unambiguous contractual language, at least insofar as the past practices are long-standing and well-accepted as between the parties.109 Second, it is common practice for arbitrators to read “just cause” provisions into collective bargaining agreements where such language is not provided for.110 This practice is commonly carried out even in spite of the Supreme Court’s admonishment that arbitrators do “not sit to dispense [their] own brand of industrial justice.”111 Third, in considering the “common law of the shop,” arbitrators will look to decisions from other arbitrators who interpreted

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109 See, e.g., Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 14 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 30 (1961); St. Antoine, supra note 8, at 14 (“[A] long-standing and well-accepted practice may prevail even over a ‘clear’ and ‘express’ provision in the agreement.”).
110 See, e.g., Richard I. Bloch, *The Changing Face of Just Cause: One Standard or Many?*, 53 PROC. OF THE NAT’L. ACAD. OF ARBS 20, 22 (2000) (“Even when contracts are silent on the standard, most arbitrators will readily infer [a just cause standard] to the extent that management will be hard-pressed to argue successfully for any other approach . . .”).
other contracts governing two other parties.\textsuperscript{112} Finally, most arbitrators subscribe to the “reserved rights” theory of interpretation, \textit{i.e.}, they assume that employers are entitled to all those rights that they have not contracted away, even if the contract says nothing to that effect.\textsuperscript{113} To the many arbitrators that subscribe to this reserved rights theory, then, the existence of a “management rights” clause in the contract is simply redundant and given little or no independent effect.\textsuperscript{114}

The purpose of this sub-section is not to question the prudence of any of the above practices—indeed, all are eminently reasonable. This sub-section simply notes that there is no standard practice of looking solely at collective bargaining agreements in labor arbitration. The contract\textit{ must }be supplemented in order to give effect to the parties’ true intentions and to allow the parties to quickly and fairly reach a resolution on their respective issues. Once one accepts that the foregoing practices are commonly employed in labor arbitration, and often without objection, one must feel more accepting of allowing external law to also play a significant role in the process, even when it is not explicitly referred to in the parties’ agreement.

\textbf{(2) THE PRESUMPTION OF LEGALITY NEEDS TO BE VERY STRONG}

Most labor arbitrators believe that when there are two possible interpretations of a collective bargaining agreement—one that would lead to an illegal award and one that would lead to a legal award—the arbitrator may assume that the latter interpretation is proper.\textsuperscript{115} Even though most arbitrators agree with this proposition, arbitrators vary in how willing or able they are to find a “legal” interpretation of the agreement when it arguably conflicts with external law. I submit that labor arbitrators need to go above and beyond, if necessary, to find a way to interpret the agreement so as to issue an award that is in compliance with law. On this point, I find myself in agreement with

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\begin{itemize}
\item \textsuperscript{112} See, \textit{e.g.}, Clyde W. Summers, \textit{Individual Protection Against Unjust Dismissal: Time for a Statute}, 62 VA. L. REV. 481, 501 (1976) (“Although arbitrators often cite no other decisions in their opinion and never consider other cases as binding precedents, they usually are quite aware of the pattern of decisions by other arbitrators and are reluctant to deviate far from that pattern.”).
\item \textsuperscript{113} Richard Mittenhal & Richard I. Bloch, \textit{Arbitral Implications: Hearing the Sounds of Silence}, 4 Proc. of the Nat’l Acad. of Arb. 65, 70 (1989); Bloch, \textit{supra} note 95, at 26 n.18.
\item \textsuperscript{114} Id. at 70 (“Indeed, the management rights clause becomes irrelevant, once the arbitrator accepts the ‘reserved rights’ theory.”).
\item \textsuperscript{115} See, \textit{e.g.}, Bernard Melzer, \textit{Ruminations About Ideology, Law, and Labor Arbitration}, 34 U. of Chi L. Rev. 545, 557-58 (1967).
\end{itemize}


Richard Mittenthal in stating that labor arbitrators may “permit” illegal conduct, if necessary, but they should not demand it.

