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# Labor Arbitration: Appealing the Procedural Decisions of Arbitrators

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## Note: Labor Arbitration: Appealing the Procedural Decisions of Arbitrators

As long as the agreement to arbitrate and the arbitration award are voluntarily accepted by the parties concerned, an arbitration provision in a collective bargaining agreement makes resort to the courts unnecessary for the settlement of disputes between labor and management. However, when one of the parties is dissatisfied with the workings of the arbitration process, the courts may be called upon to enforce the agreement to arbitrate, to enforce the arbitrator's decision, or to hear a challenge to the award.<sup>1</sup> The courts' position on reviewing the merits of an arbitrator's award is clear—no review will ordinarily be attempted.<sup>2</sup> However, the standards for reviewing procedural decisions made by an arbitrator are far from clear, even though the numerous decisions of this type made during the course of any arbitration proceeding may be crucial to its outcome.<sup>3</sup> Speedy judicial review of an arbitrator's procedural decisions is therefore important to all parties to the arbitration process. This Note will discuss both the standards for review of such procedural decisions and the methods of obtaining such review.

### I. SOURCE OF THE SUBSTANTIVE LAW GOVERNING APPEALS

Section 301(a) of the Labor Management Relations Act of 1947 provides:

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1. P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 20-21 (1966) [hereinafter cited as HAYS].

2. See note 14 *infra* and accompanying text.

3. The importance of an arbitrator's procedural decisions can be easily illustrated. For example, assume that just before an arbitration hearing is to begin the employer learns that his principal witness, a person who is not an employee, is out of town and will not be available for several weeks. When the arbitrator refuses to postpone the hearing, the employer is unable to present any evidence on his behalf. Obviously, the decision of the arbitrator to hold the hearing when an important witness is unavailable will have a substantial, and perhaps decisive, effect on the outcome of the arbitration. Other procedural decisions of an arbitrator, while not affecting the outcome of the arbitration proceeding, may cause one of the parties to suffer considerable hardship. For example, the failure of an arbitrator to reach a decision in a reasonable time after the hearing may have a devastating effect on an employee who is relying on the arbitration process to regain his job, but will not receive back pay even if he prevails in the arbitration.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>4</sup>

In *Textile Workers Union v. Lincoln Mills*,<sup>5</sup> the Supreme Court held that section 301(a) did more than merely give federal courts jurisdiction over suits for violation of collective bargaining agreements; it also authorized them to fashion a body of substantive federal law to govern such suits.<sup>6</sup> Since this substantive law must reflect national labor policy, the Court reasoned that it should be federal in origin, pointing out that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned . . . Congress has indicated by Section 301(a) the purpose to follow that course here."<sup>7</sup>

This rationale for a federal common law was reiterated five years later in *Teamsters Local 174 v. Lucas Flour Co.*<sup>8</sup> That case

4. 29 U.S.C. § 185 (1970). Since section 301 is applicable to all contracts "between an employer and a labor organization representing employees in an industry affecting commerce," it is proper to consider the section as covering practically all collective bargaining agreements. See *Cone Bros. Contracting Co. v. Bricklayers Local 3*, 263 F.2d 297 (5th Cir.), cert. denied, 360 U.S. 904 (1959).

5. 353 U.S. 448 (1957).

6. However, the applicability of section 301(a) is limited to disputes between parties covered by the National Labor Relations Act. That Act specifically excludes from coverage

the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. . . . [or] any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(2), (3) (1970).

7. 353 U.S. at 457. Justice Frankfurter, in his dissenting opinion, responded that

the most that can be said in support of finding a congressional desire to impose these "legislative" duties on the federal courts is that Congress did not mention the problem in the statute and that, insofar as purpose may be gathered from congressional reports and debates, they leave us in the dark.

353 U.S. at 465.

8. 369 U.S. 95 (1962).

involved an action in a state court to recover business losses caused when a union went on strike, allegedly in violation of a collective bargaining agreement. The state court had applied state law and held that a no-strike clause should be read by implication into a collective bargaining agreement that contained a provision requiring disputes to be settled by arbitration. On appeal, the Supreme Court affirmed the state court's substantive holding but did not agree that state law should apply. Writing for the majority, Justice Stewart noted that even though an action to enforce a collective bargaining agreement could be brought in a state court,<sup>9</sup> federal law must be applied. The Court stated:

[T]he importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.<sup>10</sup>

It is therefore well established that suits to enforce collective bargaining agreements—and therefore actions to review awards resulting from the arbitration clauses commonly found in such agreements—are governed by a federal substantive law to be developed by the lower federal courts. In both the *Lincoln Mills* and *Luca Flour* cases, however, the Supreme Court stopped short of specifying the source of that federal substantive law. When dealing with arbitration agreements specifically, there are sev-

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9. In *Dowd Box v. Courtney*, 368 U.S. 502 (1962), the Court held that section 301(a) does not divest state courts of jurisdiction in a suit for violation of a provision of a collective bargaining agreement. Concurrent jurisdiction has been a "common phenomenon in our judicial history," and where there is neither an express congressional exclusion nor incompatibility in its exercise, the Court will affirm state court jurisdictions. The Court recognized that "diversities and conflicts" may occur as a result of this concurrent jurisdiction, but that "[t]o resolve and accommodate such diversities and conflicts is one of the traditional functions of th[e] Court." *Id.* at 507-08, 514. See also *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942); *St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924); *Second Employers' Liability Cases*, 223 U.S. 1, 56-59 (1911); *Robb v. Connolly*, 111 U.S. 624, 630-31 (1884); *Clafin v. Houseman*, 93 U.S. 130, 136 (1876).

10. 369 U.S. at 104.

eral possible sources of this law. First, the federal courts could sit as common law courts and create a federal common law of labor arbitration. Second, courts might read the Federal Arbitration Act<sup>11</sup> to apply to labor arbitrations. This approach, however, might be contrary to certain implications of the *Lincoln Mills* opinion.<sup>12</sup> Finally, courts might hold that state arbitration statutes are to be incorporated by reference into the body of federal arbitration law. Even if courts hold that the law governing suits to enforce arbitration agreements is to be federal common law, both the Federal Arbitration Act and the state arbitration statutes might be used as references by courts exercising their common law powers. It is this latter approach that has been chosen by a substantial number of courts.<sup>13</sup>

#### A. FEDERAL COMMON LAW

A group of three Supreme Court cases, popularly referred to as the *Steelworkers Trilogy*,<sup>14</sup> has outlined the scope of judicial treatment of arbitration provisions in collective bargaining agreements subject to section 301 of the Labor Management Relations Act. These cases reflect a conscious choice of arbitration as the most suitable forum for applying "the common law of the shop" to resolve disputes between parties to a collective bargaining agreement. Where it is clear that the parties have selected arbitration as the means of settling a particular dispute, the courts will not, either initially or upon review, rule on the merits of the dispute. While the Court did set up a standard for reviewing an arbitrator's decision, that standard is concerned primarily with abuse of the power granted to the arbitrator under the collective agreement and not with the review of procedural decisions made by the arbitrator where the agreement provides him with no guidance.

