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James H. Carter

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*James H. Carter**

After hearing about arbitration from the Canadian perspective, and about alternative dispute resolution (ADR) broadly from the U.S. perspective, there are many other topics we could discuss that would be both interesting and intriguing. The matter at hand, however, has often proven itself to be the worst case scenerio: enforcement. Although it is true that the great majority of arbitration and other ADR situations proceed to a result which is honored, common law is made from situations that are not easily resolved. Therefore, I will address enforcement and the current attitude of U.S. courts.

A speaker at the Second Circuit Federal Judicial Conference some years ago comes to mind. This is an annual judicial conference at which judges meet and at which lawyers are invited to present speeches on various selected subjects. The subject before the Second Circuit that year was antitrust law, and one of the speakers was asked to speak about summary judgments in antitrust actions. He got up, thanked the chairman of the program and said, "My speech is brief: there is no such thing as summary judgment in antitrust suits in the Second Circuit." And then he sat down. I am pretty much in the same position, or I could be if I wanted to play it that way. When the subject is enforcement of arbitration agreements, one is tempted to say that there are not any limits. U.S. courts love arbitration. When the word is mentioned, it is magic.

One could get this impression from the case law, and it may not be entirely wrong, but I suggest to you that this situation is at least somewhat transitory. In my view, there is a pendulum effect; we are not moving on a straight line trajectory toward more ADR every day, although that may be the way it presently appears. The pendulum will eventually swing back. There are already signs of the beginnings of such a swing in current general judicial attitudes. Ultimately, the United States Supreme Court will influence where the pendulum stops, and that decision may be shaped, in large part, by whichever way the wind of judicial attitudes toward their own role in the ADR process is blowing.

There appears to be tension in the courts' attitudes when arbitration issues come before them. When an arbitration, or any kind of ADR matter, is brought into a court, the court is likely to be torn between an

* Partner, Sullivan & Cromwell, New York, New York.

interest in analyzing what the non-professional "judges" did in the case and the court's natural desire not to undo useful work done by others in disposing of disputes. Therefore, to some extent this tension is dependent on what type of people serve as arbitrators and how they appear to judges. On the one hand, arbitrators, particularly in California, might be former judges and therefore perceived as experts in resolving disputes, yet possessing no special business knowledge. On the other hand, the arbitrator may be a lay person with special business knowledge. We have heard today that arbitration in Canada is focused to a greater extent on arbitration by arbitrators with hands-on commercial expertise. However, while there are specialized arbitration groups in the United States, what I will discuss is general U.S. "commercial" arbitration, in which the great majority of the arbitrators are lawyers who do not profess any particular expertise in the subject matters that are arbitrated.

Lawyers and laymen often look at issues in different ways, especially when interpreting a contract. How will a court tend to approach an award by lay arbitrators? The court may perceive the lay arbitrators as experts who are doing a superb job, or as interlopers misapplying the law that the court is responsible for interpreting. How a judge rules often depends on the judge's views of public policy. On the one hand, he has been told that arbitration should be encouraged because, among other things, this will clear the court's docket, and the judge certainly favors clearing the local docket. On the other hand, to the extent that the arbitrators, be they laymen or lawyers, have rendered an award in what a court sees as a "legal" matter (the arbitrators may be writing awards, perhaps in some detail about application of the laws that the court is accustomed to enforcing), rather than a purely "commercial" issue (such as a quality of goods dispute), a judge may find his own view offended by what arbitrators have done. This creates a conflict in the judicial mind. But unlike the direction in which Canada is going, the doctrine in the United States does not allow the judge to intervene. The court is not to look for the bad things that the arbitrators have done but instead should enforce their awards if at all possible. This creates tension in the judicial mind; a tension that I anticipate we will see reflected increasingly in future cases.