When an arbitrator demands illegal action, he is forcing a party to face adverse legal action in the courts. In other words, he is forcing the party to be a two-time loser, with losses in both arbitration and a subsequent judicial or administrative proceeding.116 One might astutely point out that the two-time loser can “simply” go to court to have the arbitral award reversed; but judicial review of arbitral awards is extremely narrow, resulting in reversal only where there is a violation of “explicit” and “dominant” public policy, or where the award resulted from “dishonesty” or “fraud.”117 Moreover, litigating the issue(s) would require significant time and money, leading additionally to a stressful work environment and a lack of closure for the parties. Labor arbitrators should be striving for finality in their awards—especially where there are, as is typically the case, “final and binding” clauses in the agreement118—and should therefore not issue awards that will inevitably and senselessly lead to additional litigation. Such a result could hardly be what the Supreme Court and Congress had in mind when they gave their initial endorsements to labor arbitration over five decades ago.119

Interpreting contracts with a strong presumption of legality is also quite supportable from a contract-interpretation standpoint. As stated above, labor arbitrators rarely apply a strict “four-corners” approach to contract interpretation, and oftentimes they will read unstated terms into the agreements and ignore unambiguous language that would otherwise dictate contrary results. Reading into agreements a provision, to the effect that neither party should be forced to violate the law, would not be much different

116 Common sense dictates that this two-time loser would almost always be the employer.

117 United Paperworkers Intern. Union, AFL-CIO v. Misco, 484 U.S. 29, 38, 43 (1987). “[A]s 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.” Id. at 38; see also Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. REV. 703, 722 (1999). (“The absence of a record and reasoned opinions, combined with the very limited grounds on which courts may vacate arbitration awards, results in extremely few awards being vacated.”).


119 See infra p. 4; see also Ortleb v. Sheephead Nursing Home, 688 F.2d 883, 889 (2d Cir. 1982) (“It makes little sense to require the arbitrator to . . . render a decision that may be in conflict with the mandate of law and that therefore might later be set aside. This resolution would thwart federal policy rather than further it.”).
from reading in a “just cause” provision. It is inconceivable that either party would ever agree to a contract that would demand that they break the law, and the fact that an explicit provision to that effect is missing should only be taken as a limit, not a complete prohibition, on arbitral consideration of external law. Moreover, to the extent that other parties within the respective industries have a practice of not demanding violation of law, the argument could be made that this has become “the common law of the shop,” which the Supreme Court has admonished is part of every collective bargaining agreement.

To be sure, the argument I am advancing would require some equitable considerations on the part of arbitrators; but considering the overarching arbitral goals of fairness and justice (as constrained by the contract, of course), a dose of arbitral creativity and equity is not unreasonable, nor is it a consideration foreign to adjudicative forums. Importantly, going to greater lengths than normal to find a contract interpretation that is consistent with law is not the same thing as allowing the law to subvert the contract. Rather, it is a realist approach to contract interpretation that reads into the contract an intent not to demand illegal activity. Such action on the part of arbitrators does both parties a favor by preserving their contract, saving the parties time, expense, and hassle, and by not punish the parties for a lack of foresight and specificity in contract drafting within an ever-changing legal landscape.

(3) TO BROACH OR NOT TO BROACH?

121 Malin, supra note 27, at 27 (“[C]ourts should enforce awards based on external public law because the parties assume compliance with public law when negotiating the contract.”).
122 Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960) (“[T]he practices of the industry and the shop . . . is equally part of the collective bargaining agreement although not expressed in it.”).
123 See generally Cornelius J. Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1 (1983); see also Robert G. Howlett, The Role of Law in Arbitration: A Reprise, 21 PROC. OF THE NAT’L ACAD. OF ARB. 64, 65 (1968) (“[C]ourts . . . take the rules . . . as a general guide, determine what the equities of the cause demand, and contrive to . . . render a judgment accordingly, wrenching the law no more than is necessary.”) (citation omitted).
124 See Richard Mittenhal & Richard I. Bloch, Arbitral Implications: Hearing the Sounds of Silence, 4 Proc. of the Nat’l Acad. Of Arb. 65, 66 n.5 (1989) (“[A]ribtrators are in a real sense always ‘adding’ to the contract . . . . As long as that ‘addition’ draws its essence from some express contract provision or from the underlying purposes of the contract, it remains a legitimate form of contract interpretation.”).