In *United Steelworkers v. American Manufacturing Co.*,<sup>15</sup> the first case of the *Steelworkers Trilogy*, the Court faced the issue of whether a grievance should be submitted to arbitration. The Court warned that the judiciary must not undertake to determine the merits of a grievance under the guise of interpreting

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11. 9 U.S.C. §§ 1-14 (1970).

12. See text accompanying notes 33-41 *infra*.

13. See text accompanying notes 43-51 *infra*.

14. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

15. 363 U.S. 564 (1960).

the grievance procedure of collective bargaining agreements (i.e., by deciding whether a particular dispute is subject to the arbitration clause in the agreement), for to do so would be to usurp "a function which under that regime is entrusted to the arbitration tribunal."<sup>16</sup> In so holding the Court rejected the reasoning of such cases as *International Association of Machinists v. Cutler-Hammer, Inc.*,<sup>17</sup> where it was held that if the meaning of a disputed contract provision is, in the court's judgment, subject to only one interpretation, arbitration of the dispute may be enjoined. Instead, Justice Douglas, in the majority opinion, adopted the view that even "frivolous claims" should be arbitrated.<sup>18</sup>

The second case of the *Trilogy*, *United Steelworkers v. Warrior & Gulf Navigation Co.*,<sup>19</sup> also involved the arbitrability of grievances. The Court, citing *Lincoln Mills*, recognized that federal policy favored promotion of industrial stability through the collective bargaining agreement. Citing an article by Professor Cox,<sup>20</sup> the Court stated that the collective bargaining agreement calls into being a "new common law—the common law of a particular industry or of a particular plant."<sup>21</sup> Thus, the first two cases of the *Steelworkers Trilogy* established a policy of giving great deference to the arbitrator in matters of substantive law.

The third case of the *Trilogy*, *United Steelworkers v. Enterprise Wheel & Car Corp.*,<sup>22</sup> supports this policy but limits the power of the arbitrator in certain ways. In that case, the Court reversed a Fourth Circuit holding that an arbitrator's award was unenforceable. Petitioner-union and respondent-employer had a collective bargaining agreement which provided that any differences "as to the meaning and application" of the agreement should be submitted to arbitration and that the arbitrator's decision "shall be final and binding on the parties."<sup>23</sup> The Court stated that the courts must, in most instances, defer to a contract provision in the interests of finality since "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitra-

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16. *Id.* at 569.

17. 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

18. "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." 363 U.S. at 568.

19. 363 U.S. 574 (1960).

20. Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

21. 363 U.S. at 579.

22. 363 U.S. 593 (1960).

23. *Id.* at 594.

tor's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."<sup>24</sup> Despite this extensive deference given an arbitrator's decisions, the Court did place some limitations on the arbitrator's power:

[A]n 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. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.<sup>25</sup>

Absent a finding that a particular arbitration statute is specifically applicable, this broad standard of *Enterprise Wheel* is the foundation to which courts have looked in developing guidelines for reviewing the arbitration process. In this endeavor, they have been limited by the mandate of *American Manufacturing* and *Warrior & Gulf Navigation* which dictates that the arbitrator should decide the merits. Since the *Enterprise Wheel* standard is concerned primarily with the parameters of an arbitrator's jurisdictional powers under the collective agreement, it does not provide specific limitations on his power over procedure; rather, it merely establishes the basis for such limitations. The specific procedural limitations must evolve from the developing federal substantive law.

## B. FEDERAL ARBITRATION ACT

While *Lincoln Mills*, *Lucas Flour*, and subsequent cases demonstrate that federal substantive law must be applied where the collective bargaining agreement is within the scope of section 301, the question remains whether common law or statutory law is to be applied in the review of an arbitrator's procedural decisions. The Federal Arbitration Act<sup>26</sup> is the sole statute in which Congress has addressed the subject of arbitration comprehensively. Specific application of the provisions of that statute to the review of procedural decisions of arbitrators would not only enhance the concreteness of the standards of review but also preempt the judicial standard that has evolved from the *Steelworkers Trilogy*.<sup>27</sup> The standards set forth in the Act are pref-

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24. *Id.* at 599.

25. *Id.* at 597.

26. 9 U.S.C. §§ 1-14 (1970).

27. Markham, *Judicial Review of an Arbitrator's Award under Sec-*

erable because they are far more explicit and carefully prescribed than the judicial standard that has evolved from the *Steelworkers Trilogy* in general and from *Enterprise Wheel* in particular. The specific statutory standards<sup>28</sup> would make a subsequent evaluation of the procedural fairness of a particular proceeding much easier than it would be under a strict common law approach. These standards give the parties to an arbitration agreement, absent any contractual provisions to the contrary, a definite statement of what is expected of them, thereby eliminating much of the uncertainty necessarily present under the common law approach.

For example, section 10 of the Federal Arbitration Act, which sets forth the grounds for vacating an award, permits an inquiry into the procedural integrity of the arbitration process. Subsections (a), (b), and (c) of section 10 require vacation of an award because of procedural infirmities:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.<sup>29</sup>

One particularly troublesome problem to which these standards might be applied arises where the arbitrator seeks to hold the hearing at a time when a principal witness is unavailable. Under the above standards, a party to the proceeding might argue that the arbitrator's decision constitutes (1) evident partiality such that vacation of the award under section 10(b) is required

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*tion 301(a) of the Labor Management Relations Act*, 39 TENN. L. REV. 613, 642 (1972).

28. The Federal Arbitration Act recognizes the validity and irrevocability of written agreements to arbitrate, 9 U.S.C. § 2 (1970), and prescribes procedures for ordering a stay of court proceedings where there is an arbitrable grievance at issue, *id.* § 3, for compelling arbitration and for determining arbitrability, *id.* § 4, for appointing arbitrators, *id.* § 5, for making proper application to the court, *id.* § 6, for compelling the attendance of witnesses, *id.* § 7, for confirming the award of the arbitrator, *id.* § 9, for vacating an award and for rehearing, *id.* § 10, for modifying or correcting an award, *id.* § 11, and for specifically enforcing the award, *id.* § 13.