With that as my thesis, let me give you a brief overview of U.S. arbitration law. The United States has a confusing statutory situation governing arbitration. While one hopes for a multiplicity of creative ideas in a federal system, a negative consequence of this diversity may be conflicting and confusing legal pronouncements on certain issues until they are settled by the Supreme Court or by the great weight of authority. In the United States, the Supreme Court decides relatively few matters on arbitration law. Therefore, there is a large and diverse body of judges making law and one often must wait a considerable amount of time for a consensus to emerge on any given issue.

The United States has a Federal Arbitration Act with three parts.

Chapter I of the Federal Arbitration Act is the original statute. Chapter II followed much later and deals with international commercial matters and implements the 1958 New York Convention. Finally, Chapter III of the Act consists of the Panama Convention for Inter-American arbitrations which the United States implemented in fall 1990.

Chapter I deals with the basic machinery for certain judicial actions regarding arbitrations. The chapter contains mechanisms by which to compel arbitration, to appoint an arbitrator, and to enforce an award. Chapter II incorporates all this for international transactions, but also gives jurisdiction to a federal court beyond the jurisdictional bases available in a purely domestic arbitration. U.S. state arbitration law is, in broad terms, uniform in that most states have enacted some version of a uniform model statute. But many states have made alterations in the model, so it is not purely uniform. Those state statutes, in turn, sometimes must be applied by courts together with the federal law.

Chapter III is a specialized provision to implement the Panama Convention. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is the main international agreement, providing for almost world-wide mutual recognition of awards among signatory nations. Most nations have signed and ratified the New York Convention, but a few still have not. Therefore, the Panama Convention brings some additional countries into this global network.

In addition to the existing treaties, the United States has some rather new legislative initiatives. For example, state international arbitration statutes have been enacted in a few states, California and Texas being among the most important. Most of these statutes are variations of the UNCITRAL Model Law. The status of these state statutes, applicable solely to international matters, is largely unsettled in the United States regarding the extent to which they are preempted by federal law. In 1989, the Supreme Court decided *Volt v. Standford University*, holding that the Federal Arbitration Act does not preempt state legislation unless there is a direct conflict. The implications of this holding in various contexts is not yet fully resolved.

The subject of federal preemption is the first of a series of gusts of air blowing the pendulum of U.S. attitudes back from extreme pro-arbitration attitudes. In recent years, the Supreme Court and the lower courts have struck down any law or doctrine that tended to hamper the freedom of parties to submit certain issues to arbitration. The courts simply ruled that such state laws were preempted by federal law which, as everyone knew, was pro-arbitration. That is not necessarily a full statement of the law today. Now it is settled that there is no broad preemption of state arbitration laws when interstate or international commerce is involved; there is only preemption when some measure is directly in conflict with federal law. As before, a state statute holding that a particular type of dispute cannot be arbitrated presumably will be in conflict with federal law, and therefore will be preempted. But new state statutes are now

including many other provisions regarding what parties can do to compel arbitration or to enforce an arbitration award, and these may raise questions of conflicts of law within the U.S. federal structure.

The next point to be considered is arbitrability. Does public policy stand in the way of some things being arbitrable? Reference has already been made to the fact that in recent years public policy has not stood in the way of arbitrability. In case after case, prior reservations have been set aside: antitrust, securities law, RICO, all went to arbitration. Presently, virtually anything can be arbitrated. However, in the future, as arbitrators pass on claims arising under increasingly intricate statutes, and as judges have to rule on some awards that include things they may find strange, it will be interesting to see whether there is any erosion of that attitude. Indeed, the answer may come this year when the Supreme Court is expected to decide on public policy objections to arbitrability in a decision dealing with statutory discrimination claims. The crucial question will be whether, when a statutory right, such as protection from age discrimination, is put in the hands of arbitrators, the Court will continue to compel arbitration in every case.