318
Baldwin: The Eternal Debate on External Law in Labor Arbitration: Where We

An important question remains: how should the arbitrator broach the external-law issue? Should the arbitrator raise the issue *sua sponte*, or should he wait for a party to raise the external-law question? Howlett, Cox, and Mittenthal argue that the arbitrator should, *sua sponte*, probe for conflicts between the law and the contract. My belief is that the arbitrator, as a neutral adjudicator, should almost always wait for one of the parties to raise the external law issue, even if the arbitrator notices a potential conflict between law and contract.

Although there is perhaps more flexibility for arbitrators to be proactive than there is for judges, arbitrators are not advocates. Nor are arbitrators mediators. The arbitration process includes party advocates for a reason, and in order to allow these advocates to fulfill their obligations as they see fit, arbitrators should remain relatively passive throughout the proceeding and allow the parties—who indeed created the collective bargaining agreement in the first place—to make their own cases. Unilaterally infusing arguments into the proceeding would serve to subvert the advocates, benefit one party over another, and, incidentally, tarnish the arbitrator’s reputation in an industry in which reputation is paramount.


128 St. Antoine conducted an interesting study on this very topic within the National Academy of Arbitrators. He found “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.” Theodore J. St. Antoine, *External Law in Arbitration: Hard-Boiled, Soft-Boiled, and Sunny-Side Up*, 57 PROC. OF THE NAT’L ACAD. OF ARB. 185, 190 (2004).

129 I say “almost always” in recognition of the fact that these sorts of issues arise in a number of complicated and varied contexts. Thus, the door should perhaps remain open to raising the legal issue *sua sponte* in appropriate circumstances where adverse consequences would otherwise appear substantial and certain.

130 It is true that in some instances party representatives may prove incompetent. Still, however, employers select their representatives at their own peril, and employees will have recourse against their union representatives if they fail to provide adequate representation. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).


319
Additionally, arbitrators are rarely given advanced notice of the issues that are to come before them.\textsuperscript{132} As labor arbitrator Bonnie Bogue notes, “It is the lucky arbitrator who is only confronted with the issue in the relative sanctity of the office, with time to deliberate over well-crafted written arguments and with research tools available.”\textsuperscript{133} Raising a legal question \emph{sua sponte} is dangerous considering the lack of briefing on the subject, the inability for advocates to make a knowledgeable oral argument on the issue, and the complexities and frequent changes in legal standards.

The argument in favor of restraint is strengthened by the NLRB’s new deferral policy, articulated in \textit{Babcock & Wilcox Construction Co.}\textsuperscript{134} Previously, the NLRB policy was to defer to arbitral awards where, essentially, the arbitrator “considered” the unfair labor practice issue (which would be \textit{presumed} when (i) the contractual issue was factually parallel to the unfair labor practice issue, and (ii) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice claim) and the award was not “clearly repugnant” to the purposes and policies of the National Labor Relations Act.\textsuperscript{135} This lax deferral standard resulted in many employees being prevented from bringing unfair labor practice claims to the NLRB, whether the legal issue was actually considered in the preceding arbitration or not.\textsuperscript{136} Under \textit{Babcock & Wilcox}, however, the NLRB will only defer where, \textit{inter alia}, the party urging deferral proves that the arbitrator was explicitly \textit{authorized} to decide the unfair labor practice issue and was presented with and considered the statutory issue, meaning that the arbitrator actually \textit{identified} the legal issue and at least generally addressed it.\textsuperscript{137} This holding, coupled with \textit{Gardner-Denver},\textsuperscript{138} puts much less pressure on arbitrators to identify legal issues, and instead leaves the fate of legal claims in the parties’ hands. If the legal issue is not raised in the arbitration, the doors to the NLRB and the courts should remain open for the parties.

If a party raises an arguably meritorious legal argument, however, the arbitrator should ensure that both sides are given an opportunity to speak on

\textsuperscript{133} Bogue, \textit{supra} note 132, at 84.
\textsuperscript{134} 361 N.L.R.B. 132 (2014).
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} Babcock & Wilcox Construction Co, 361 N.L.R.B. 132, at *7–10 (2014). Notably, this holding is limited to 8(a)(1) and 8(a)(3) cases. \textit{Id.}, at *1.
\textsuperscript{138} \textit{Infra} pp. 16–17.
the matter, including through post-hearing briefs, if necessary. Not only is this fair to both parties, but this recognizes that many arbitrators are not legal experts,139 and therefore should welcome the opportunity to become more informed on pertinent legal issues. In order to preserve party resources and avoid the over-legalization of arbitration, the arbitrator should not ask for legal arguments or supplementation when he knows that the law should not or need not be considered in deciding a particular case.