29. *Id.* § 10(a)-(c). A remedy for the abuse of an arbitrator's power is provided by subsection (d), which requires vacation of an award "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.* § 10(d).



and (2) misconduct or misbehavior by which his rights have been prejudiced, thereby requiring vacation under section 10(c). A party could also contend, in appropriate circumstances, that criteria which make the *time* of hearing important—*i.e.*, the availability of evidence and witnesses, so that a complete hearing on the merits may be had—apply with equal force to the *place* of hearing.

Despite the apparent value of the Act in the conduct of labor arbitration proceedings, there remains some question as to whether it is applicable to them. Although it does provide that any maritime, international, or interstate contractual obligation to arbitrate controversies between parties "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"<sup>30</sup> the legislative history and language of the Act indicate that Congress may have intended it to apply only to commercial contracts.<sup>31</sup> This interpretation finds support in a provision placed in the Act as a result of labor objections to the inclusion of industrial arbitration. It states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>32</sup>

A number of lower courts have disregarded this language, however, and have held that the remedial scheme established by the Federal Arbitration Act is applicable to arbitration actions founded on section 301 of the Labor Management Relations Act.<sup>33</sup>

30. *Id.* § 2.

31. See Note, *Federal Enforcement of Grievance Arbitration Provisions under the Doctrine of Lincoln Mills*, 42 MINN. L. REV. 1139, 1142 (1958).

32. 9 U.S.C. § 1 (1970). See Burstein, *The United States Arbitration Act—A Reevaluation*, 3 VILL. L. REV. 125, 130 (1958).

33. *Post-Lincoln Mills*: *Electronics Corp. v. International Elec. Workers Local 272*, 492 F.2d 1255 (1st Cir. 1974); *International Ass'n of Machinists v. General Elec. Co.*, 406 F.2d 1046 (2d Cir. 1969); *Stereotypers Local 18 v. Newark Morning Ledger Co.*, 397 F.2d 594 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968); *Mogge v. Machinists Dist. 8*, 387 F.2d 880 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968); *Pietro Scalzitti Co. v. Operating Eng'rs Local 150*, 351 F.2d 576 (7th Cir. 1965); *Technical Eng'rs Local 149 v. General Elec. Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N.D. Ohio 1967); *Machinists Local 1416 v. Jostens, Inc.*, 250 F. Supp. 496 (D. Minn. 1966); cf. *Rhine v. Union Carbide Corp.*, 343 F.2d 12 (6th Cir. 1965).

*Pre-Lincoln Mills*: *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49 (6th Cir. 1954); *Tenney Eng'r, Inc. v. Local 437, United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953).

These courts have done so by declaring either that the aforementioned exclusion in section 1 of the statute does not apply to collective bargaining agreements,<sup>34</sup> or that if the exclusion does apply, it is limited to collective bargaining agreements covering workers actually in the transportation industries.<sup>35</sup> Other courts have held that the Act is not applicable.<sup>36</sup> Although presented with an opportunity to do so in *Lincoln Mills*,<sup>37</sup> the Supreme Court has not ruled on this question. In that case, the Fifth Circuit had found the Act inapplicable. The Supreme Court majority should therefore have made some reference to that finding; since none was made, it may be that the Court accepted sub silentio the decision of the lower court on this issue.<sup>38</sup> This interpretation is supported by the dissenting opinion of Justice Frankfurter, which stated that the silent treatment given the Federal Arbitration Act by the majority was a rejection, though not explicit, of the availability of that Act to enforce arbitration clauses in collective bargaining agreements.<sup>39</sup> In light of his unaccepted invitation to make the rejection explicit,<sup>40</sup> however, the Court's silence on this point may also be interpreted as a simple refusal to

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34. See *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957) ("We follow in part a different path than the Court of Appeals, though we reach the same result." *Id.* at 548) (a collective bargaining agreement between a union and an employer is not a "contract of employment" within the meaning of 9 U.S.C. § 1 (1970)).

35. See *Tenney Eng'r, Inc. v. Local 437, United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953) (9 U.S.C. § 1 (1970) operates to exclude, along with seamen and railroad employees, only those other classes of workers who are actually engaged in movement of interstate or foreign commerce or in work so closely related as to be in practical effect a part of it).

36. See *Markham*, *supra* note 27, at 643 n.194.

37. 353 U.S. 443 (1957). The Court held that under section 301 the district court properly decreed specific performance of an agreement to arbitrate. It could have held that the Federal Arbitration Act was applicable and that the order was proper under section 4 of the Act.

38. For a view that use of the Federal Arbitration Act has been tacitly rejected by the Supreme Court, see *Smith & Jones, The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 *MICH. L. REV.* 751, 801, 802 n.120 (1965) [hereinafter cited as *Smith & Jones*].

39. 353 U.S. at 466 (dissenting opinion); see *Technical Eng'rs Local 149 v. General Elec. Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958) (assumption that the Federal Arbitration Act is inapplicable to collective bargaining agreements).

40. Mr. Justice Frankfurter called on the majority to "make this rejection explicit" and to recognize that "when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." 353 U.S. at 466 (dissenting opinion),

reach an issue unnecessary to its decision.<sup>41</sup>

Thus, there may be two ways in which a party receiving an adverse arbitration award can invoke the specific standards of the Federal Arbitration Act in challenging that decision. The party may rely upon the previously mentioned lower court decisions which construe the Act as controlling the arbitration of disputes under a collective bargaining agreement, thereby excluding any common law to the contrary;<sup>42</sup> or he may argue that even though the Supreme Court has not expressly adopted the statutory standards as part of federal substantive law, these standards represent the sole comprehensive congressional expression of federal arbitration policy and therefore should be viewed by the courts as indicating proper operating procedure in the conduct of arbitration proceedings.

The latter argument can be supported in two ways. First, even before *Lincoln Mills* the Federal Arbitration Act had proved useful to courts faced with the problem of fashioning a body of common law to deal with arbitration questions. As early as 1953, Judge Wyzanski determined in *Textile Workers v. American Thread Co.*<sup>43</sup> that section 301 of the Labor Management Relations Act demanded a judicially-created body of law; he then turned to the Arbitration Act as a "guiding analogy" in ruling that if the parties failed to agree on an arbitrator within ten days, the court would appoint one.<sup>44</sup> Second, it has been argued that the Supreme Court itself has shown an intent to parallel the principal provisions of the Arbitration Act. The holding in *Lincoln Mills* that the courts can compel specific performance of the arbitration promise made substantive law at least as far-reaching as section 4 of the Act, which requires compliance with strict procedural requirements before specific performance is granted. *Lincoln Mills* also made it clear that the new common law, like section 2 of the Arbitration Act, renders a contract to submit future disputes to arbitration as valid, irrevocable, and enforceable as any other contract. Further, the power to stay proceedings pending arbitration, comparable to the power granted in section 3 of the Federal Arbitration Act, cannot sensibly be denied a court empowered to hear a separate suit to

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41. Dunau, *Scope of Judicial Review of Labor Arbitration Awards*, 24 N.Y.U. CONF. LAB. 175, 182 (1972) [hereinafter cited as Dunau].

