None of these procedures is perfect. But all are good in the sense that they have the common purpose to provide a quick solution, and because they may be challenged either through a request for court review or by arbitration.

The choice among them depends on the dispute and on the parties’ specific needs.

For urgent measures, the Pre-Arbitral Referee procedure seems to be quite effective. Court-ordered mediation also is a good tool to settle a disagreement in a not-litigious way.

As to disputes and decisions that go to the contract’s substance, the DAB, and the U.K. adjudication, are both good—close to arbitration, subject to the enforcement concern about the DAB, and which may not always be much better than a quick award.

And voluntary or court-ordered mediation remains a very good tool to settle a disagreement, international or otherwise, in a not-litigious way.

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A ‘Sea Change’ for Collective Bargaining as the U.S. Supreme Court Permits Unions to Agree to Arbitration for Discrimination Claims

BY CHRISTOPHER WALSH

The U.S. Supreme Court has departed from a number of its earlier decisions by holding that a collective bargaining agreement provision requiring arbitration of claims arising under federal anti-discrimination laws is enforceable.

Some might say that the Court overruled its earlier decisions in derogation of stare decisis last month when it decided 14 Penn Plaza LLC v. Pyett, 07-581 (April 1, 2009)(available at www.supremecourtus.gov/opinions/08pdf/07-581.pdf). The decision holds that an employee asserting discrimination claims in court may be compelled to arbitrate them under Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. 1, et seq.

Pyett will have little bearing on commercial arbitrations and employment arbitrations involving nonunion employees, because previous Court decisions already have established that claims arising under federal statutes are arbitrable under the FAA.

But Pyett likely will have a substantial effect on how labor arbitrations are conducted because the decision marks a sea change in the Court’s view of the purpose and proper procedure for labor arbitrations. The extent of the ultimate effect on labor arbitrations will depend on whether and how employers and unions adopt provisions in their collective bargaining agreements seeking to compel arbitration of statutory discrimination claims.

AVOIDING STOPPAGES

Since the 1960 Steelworkers’ case trilogy, labor arbitration was viewed by the Court as a way to avoid work stoppages by privately enforcing the terms of collective bargaining agreements. While run-of-the-mill commercial arbitration was recognized as a substitute for litigation, labor arbitration was recognized as a “substitute for industrial strife.” United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

Thus the purpose of labor arbitrations was “to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry. . . .” United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). In settling such disputes, the arbitrator’s ultimate obligation was to be faithful to the collective bargaining agreement. While an arbitrator could “look for guidance from many sources,” the arbitrator’s award was “legitimate only so long as it draws its essence from the collective bargaining agreement.” Id. at 597.

Indeed, as conceived by the Court in the Steelworkers trilogy, labor arbitrators were charged with giving effect to “a new common law—the common law of a particular industry or of a particular plant.” Warrior & Gulf Navigation, 363 U.S. at 579.

As the National Academy of Arbitrators noted in its amicus brief (the Pyett briefs are available at Scotusblog’s Wiki at www.scotuswiki.com/index.php?title=14_Penn_Plaza_LLC_v._Pyett), the unique function ascribed to labor arbitrations by the Steelworkers trilogy resulted in a style of arbitration that differs in important and substantial ways from arbitration styles prevailing in other types of arbitrations.

Because labor arbitrators are beholden to “the common law of a particular industry or of a particular plant,” a premium is placed on labor arbitrators with an expertise in industrial relations—not necessarily the law or traditional judicial procedures for dispute resolution. In fact, according to the National Academy of Arbitrators, “almost 40% of labor arbitrators are trained in industrial relations, not law.” Brief Amicus Curiae of the National Academy of Arbitrators at 15.

Moreover, in labor arbitrations, there is rarely pre-hearing discovery, and custom and past practice at the employee’s

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work site “constitute one of the most significant evidentiary considerations in labor-management arbitration.” Elkouri & Elkouri, “How Arbitration Works,” 605 (Alan Ruben ed., 6th ed. 2003). Labor arbitrators also generally do not award damages for emotional distress. Instead, their awards are generally limited to economic damages and equitable relief relating to the employment relationship, e.g., reinstatement or reassignment.

RECASTING THE FUNCTION

The Pyett decision, however, signals the Court’s recasting of the function of labor arbitrations. In its new form, labor arbitration will require new procedures and arbitrators with new skills and areas of expertise. Instead of being faithful only to the collective bargaining agreement and a particular plant’s or industry’s “common law,” labor arbitrators now may be called on to interpret and apply a broad array of federal and state statutes and other laws on to interpret and apply a broad array of particular plant’s or industry’s “common expertise. Instead of being faithful only to arbitrators with new skills and areas of

distress and other types of relief which are not typically awarded in labor arbitrations as currently conducted. This, in turn, will require consideration of expert psychological witnesses and other evidence that is not typically seen in labor arbitrations.

While only time will tell what becomes of labor arbitrations, the essence of labor arbitrations will have to change in order to accommodate the types of claims that now must be resolved by tribunals whose

changing the Law

The question: Can unions bargain away their members’ ability to take discrimination cases to court?
The old answer: No waiver of rights under a collective bargaining agreement.
The new answer: In its second arbitration decision of the 2008-2009 term, the Supreme Court reverses course and says that there is no waiver of rights. It’s a forum choice.

ENSURING ARBITRABILITY

Employers with unionized workforces should cheer the Pyett decision as it will allow them to seek to include in their collective bargaining agreements broad grievance-arbitration provisions covering statutory discrimination claims, a procedure which should be less expensive than litigation. To ensure the arbitráility of such claims, however, employers will need to make sure the collective bargaining agreement is properly crafted.

When drafting agreements, employers should keep the following two ideas in mind:

- To be enforceable, the agreement to arbitrate the statutory claim must be “clear and unmistakable.” The best way to ensure this is to list in the collective bargaining agreement all of the statutes, ordinances, and regulations that may be the source of an employee’s claim. Care should be taken to cover legislative enactments of all jurisdictions, even municipalities, which may apply. State common-law causes of action also should be expressly included in the arbitration provision.

- Second, and more important, the collective bargaining agreement should give the employee a mechanism to pursue statutory claims on his or her own if the union decides not to pursue them.

Typically, the union decides what grievances it will pursue, and controls the grievance’s prosecution. For instance, the collective bargaining agreement at issue in Pyett provides that “[a]ll Union claims are brought by the Union alone and no individual shall have the right to compromise or settle any claim without the permission of the Union.” Thus, a union may be able to preclude an employee from vindicating his or her statutory rights.

Justice Thomas appears to acknowledge that when the collective bargaining agreement puts the union in a position “to prevent [employees] from effectively vindicating their federal statutory rights in the arbitral forum,” the agreement to arbitrate may not be enforceable. Slip op. at 25 (internal quotations and citations omitted).

To avoid this potential problem, a collective bargaining agreement should provide that an employee may commence an arbitration on his or her own to vindicate statutory rights if the union refuses to do so through the standard grievance-arbitration process provided in the collective bargaining agreement.