(4) ALTHOUGH THE LAW HAS A DEFINITE ROLE TO PLAY IN ARBITRATION, ITS USE NEEDS TO BE CAREFULLY CIRCUMSCRIBED

Although the position I advance is more welcoming of external law than is the traditionalist position, it must be recognized that in order for labor arbitration to continue to serve the role it was originally intended to play, the use of external law needs to be carefully circumscribed.

For starters, arbitrators need to be careful about deciding what sections of relevant statutes they decide to “incorporate” into the parties’ bargain. Even when parties expressly incorporate a statute into their collective bargaining agreement, the arbitrator should not assume that each section, of what could be a highly complex statute, was intended to be incorporated. Labor Arbitrator Richard Bloch sums up the issue soundly:

[A]bsent clear guidance from the parties, the assumption by the arbitrator must be that these statutes have been incorporated, if at all, for the purpose of absorbing their generalized benevolent goals, and not necessarily for their specifics in every detail. . . . It is unlikely that the parties will have focused on the myriad of ticklish problems that can arise, such as burdens of proof, remedies, or arcane legal ramblings. . . .140

Allowing each provision of a complex statute to play a role in arbitration would make labor arbitration longer, more complicated and expensive, and it would introduce elements into labor arbitration that are foreign to the forum.

139 Although statistics vary, it is safe to say that just about half of American labor arbitrators are lawyers. See Sarah Rudolph Cole, Let the Grand Experiment Begin: Frye Authorizes Arbitration of Unionized Employees’ Statutory Discrimination Claims, 14 LEWIS & CLARK L. REV. 861, 876 n.85 (2010); Steven K. Birch, The Arbitrator’s Dilemma: External vs. Internal Law? Narrowing the Debate, 53 DISP. RESOL. J. 58, 64 (1998). Although evidence suggests that arbitrators, both lawyer and non-lawyer, are capable of handling some legal issues, see infra p. 36, this does not address the fact that the law is complicated and constantly in flux. Even seasoned judges rely on briefing, law clerks, and outside experts to appropriately analyze legal issues.

Title VII and the Americans with Disabilities Act, for example, provide for punitive damages\(^\text{141}\) and attorney’s fees.\(^\text{142}\) In traditional labor arbitration, however, punitive damages and attorney’s fees are not ordered except in unusual cases.\(^\text{143}\)

Also, in the interest of preventing the over-legalization of arbitration, arbitrators should only go “above and beyond” to find a legal interpretation of the contract when the alternative would be to require illegal conduct. When the arbitrator simply permits, rather than requires, illegal conduct, the aggrieved party is still able to vindicate his statutory rights in the appropriate judicial or administrative forum. Thus, when the arbitrator simply permits illegal conduct that is allowed by the parties’ bargain, he is not forcing anyone to be a two-time loser or law breaker, and the equities of the situation tip in favor of following the contract.

Although individuals might have benevolent purposes in mind when arguing that labor arbitrators should make greater efforts to look out for minority or vulnerable employees, these arguments fail to give countervailing weight to important considerations, such as: (1) the “majority rule” of collective bargaining has been recognized by the Supreme Court as a necessary byproduct of collective bargaining;\(^\text{144}\) (2) although unions may have a history of discriminating against minorities, these practices seem to have all but disappeared;\(^\text{145}\) (3) unions are subject to a duty of fair representation;\(^\text{146}\) (4) judicial and arbitral forums exist separately for a reason; and (5) the arbitrator needs to decide cases impartially, without dispensing “his own brand of industrial justice.”\(^\text{147}\) The “poor employee” argument may have political appeal, but arbitration should be devoid of politics, and therefore this argument is ultimately not compelling.

Finally, one needs to realize that over-reliance on the law threatens the attributes of labor arbitration that have made it such an integral part of labor-management relations. Labor arbitration quickly and efficiently resolves work


\(^{144}\) *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975).

\(^{145}\) *See*, e.g., *Cole*, supra note 5, at 864 (“To ensure their survival, unions have become staunch advocates of traditionally unrepresented groups as they recognize that members of those groups form a large percentage of their newest and most supportive members.”).