42. See note 33 *supra* and accompanying text.

43. 113 F. Supp. 137 (D. Mass. 1953).

44. 113 F. Supp. at 142, discussed in Note, *The Common Law of Grievance Arbitration: New Wine in Old Bottles*, 58 NW. U.L. REV. 494, 498 (1964).

enforce the same arbitration. Thus, in one decision, the Court essentially adopted what Judge Magruder called "the heart of the United States Arbitration Act . . . contained in sections 2, 3, 4."<sup>45</sup>

The Supreme Court has expressly considered only one other common-law provision that parallels the Arbitration Act. In *United Steelworkers v. Enterprise Wheel & Car Corp.*,<sup>46</sup> the Court reversed the Fourth Circuit, holding that an arbitrator's award is enforceable even where the underlying collective bargaining agreement has expired in the interim between the occurrence of the incident and the award.<sup>47</sup> This decision in effect affirmed a common-law principle comparable to the grant to the courts in section 9 of the Arbitration Act of the power to enforce an award.

Despite this limited Supreme Court guidance, however, the lower courts have continued to look to the provisions of the Arbitration Act in fashioning the common law.<sup>48</sup> This approach of using the Federal Arbitration Act as a guide rather than as a set of controlling standards appears to be the favored approach in dealing with collective bargaining agreements found to "affect interstate commerce."<sup>49</sup>

### C. STATE ARBITRATION ACTS

Since the *Lincoln Mills* and *Lucas Flour* decisions were handed down, state arbitration acts have become useful primarily

45. *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 97 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957), discussed in Note, *supra* note 44, at 499-500.

46. 363 U.S. 593 (1960).

47. *Id.* at 596, 599.

48. See, e.g., *Ingraham v. Local 260, Int'l Union of Elec. Workers*, 171 F. Supp. 103, 106 (D. Conn. 1959), where the court said: "There can be little doubt that the United States Arbitration Act is a part of the body of the federal labor law to which courts may look in defining federal law under [section 301]. . ." (citing the pre-*Lincoln Mills* case of *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956)).

49. In a companion case to *Lincoln Mills*, *Goodall-Sanford, Inc. v. Textile Workers Local 1802*, 353 U.S. 550 (1957), the Court held that an order directing arbitration was a "final decision" that could be appealed, and that contrary judicial rulings based on the Federal Arbitration Act (see, e.g., *Schoenamsgruber v. Hamburg Line*, 294 U.S. 454 (1935); *In re Pahlberg*, 131 F.2d 968 (2d Cir. 1942)) were not applicable. Thus it is apparent that not all procedural law developed in cases under the Federal Arbitration Act can be considered controlling in labor law cases. For an interpretation of *Lincoln Mills* and its two companion cases as a statement by the Court that the Federal Arbitration Act should be used as "a guiding analogy," see O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 3-5 (1973) [hereinafter cited as FAIRWEATHER].

as guides for the formulation of federal substantive law. As the Court stated in *Lincoln Mills*, "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy."<sup>50</sup> In deciding arbitration cases, state courts thus frequently look to their own arbitration acts as embodiments of federal policy.<sup>51</sup>

Seventeen states have enacted the Uniform Arbitration Act.<sup>52</sup> Similar in many respects to the Federal Arbitration Act,<sup>53</sup> the Act establishes procedures which are essentially the same as those found in the federal statute, and it is primarily in these areas that the Uniform Act may be of value in formulating federal substantive law. For example, the Uniform Act provides for majority action by arbitrators,<sup>54</sup> gives the arbitrator the authority to set the time and place of the hearing and sets forth other hear-

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50. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), citing *Board of Comm'rs v. United States*, 308 U.S. 343, 351-52 (1939). See also *Machinists Local 1416 v. Jostens, Inc.*, 250 F. Supp. 496 (D. Minn. 1966), where the court stated that even if the Minnesota Arbitration Act were not applicable per se to a federal action brought in Minnesota to compel an employer to submit to arbitration of a dispute arising out of an alleged violation of a collective bargaining agreement, it was part of that body of federal law to which courts could resort in implementing federal policy.

51. FAIRWEATHER, *supra* note 49, at 5. See generally *Carpenters Local 2131 v. Aetna Steel Prods. Corp.*, 36 Lab. Arb. 717 (C.P. Schuylkill Co., Pa. 1960); Comment, *The Applicability of State Arbitration Statutes to Proceedings Subject to LMRA Section 301*, OHIO STATE L.J. 692 (1966).

52. The Uniform Arbitration Act was written in 1955 and subsequently adopted in Alaska, Arizona, Arkansas, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Texas, and Wyoming. For the particular variations adopted by each state, see UNIFORM ARBITRATION ACT (U.L.A.) §§ 1-25 (annotations).

53. Both acts recognize the validity and irrevocability of written agreements to arbitrate, 9 U.S.C. § 2 (1970), UNIFORM ARBITRATION ACT § 1; and prescribe procedures for ordering a stay of court proceedings, 9 U.S.C. § 3 (1970), UNIFORM ARBITRATION ACT § 2; for compelling arbitration and for determining arbitrability, 9 U.S.C. § 4 (1970), UNIFORM ARBITRATION ACT § 2; for appointing arbitrators, 9 U.S.C. § 5 (1970), UNIFORM ARBITRATION ACT § 3; for making proper application to the court, 9 U.S.C. § 6 (1970), UNIFORM ARBITRATION ACT § 16; for compelling the attendance of witnesses, 9 U.S.C. § 7 (1970), UNIFORM ARBITRATION ACT § 7; for confirming the award of the arbitrator, 9 U.S.C. § 9 (1970), UNIFORM ARBITRATION ACT § 11; for vacating an award and for a rehearing, 9 U.S.C. § 10 (1970), UNIFORM ARBITRATION ACT § 12; for judicial modifying or correcting of an award, 9 U.S.C. § 11 (1970), UNIFORM ARBITRATION ACT § 13; for filing timely motions to vacate or modify the award, 9 U.S.C. § 12 (1970), UNIFORM ARBITRATION ACT §§ 12, 13; and for obtaining enforcement of the award, 9 U.S.C. § 13 (1970), UNIFORM ARBITRATION ACT §§ 14, 15.