There is already some reluctance in the state courts to extend arbitrability in other, somewhat comparable, areas. One recent example is a decision of the highest court of New York, in December of 1990, in which the State Superintendent of Insurance had taken over an insolvent insurance company. The New York Court of Appeals held that although the Superintendent of Insurance had acceded to a perfectly straightforward commercial arrangement, and was now standing in the shoes of the party that made an agreement to arbitrate, the agreement would not be enforceable. Public policy was held to bar such a "restriction" on a government officer. This New York Court of Appeals decision seems to imply that courts are going to be sympathetic to civil servants (a group which has not experienced and does not want to experience much arbitration) when outside parties try to compel arbitration of disputes involving these individuals. Whether that attitude will swing the pendulum back very far, remains to be seen. One positive development in this field has been the creation of new federal statutes which direct U.S. agencies to test the waters of arbitration. These new legislative mandates may help to diminish officials' reluctance to use arbitration to resolve disputes.

Another area of the law to watch for signs of changing judicial attitudes toward arbitration is punitive damages. The decisions in this area vary. The law in some U.S. states is that, while courts may award punitive damages in fairly broad circumstances, for reasons of public policy arbitrators may not. That is the law in New York, at least at present, as pronounced in 1976 by the New York Court of Appeals. Federal court decisions in various places around the country, however, have been to the contrary. If a matter is decided by a federal court because there is a basis for federal jurisdiction, such as diversity, and if an arbitrator is acting

under the Federal Arbitration Act because interstate or international commerce is involved, can the arbitrator award punitive damages or not? It poses an attitudinal dilemma again for courts. On the one hand, the prevailing view seems to be that anything goes; that arbitrators should be able to do what they want, and if an award calls for punitive damages it should be enforced. But on the other hand, suppose the arbitrators do a bad job in awarding the damages, or at least a job a court would not do. The temptation is very strong, when a court reviews such an award, to hold that this is something beyond the power of arbitrators. So far, federal judges have been moving in the direction of permitting arbitrators to award punitive damages—there is not a large number of arbitrators doing it, but it does happen. Those are the awards that are litigated, the hard cases that actually make the law. Regardless of whether punitive damage claims will be held universally arbitrable, the situation is bound to remain in flux for some time to come.

A related area, which I predict you will hear more about in the future, involves "unilateral" arbitration clauses. An example of such a clause is one that says, in effect, "I get to choose between either arbitrating with you or suing you in court, but you do not get a choice. You can only sue me in court." Such clauses represent a unilateral right of one party and are usually found in a contract in a commercial context not involving a form a consumer has signed. Let us assume that one party has the superior bargaining power and the other side agrees to such a clause. Is the clause enforceable? Until quite recently, many in the United States would have thought not. However, at least four states, New Jersey, New York, Florida and Alaska, think such a clause is enforceable. Once again, there is a tension in judicial attitudes. A judge may think, "Well, it is a little unusual, but it is one more item I can clear off my docket. It is not mutual, but it's not totally coercive. So I will enforce it." On the other hand, what if a bad case comes along? If the court of last resort in a state gets a case in which it appears that an unfair advantage has been taken, then we may well see a different outcome. Although the law in the United States is that virtually anything commercial is arbitrable and a court may compel arbitration, there are some limits.

The scope of issues involved in arbitration is still being debated. According to the Supreme Court, any doubts about the scope of issues to be arbitrated should be resolved in favor of arbitration. This was the opinion at what may turn out to be the high point, in the early 1980s, of the Supreme Court's encouragement of arbitration. Any doubt, any doubt at all, must be resolved in favor of arbitration. The lower courts recite that language in every decision and, by and large, follow it. But, here again, a hard case may test such wisdom. Suppose someone comes along with a totally frivolous claim. For example, the contract has an arbitration clause in it, and one party claims that there is a dispute over something that is just indisputable. Nevertheless, that party may attempt to begin

the process of arbitration, which may take months or even years, resulting in no judicial review until an award is made. This gives that party an advantage over an action, in which a summary disposition perhaps would be more likely.