\(^{146}\) *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

disputes in a relatively inexpensive and informal manner. Over-reliance on
the law would require parties to expend more money on legal resources,
protract the resolution of sensitive work issues, and fundamentally change
the nature of labor arbitration to make it a formalized process almost
indistinguishable from that which occurs in a courtroom. There is a
significant role for the law to play in labor arbitration, but the law should not
play a role bigger than necessary to efficiently resolve the work dispute in a
manner that is faithful to the parties’ bargain.

VIII. CONCLUSION

It is apparent that the labor industry has evolved considerably over
the last several decades. Over time, labor arbitration has grown much more
intertwined with public law and policy, casting doubt upon the claim that the
forum is wholly private in nature. Because of this evolution, modifications
need to be made to the “traditional approach” to interpreting collective
bargaining agreements. It is no longer reasonable to ignore the significant
effect that external law has in the workplace, and indeed, it has become
apparent that the line between “the common law of the shop” and external law
has been significantly blurred.

The four guiding principles I have proffered seek to modify Meltzer’s
traditional approach by allowing measured consideration of external law to
the extent necessary to maintain industrial peace, prevent unfair results, and
ultimately issue an award that accords with the various needs and intents that
underlie the parties’ bargain. While allowing external law to play an increased
role in the proceedings, its use is tempered by only allowing certain core
aspects of external laws to be incorporated, by requiring one of the parties to
raise the external law issue, and by only allowing external law to trump an
otherwise clear agreement when the agreement would demand an award that
required violation of law. These limitations are in recognition of the fact that
labor arbitration is a forum that exists separately from judicial and
administrative forums. Labor arbitration was created to quickly and
efficiently resolve disputes in the workplace, and although the evolving labor
industry has forced the forum to make some adjustments, the law was never
intended to play a major role in labor arbitration, and nor should it today, lest
the forum lose the very attributes that make it such an appealing system of
dispute resolution.

Moving forward, one must ask what changes can be made to labor
arbitration to render it better suited to identifying and resolving legal issues.
One potential change would be to require all labor arbitrators to possess law
degrees or, alternatively, to receive continued legal education. Considering that just about half of American labor arbitrators are not lawyers,\textsuperscript{148} it seems doubtful that a law degree will become a mandatory requirement any time soon. Requiring some form of continued legal training might be prudent, however, especially if the NLRB reverts back to its old Olin deferral standard, under which many employees’ legal rights under the NLRA were effectively decided in arbitration.\textsuperscript{149} In any event, it would certainly be beneficial to the parties to come before an arbitrator who possesses at least a basic understanding of the current state of law under the major labor and employment statutes.\textsuperscript{150}

It is probably true that most labor arbitrations do not implicate significant issues of external law.\textsuperscript{151} Nonetheless, the fact remains that unions represent more than sixteen million employees in the United States,\textsuperscript{152} and almost all of these employees are covered by a collective bargaining agreement containing an arbitration clause.\textsuperscript{153} It is clear, then, that labor arbitration continues to play a major role in the governance of the American workplace, making it imperative that we continue to adapt the forum to help it respond effectively to changes in the labor industry. As rare as the external law dilemma may be, all labor arbitrators should know how to resolve it when it rears its ugly head.

\textsuperscript{149} See infra pp. 29–30.
\textsuperscript{150} To the extent that having an arbitrator who lacks significant legal training is problematic, however, this problem is greatly alleviated by the fact that the parties typically have great flexibility in choosing an arbitrator who can suit their specific needs on an \textit{ad hoc} basis. See, e.g., JAY E. GRENG & ROCCO M. SCANZA, FUNDAMENTALS OF LABOR ARBITRATION 27–35 (2011); Cole, supra note 5, at 873–74.
\textsuperscript{151} See Perry A. Zirkel, \textit{The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards}, 1 DET. C.L. REV. 31, 45 (1985) (finding that external law played a major role in just five percent, and a minor supporting role in just ten percent, of a sample of published arbitration awards); see also St. Antoine, supra note 20, at 189 (“Fortunately for me, both parties have always agreed on either my considering the law or my ignoring it.”).
\textsuperscript{153} See Cole, supra note 5, at 873-74.