54. UNIFORM ARBITRATION ACT § 4.

ing procedures,<sup>55</sup> grants an absolute right to the participants to be represented by an attorney,<sup>56</sup> permits the use of depositions,<sup>57</sup> requires the arbitrator's award to be in writing,<sup>58</sup> sets forth a procedure for petitioning the *arbitrator* for a modification or correction of the award,<sup>59</sup> defines venue requirements,<sup>60</sup> enumerates the specific court orders from which an appeal may be taken,<sup>61</sup> and declares that the "act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."<sup>62</sup>

It should be noted that in neither the Federal nor the Uniform Act is there an attempt to prescribe the manner in which the arbitrator's hearing shall be conducted. It is apparently assumed that the traditional informality of such hearings will be continued. Witnesses may, but need not, be sworn; technical objections to the reception of evidence are not permitted; and affidavits, signed statements, and hearsay may be received. The parties, however, are free to urge upon the arbitrator the value that such evidence does or does not have. There is no requirement that there be findings of fact by the arbitrators and none need be made,<sup>63</sup> although there is no prohibition against such findings and "the arbitrator will usually be well advised to state the reasons for his decision and award."<sup>64</sup>

## II. SELECTION OF A FORUM FOR APPEALING THE ARBITRATION AWARD

In deciding whether to appeal an arbitration award, a party should consider the characteristics of and potential remedies available from four different forums: the arbitrator, the Na-

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55. *Id.* § 5.

56. *Id.* § 6.

57. *Id.* § 7.

58. *Id.* § 8.

59. *Id.* § 9.

60. *Id.* § 18.

61. *Id.* § 19.

62. *Id.* § 21.

63. See *McQuaid Mkt. House Co. v. Home Ins. Co.*, 147 Minn. 254, 257, 180 N.W. 97, 98 (1920):

It is well settled, in the absence of statute otherwise providing, that in the common-law arbitration the arbitrators need not specify in detail the facts made the basis of their decision, but may report the result of their deliberations in the form of general conclusions, which determine the points involved, together with a statement of the gross allowance made.

64. Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 350 (1958).

tional Labor Relations Board, state courts, and federal courts. An appeal to the arbitrator is frequently the simplest, but his powers of review are extremely limited. The NLRB, while equipped to handle matters which are essentially unfair labor practice issues, is not particularly well suited to handle questions of basic procedural fairness. An appeal to the courts, however, while procedurally the most complex and often the most time-consuming, insures the appellant review before a forum well-versed in the rudiments of basic procedural fairness. The appellant's choice of a court may be greatly influenced by the differences in the procedural rules and requirements of federal and state courts and of the courts of different states.

#### A. PETITIONING THE ARBITRATOR

It is . . . [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration.<sup>65</sup>

This general rule results from the unwillingness of courts to allow a nonjudicial officer, who acts sporadically without following formal procedures, to reexamine a final decision once he has rendered it. One rationale behind the rule is that "the potential evil of outside communication and unilateral influence" which might affect a new conclusion is minimized if an arbitrator is not allowed to modify his decisions.<sup>66</sup> Furthermore, if an arbitrator could freely change his mind, the purpose of the arbitration agreement—the prevention of industrial strife—would be frustrated.<sup>67</sup> In the words of one court, once an arbitrator makes an award, "the rights of the parties to that award are vested and cannot be destroyed by a later attempted modification" of

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65. *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). The general rule was enunciated as early as 1805 in *Henfree v. Bromley*, 6 East 309, 102 Eng. Rep. 1305 (K.B. 1805). See also *Bayne v. Morris*, 68 U.S. (1 Wall.) 97 (1863), in which the Court said:

Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.

*Id.* at 99.

66. *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). See also *Local 35, Newspaper Guild v. Washington Post Co.*, 442 F.2d 1234, 1238-39 (D.C. Cir. 1971); *Parker v. Mercury Freight Lines, Inc.*, 307 F. Supp. 789, 795 (N.D. Ala. 1969).

67. *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F.2d 980, 982 (10th Cir. 1951); *Parker v. Mercury Freight Lines, Inc.*, 307 F. Supp. 789, 794 (N.D. Ala. 1969).

the award.<sup>68</sup> This rule of finality is additionally buttressed by the traditional view of the solemnity of all judgments.<sup>69</sup>

The common law principle of finality has been limited by the courts, however, to allow resubmission of awards to the arbitrator in certain instances. The courts may remit an award where it is patently ambiguous, indefinite, unclear, incomplete, or self-contradictory.<sup>70</sup> Absent contrary statutory principles, there is strong authority for requiring any further consideration of the award by the arbitrator to be obtained, not by petitioning the arbitrator directly, but by requesting the court to resubmit the dispute.<sup>71</sup> Furthermore, there is no legal basis for any at-

68. *Loyal Band or Group of Creek Indians v. United States*, 97 F. Supp. 426 (Ct. Cl.), cert. denied, 342 U.S. 813 (1951), cited in *Parker v. Mercury Freight Lines, Inc.*, 307 F. Supp. 789, 795 (N.D. Ala. 1969).

69. *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 & n.15 (3d Cir. 1967). In *Parker v. Mercury Freight Lines, Inc.*, the court stated that while

there are differences in the nature and purpose of labor arbitration and commercial arbitration which depending on the issue before the court could make holdings in the commercial context irrelevant in the labor context. . . . [t]here is nothing so peculiarly different between a commercial arbitration dispute and a labor arbitration dispute that would make the general principles regarding finality . . . even though pronounced in the commercial context, any the less applicable . . . in the labor context.

307 F. Supp. 789, 795 (N.D. Ala. 1969).

70. *E.g.*, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 433 n.10 (1966); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960); *United Steelworkers v. Timken Roller Bearing Co.*, 324 F.2d 738, 740 (6th Cir. 1963); *International Ass'n of Machinists v. Crown Cork & Seal Co.*, 300 F.2d 127 (3d Cir. 1962); *Todd Shipyards Corp. v. Shipbuilding Workers Local 15*, 242 F. Supp. 606, 611-12 (D.N.J. 1965); *Transport Workers Local 234 v. Philadelphia Transportation Co.*, 228 F. Supp. 423, 425-26 (E.D. Pa. 1964).