The system in many countries is that arbitrators are the sole judges of their own jurisdiction. In the United States, the Federal Arbitration Act makes the validity of the contract a matter for the arbitrator's decision. The Act also says, however, that if a party asks a judge for his ruling on the contract's validity, the judge must be satisfied at the outset that the issue involved is referrable to arbitration. A party may raise a public policy argument, of the sort just mentioned, as the basis for a claim of non-arbitrability. But in this context, the issue of referability to arbitration also may mean determining whether the claim is frivolous, and as a result, whether a court is supposed to consider the issues as alleged in order to determine whether or not they are within the scope of the arbitration clause. U.S. courts have wrestled with this latter problem and have come up with various forms of words circumscribed to require only a threshold judicial inquiry. "We want to peek at it," courts say in effect. "We want to keep some control over it. But basically that is supposed to be the arbitrator's responsibility." Perhaps one could use the term "plausibility test." There is currently a split among the circuits on that issue. As of February 1991, the Ninth Circuit has held that challenges to the "very existence of a contract" are not arbitrable. These are non-arbitrable issues that the court will decide.

Another question that arises concerning the scope of arbitrable issues involves the choice of law clause in contracts. For example, if the clause selects the law of Ohio as the substantive governing law, and a party to a dispute under the clause argues that Ohio law provides, as a substantive matter, that all issues as to arbitrability are for the arbitrators to decide, does that mean that the governing law clause in effect trumps the idea that a court can administer a "plausibility test" on the issues under the Federal Arbitration Act? Massachusetts and Hawaii courts have said "yes" in cases raising this type of issue. In due course, we will see what the trend is going to be. As the relationship between federal arbitration law and state law evolves, a standard choice of law clause may result in a choice of some things that the parties may not have realized they were barginning for, at least in the area of what is arbitrable and what enforcement of a duty to arbitrate may mean.

There is also continuing debate about enforcement of arbitration arrangements regarding provisional remedies. Those who practice in this area know that the debate has raged for two decades over attachments in non-maritime matters. Some federal courts hold the Federal Arbitration Act permits provisional remedies; some hold not. State law also varies.

The latest trend in provisional remedies involves preliminary injunctions. There was a case in the Second Circuit at the end of 1990 involving an arbitration over the use of the Borden trademark in Japan. The

federal courts involved, including the Second Circuit, were convinced that this was an immediate matter calling for a preliminary injunction and that it could not wait until arbitrators had been selected and could rule on it. If the magic words "in aid of arbitration" are used to explain the courts' behavior, then I would suggest that there is a fairly large scope for judicial intervention in this area under the rubric of preliminary injunctions. Courts are likely to use this as another method to intervene in arbitral matters for cases in which they feel it is appropriate. As a result, parties will argue that the arbitrators cannot get to an issue in time, or that irreparable damage is about to occur. In trying to convince the courts they will argue, "You're doing something as an aid to arbitration, so the Supreme Court doctrine requiring pro-arbitration attitudes supports it."

Confirmation of awards merits brief mention. Here you really could, if you wished, take the approach of that speaker at the Second Circuit judicial conference and just say that, except for evidence of actual fraud, anything goes. All awards will be enforced.

In U.S. law the exceptions to enforcement in all of the various statutes are reasonably consistent and have been interpreted by the courts to set uniformly high standards where enforcement may be resisted. There are defenses parties may raise either under U.S. domestic statutes or under the New York Convention, as implemented in the United States, and similarly under the Panama Convention for Inter-American matters. These defenses state in a variety of ways that unless there has been fraud or some gross violation of procedural due process in the arbitration, the courts will enforce awards.

The judicial decisions through the 1970s, and through most of the 1980s, have looked at some fairly hard fact situations and nevertheless almost without fail enforced awards. This "tough luck" approach has surprised people. Consequently, a belief has formed that the standards to be met before the courts will review and reject an award are extroadinarily high.