71. *Union Local 679 v. Richmond-Chase Corp.*, 191 Cal. App. 2d 841, 13 Cal. Rptr. 341 (1961) (arbitrators have no authority to order a rehearing); see generally Annot., 37 A.L.R.3d 200, 220-25 (1971). Courts have directed a hearing de novo before the same arbitrator where the award covered matters beyond submission, *Kollsman Instrument Corp. v. Crivelli*, 24 App. Div. 2d 865, 264 N.Y.S.2d 359 (1965), or the meaning of the award was unclear, *Kennedy v. Continental Transportation Lines, Inc.*, 230 F. Supp. 760, 763 (W.D. Pa. 1964); *Transport Workers Local 234 v. Philadelphia Transportation Co.*, 228 F. Supp. 423 (E.D. Pa. 1964). Courts have also directed a hearing before a new arbitrator where proffered evidence was found by the court to be so relevant that its exclusion by the arbitrator denied a fair hearing. *Smaglio v. Fireman's Fund Ins. Co.*, 432 Pa. 133, 247 A.2d 577 (1968). See *FAIRWEATHER*, *supra* note 49, at 371. The power to remand will not be exercised unless there is patent ambiguity in the decision or the text of it is not germane to the issue presented as reflected by the record of the proceedings. To remand under any other circumstances, the courts have said, would be to suggest to the arbitrator that the court differed in opinion with the result which he had reached on the merits and would constitute an intrusion upon his exclusive function of passing upon the merits of the



tempt by either party to reopen the hearing for a reconsideration of the merits, although at least one arbitrator has approved such reconsideration in certain circumstances.<sup>72</sup>

There seems to be a dichotomy between theory and practice here, since arbitrators do occasionally reopen a hearing for the purpose of correcting ambiguities and inconsistencies, even after an award has been made. For example, in *American Bakery and Confectionary Workers v. National Biscuit Co.*,<sup>73</sup> the court recognized without comment the fact that the employer in that case had attempted to clarify an award informally by correspondence with the arbitrator. The court seemingly

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grievance. *Machinists Local 1893 v. Aerojet-General Corp.*, 263 F. Supp. 343, 346 (C.D. Cal. 1966); *Todd Shipyards Corp. v. Shipbuilding Workers Union*, 242 F. Supp. 606, 611 (D.N.J. 1965).

However, the rehearing order is not a judicial invasion of the arbitrator's province, but rather serves to give the parties what they bargained for—a clear decision from the arbitrators. *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir.), cert. denied, 393 U.S. 925 (1968).

72. In *Twin City Rapid Transit Co.*, 7 Lab. Arb. 845 (1947), arbitrator McCoy found that although it is settled that in the absence of a specific stipulation arbitrators are without power to act further after rendering a final award, an exception to that principle is proper in cases of fundamental mistake of fact apparent in the award or record. McCoy stated that such an exception is justified (1) by analogy to the right of courts to amend their decisions "*nunc pro tunc*" after their general powers have expired; and (2) on the theory that such an award, based on fundamental error of fact, is void and therefore not an award at all. To rule that arbitrators may not amend such awards would render arbitration a cause of litigation rather than a substitute for it. It was the intent of McCoy to limit reconsideration to awards that could be successfully impeached in court. *Id.* at 869. It should be noted, however, that this case involved arbitration of contract terms, and, as McCoy recognizes, such arbitration "differs radically from arbitration of grievances." *Id.* at 848. Furthermore, the arbitration agreement in this case contained a provision for interpretation of an award in certain circumstances. *Id.* at 865.

With this view should be compared *Waterfront Employers Ass'n of Pacific Coast*, 9 Lab. Arb. 5 (1947). In that case the arbitrator stated that an arbitration agreement which provides that awards are "final and binding upon the parties," but which also contains a very broad definition of arbitrable matters, may be construed to permit the arbitrator to rehear the issue upon which the prior award was rendered and, upon a proper showing, to modify, supersede, or set aside a prior award under the same contract. *Id.* at 16-17.

The case law in this area, however, consistently denies arbitrators independent authority to reconsider the merits. See, e.g., *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F.2d 980, 983 (10th Cir. 1951) (arbitrators have no authority to enter a second award modifying their first award on a dispute growing out of the discharge of an employee, where the first award purported on its face to be complete and final and did not indicate any intention of arbitrators to reserve to themselves any matters for further consideration and determination).

73. 378 F.2d 918 (3d Cir. 1967).

ignored the effect of this informal action and based its decision on a reading of the arbitrator's opinion alone.<sup>74</sup> Of course, when both parties to the arbitration join in requesting the arbitrator to modify or correct the award, the arbitrator's authority to act is clear.<sup>75</sup>

The strongest argument for allowing a direct, unilateral appeal to the arbitrator for a change in the award can be made by attempting to incorporate into federal substantive law, by analogy, the provision in many state arbitration acts which allows such a petition by one of the parties.<sup>76</sup> Even where controlling, however, this statutory provision is extremely limited. It does not allow a review of the merits of the decision, but merely modification or correction where

[t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [or]

. . . .

[t]he award is imperfect in a matter of form, not affecting the merits of the controversy.<sup>77</sup>

Thus, the arbitrator's legitimate scope of review over his own award is very narrow. If it does appear that the award may be appropriately modified by resubmission to the arbitrator, however, a request for resubmission should properly be made to a court of appropriate jurisdiction. For example, where a party has been denied the benefit of a key witness's testimony due to the arbitrator's selection of an inconvenient time or place for the hearing, a request for resubmission on such grounds would probably fail because it is outside the arbitrator's ambit of review. Instead, the aggrieved party should petition the court for review.

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74. *Id.* at 926.

75. *Eveleth v. Chase*, 17 Mass. 458 (1821) (arbitrators under a parol submission may make a valid supplementary award with the parol consent of both parties). See Annot., 104 A.L.R. 710, 716 (1936).

76. It may be argued that such statutes reflect the federal labor policy. See text accompanying notes 43-51 *supra*. Also, for an argument that the "*functus officio*" doctrine as applied to arbitrators was specifically rejected in *Enterprise Wheel* and should no longer be applied, thereby permitting unilateral appeals to arbitrators, see FAIRWEATHER, *supra* note 49, at 348-51. Fairweather's view, as it applies to unilateral appeals to the arbitrator, is not the generally accepted one, however.

77. UNIFORM ARBITRATION ACT (U.L.A.) § 13(a)(1), (3). Similar provisions are also present in several states where the Uniform Act has not been enacted. See FAIRWEATHER, *supra* note 49, at 348 (collecting statutes).

## B. PETITIONING THE NLRB VERSUS PETITIONING THE COURTS

The jurisdiction of the arbitrator and the National Labor Relations Board often overlap, because (1) many grievances made arbitrable by a collective bargaining agreement can be framed to encompass an unfair labor practice,<sup>78</sup> and (2) a majority of collective agreements incorporate one or more provisions of the National Labor Relations Act, thereby making many breaches of contract statutory violations as well.<sup>79</sup> The Board and the courts presently have concurrent jurisdiction over conduct that allegedly constitutes both an unfair labor practice and a breach of the collective bargaining agreement.<sup>80</sup>

In the face of possible conflicting determinations between arbitrators and the courts on the one hand, and the National Labor Relations Board on the other, the Supreme Court, without articulating its rationale, held in *Smith v. Evening News Association* that litigants have a choice of forum.<sup>81</sup> The effect of this decision was a quiet liquidation of the preemption doctrine set out in *San Diego Building Trades Council v. Garmon*,<sup>82</sup> which granted exclusive jurisdiction to the Board with respect to conduct arguably protected by section 7 or arguably prohibited by section 8 of the Labor Management Relations Act. The impact of *Smith* has been to shift significant decision-making power from the Board to arbitrators and the courts.