Still, the judicial tension remains. On the one hand, the courts do not want to encourage people to bring every arbitration award in to be reviewed. Therefore, the standards are kept high—again, to clear the dockets. On the other hand, if a case comes along that presents an egregious situation, there are defenses that can be raised into which parties can fit a variety of issues to which future courts may respond. There are always cases claiming that a party has not been allowed to present its case properly in arbitration, and this fits into one of the exceptions to enforcement under all of the U.S. statutes. The arguments that have been made range from such things as, "I was not entitled to enough discovery"—which does not get very much sympathy—to, "I was not given notice of something that was going to happen." The latter argument is fairly worrisome, yet it has been rejected in some cases. There can be fairly extreme situations, stopping just short of fraud, where very "high

handed" things have been done by arbitrators. Because of those instances, there are now a few cases suggesting that judges have not entirely abdicated their role in enforcement.

One of the standards found in U.S. domestic law, although it is unclear whether or not it is applicable to enforcement in U.S. courts reviewing international awards, is that an award will not be enforced if it is in "manifest disregard of the law." We heard a discussion earlier today of the situation in Canada regarding domestic awards and the extent to which courts expect the law to be followed by arbitrators. As those who practice in the United States know, the traditional recitation in all opinions on enforcement issues by U.S. courts is that errors of law do not matter. In fact, neither errors of fact nor errors of law are, in themselves, sufficient to bar enforcement. However, there are some errors of law that do matter—ones that offend a court too greatly. The courts have created a safety valve for themselves, and they also rely on statutory formulations such as those under the Federal Arbitration Act, Chapter I, stating in opinions that "deliberate disregard of the law" or "irrationality" will prevent enforcement.

While I have never seen "deliberate disregard of the law," I can, however, imagine an arbitrator writing an award saying, "This is the law, but I do not like it and I'm not going to follow it." I do not, however, anticipate seeing a lot of this behavior.

"Irrationality," however, is more elusive. It may be just something that the judge does not like. But how far will the judge go in putting up with things that arbitrators have done but that he does not like before he puts it under the heading of irrationality? Irrationality is one of the standards for rejecting enforcement under the New York statute. New York state court judges give speeches at arbitration functions saying, "That is the standard but, of course, we've never seen it." In all those years, has nothing irrational ever been seen in an arbitration award? A long time may have passed without our seeing one, but a judge in New York may now lay claim to a sighting of arbitral irrationality. It came about in February of 1991 in a state trial court decision. While no one knows what will happen to it on appeal, I cite it as an illustration of a trend. The case involved alleged quality defects in textiles, and the court found that a failure to consider the nature and ordinary use of the goods in finding them defective was irrational. Evidently the judge simply knew more about textiles than the arbitrators; at least he knew more about the Uniform Commercial Code, upon which the arbitrators claimed reliance. The judge felt the U.C.C. had been applied incorrectly and the court found the award irrational and refused to enforce it.

These are still only straws in the wind. There is no rush by the courts to overturn awards. Nevertheless, the safety valves permitting greater judicial control do exist in the statutes. My prediction is that as we rush pell-mell toward ADR in every area of life, and as more people are called upon to make decisions that are reviewable by judges, we are

going to see an increasing number of hard cases. Some of those cases will inevitably find their way into the courts and will result in more examples of judges using those safety valves as an excuse to decline enforcement of an agreement to arbitrate or to decline enforcement of an arbitral award.

Ultimately, I believe there are limits to how far courts will go in deferring to private adjudication in the interest of clearing their own dockets. I think it is wise that there are such limits, since the pendulum has swung too far in the direction of total deference. There ought to be doctrines and decisions setting boundaries so that people cannot say, "There are no limits on what courts will enforce as long as the word arbitration is mentioned."

I am reminded of a law school professor of mine who, when reading a case in which a judge had decided some procedural matter on the basis of the need to clear the crowded dockets of the court, went into a fury at that principle of jurisprudence. He said, "When was the last time you read an obituary of a judge dropping dead at an early age from overwork? *Lawyers* drop dead from overwork, not judges." There is some truth to that. Clearing the dockets is all well and good, but we need some judicial control over arbitration in appropriate circumstances and some judicial willingness to become involved in these issues.