Under existing law the National Labor Relations Board engages in limited review of arbitration awards. In *Spielberg Manufacturing Co.*,<sup>83</sup> the Board, following the statutory policy of en-

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78. NATIONAL ACADEMY OF ARBITRATORS, *THE ARBITRATOR, THE NLRB, AND THE COURTS* 121-22 (20th annual meeting 1967) (statement of E. Lewis).

79. Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52, 68, 69 (1957).

80. See *Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714-15 (7th Cir. 1969); *NLRB v. George E. Light Boat Storage, Inc.*, 373 F.2d 762 (5th Cir. 1967). For a brief history of the development of the law defining the relationship between arbitrators, the NLRB, and the courts, see Note, *Deference of Jurisdiction by the National Labor Relations Board and the Arbitration Clause*, 25 VAND. L. REV. 1057, 1058-59 (1972).

81. 371 U.S. 195, 197 (1962). The danger of conflict is mitigated by the requirement that the courts under section 301 must apply principles of federal law which, of course, will include the Labor Management Relations Act. For an analysis of the Court's handling of the preemption problem under section 301, see Sovern, *Section 301 and Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1962).

82. 359 U.S. 236 (1959).

83. 112 N.L.R.B. 1080 (1955).

couraging the voluntary resolutions of disputes, adopted a three-pronged test to determine when it would defer to the decision of the arbitrator. The Board will defer where (1) the arbitration proceedings appear to have been fair and regular; (2) all parties have agreed to be bound by those proceedings; and (3) the arbitration decision is not clearly repugnant to the purposes and policies of the labor laws.<sup>84</sup> The Supreme Court, in holding that a dispute which may be cognizable under the National Labor Relations Act may still be submitted to arbitration, noted the *Spielberg* doctrine and quoted approvingly from one of the Board's earlier applications of it.<sup>85</sup>

Where any of the three requirements cited in *Spielberg* are not met, the Board will not defer. Intervention by the Board is one of the safeguards afforded the individual grievant who may be faced with representation at an arbitration hearing by an unsympathetic union.<sup>86</sup> Furthermore, if grounds for alleging an unfair labor practice can be found, a victim of an unfair proceeding can appeal to the Board to intervene in his behalf. The Board, however, will not allow a second hearing merely because an unfair labor practice could be found to exist.<sup>87</sup>

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84. *Id.*

85. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271 (1964). The Court adopted the words of *International Harvester Co.*, 138 N.L.R.B. 923, 925-26 (1962):

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. . . . However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.

See *Associated Press v. NLRB*, 492 F.2d 662 (D.C. Cir. 1974).

86. Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1195 (1968).

87. In *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), the Board deferred to an arbitrator's decision despite the fact that the Board could have found that an unfair labor practice had been committed. The Board was unwilling to allow the union a second hearing after it had initially lost its case at arbitration.

It has been argued that the NLRB should refrain entirely from reviewing arbitration awards, even though representation and unfair labor practice questions are present. Such cases are primarily concerned with contract questions that the parties have agreed to submit to arbitration or that have been decided by the arbitrator. Furthermore, the two primary functions performed in an arbitration case are contract interpretation and enforcement—both tasks for which the courts are better suited than the Board. Thus, it is argued, the jurisdiction of the Board should not be extended to oust courts from section 301 cases. Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?*, 10 LAB. L.J. 477 (1959); Note, *Federal Enforce-*

## C. STATE VERSUS FEDERAL COURTS AND THE REVERSE-ERIE PROBLEM

Several factors should be considered in deciding whether to seek review in a state court of an arbitration award made pursuant to a collective bargaining agreement. First, where the collective bargaining agreement affects interstate commerce, federal substantive law is controlling.<sup>88</sup> State arbitration statutes are inapplicable except to the extent that they are deemed to be rules absorbed by federal law.<sup>89</sup> Second, the common-law presumption is against applying state arbitration statutes to collective bargaining agreements absent a specific provision in the agreement incorporating not just the laws of a particular state, but the arbitration statute itself.<sup>90</sup> Thus, a provision in an agreement that it is to be governed by the laws of a particular state would not be sufficient to rebut the common-law presumption. Finally, if a claim based on a federal right is brought in a state court, it may be removed to federal district court if it might in the first instance have been brought there.<sup>91</sup>

State courts may apply their own procedural law when enforcing a federal right,<sup>92</sup> but may not defeat the substance of a federal claim under the guise of regulating procedure.<sup>93</sup> Thus,

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*ment of Grievance Arbitration Provisions under the Doctrine of Lincoln Mills*, 42 MINN. L. REV. 1139, 1161 (1958).

88. See text accompanying notes 4-10 *supra*.

89. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). See also *Interstate Bakeries Corp. v. Bakery Drivers Union*, 31 Ill. 2d 317, 201 N.E.2d 452 (1964), in which the court held that a state constitutional provision forbidding arbitration of future disputes was inapplicable in an action under section 301.

One of the incidental results of this preemption of the field by federal law is the displacement of state statutory procedural safeguards on arbitration. For example, the federal law has not required that agreements to arbitrate be in writing or that the award be in writing and be acknowledged by the arbitrator. It is, as one commentator laments, unfortunate that all the procedural safeguards of the state statutes have been thus eliminated. See HAYS, *supra* note 1, at 18-19.

90. *American Sterilizer Co. v. Local 832, UAW*, 278 F. Supp. 637, 640-41 (W.D. Penn. 1968). See also *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967); *Keller v. Teamsters Local 249*, 423 Pa. 353, 223 A.2d 724 (1966).

91. 28 U.S.C. § 1441 (1970). A provision in the contract that it is to be governed by state law does not prevent removability. *Ingraham Co. v. Local 260, Int'l Union of Elec. Workers*, 171 F. Supp. 103 (D. Conn. 1959); see Annot., 63 A.L.R.2d 1356 (1959). If, alternatively, the action is brought in or removed to the federal court on the ground of diversity of citizenship, the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires that state, rather than federal, substantive law be applied. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

92. See *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

93. *Brown v. Western Ry.*, 338 U.S. 294, 296 (1949). As Justice

a state court enforcing the federal right is presented with problems similar to those that confronted the federal courts after *Erie Railroad v. Tompkins*:<sup>94</sup> it must determine both the limits of the substantive right to arbitration granted by federal law and the points at which its own procedure may undercut that right.<sup>95</sup> In all cases involving the enforcement of federally created rights in state courts, proper deference must be given to the paramount nature of federal law. Once the extent of the federal right is established, the operation of local policy is to that degree preempted. Moreover, according to one commentator, "federal paramountcy" extends as much to procedural as to substantive matters. If the federal purpose is clear, and if it is valid, there is no room, he argues, for the type of local procedural autonomy allowed in conflict of laws situations.<sup>96</sup> Nevertheless, in the course of developing a body of federal substantive law under section 301 many state and federal courts have required strict compliance with the different procedural requirements of their respective arbitration statutes. While the federal purpose is clear—deference to arbitration—the federal substantive law is not. Thus the Supreme Court has recognized that in certain instances the procedural requirements of a particular state will be adopted as part of the federal substantive law for that state, even though this may result in different procedural standards in different forums.<sup>97</sup>

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Frankfurter noted,

[i]f the States afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress—either expressly or by local methods of enforcement that accomplish the same result.

Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 369 (1942) (concurring opinion). Accord, C. WRIGHT, FEDERAL COURTS § 45 (1970).

94. 304 U.S. 64 (1938).

95. See Note, *The Federal Arbitration Act in State Courts: Converse Erie Problems*, 55 CORNELL L. REV. 623, 624-25 (1970).

96. Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384, 387 (1956). Two other reasons have been advanced in support of applying foreign law to a greater extent in the federal/state areas than in the normal conflicts situation: (1) only one additional set of laws need be mastered by the state judges, not 49; (2) it is easier to forum shop in the federal/state situation since the shopper does not have to leave his state. Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1557-58 (1960).

97. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) (state statute of limitations controls in the filing of a section 301 suit). See discussion in text accompanying notes 120-24 *infra*.

## D. FORUM SHOPPING

1. *Jurisdiction, Venue, and Transfer*

The extent to which an aggrieved party may forum shop for a favorable set of state procedural standards to incorporate into the federal substantive law of that district is limited by the party's ability to (1) obtain proper venue, (2) acquire personal jurisdiction over the adverse party, and (3) resist attempts to have the action removed for consideration under another forum's less favorable procedural standards. Section 301(c) of the Labor Management Relations Act provides:

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.<sup>98</sup>

Although entitled "jurisdiction," the courts have uniformly held that this section is a venue provision.<sup>99</sup> As section 301(a) makes clear, section 301(c) prescribes the proper venue for suits under the Labor Management Relations Act which are "brought in any district court of the United States having jurisdiction of the parties."<sup>100</sup> The argument can be made that the venue provisions of section 301(c) pertain only to labor organizations and do not include private persons or corporations; however, section 301(a) has also been recognized as a venue statute, and it clearly applies to private persons and corporations—albeit subject to the limitations of section 301(c) quoted above.<sup>101</sup>

When the forum selected is outside the state where the adverse party is located, there are two requisites to the acquisition

98. 29 U.S.C. § 185(c) (1970).

99. *Central Operating Co. v. Utility Workers Local 426*, 491 F.2d 245, 250 (4th Cir. 1974); *Rubber Local 102 v. Lee Rubber & Tire Corp.*, 394 F.2d 362, 364 (3d Cir.), cert. denied 393 U.S. 835 (1968); *Franchino v. Valenti*, 347 F. Supp. 1020, 1022 (E.D.N.Y. 1972); *Dixie Carriers, Inc. v. Maritime Union*, 35 F.R.D. 365, 369 (S.D. Tex. 1964). See also *Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 562 (1967).

100. *Franchino v. Valenti*, 347 F. Supp. 1020, 1022 (E.D.N.Y. 1972).

101. *White Motor Corp. v. UAW*, 491 F.2d 189, 191 (2d Cir. 1974); *Swanson Painting Co. v. Painters Local 260*, 391 F.2d 523, 526 (1968). Additionally, where the adverse party is a corporation there is a federal statute of general application. It provides:

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 U.S.C. § 1391(c) (1970).

of personal jurisdiction. The first is effective service of process. The second is sufficient contacts between the party and the forum state to insure that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>102</sup> Federal Rule of Civil Procedure 4(f) provides in relevant part:

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.<sup>103</sup>

While it has been argued that section 301(d) authorizes nationwide service of process for section 301 actions, this argument has been found to be without merit.<sup>104</sup> Thus, the procedure to be followed in the district courts in obtaining personal service upon a party not an inhabitant of, or found within, the state where the district court is located is governed by Rule 4(e) of the Federal Rules of Civil Procedure. That rule provides that whenever a statute or rule of court of the state in which the federal district court is located allows service of a summons upon a party not an inhabitant of, or found within, the state, service may be made under the circumstances and in the manner prescribed in the statute or rule. Therefore, any extraterritorial service provisions of the state in which the district court is held are available under Rule 4(e).<sup>105</sup>

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102. *Swanson Painting Co. v. Painters Local 260*, 391 F.2d 523, 524 (9th Cir. 1968). As to the latter factor, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

103. Additionally, Rule 4(f) permits service out of the state but not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial, on parties brought into the action under Rules 14 or 19.

104. Section 301(d) provides:

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

29 U.S.C. § 185(d) (1970). In *Central Operating Co. v. Utility Workers Local 426*, 491 F.2d 245 (1974), plaintiff argued that this section authorizes service of process upon unions to be effected anywhere in the United States. The court rejected this contention, stating that the purpose of the section was to make it clear that a union, although an unincorporated association, could sue and be sued. By providing that the service of summons upon an agent of a union would be adequate to subject a union to the jurisdiction of the federal court issuing the summons, the Congress had removed a major obstacle to suing unions. *Id.* at 249. The only other court to have considered this contention also rejected it. *Daily Review Corp. v. Typographical Union*, 9 F.R.D. 295 (E.D.N.Y. 1949).

105. Most states have substitute service of process provisions as part of their long-arm statutes which are adequate to effect service upon employers amenable to suit in a district court held in such state on an action



A second requisite to acquiring personal jurisdiction is set out in *Hanson v. Denckla*,<sup>106</sup> where the Supreme Court indicated that activities within a state which qualify as "contacts" for the purpose of meeting the "minimum contacts" requirement must be of a kind which show that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>107</sup> Finally, in actions brought under section 301, there is authority for the proposition that where the federal district court has personal jurisdiction over the defendant, it also has venue in the action.<sup>108</sup>

While a party appealing an arbitrator's decision may be able to obtain venue and personal jurisdiction in a favorable forum, the advantages gained by forum shopping may be lost if the defendant is able to remove the action to a different forum and thus subject it to less favorable procedural standards. Changes of venue may be obtained pursuant to 28 U.S.C. § 1404, which provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The Reviser's Notes state that "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper."<sup>109</sup> However the statute is more than a mere codification of this common law doctrine, for the Supreme Court has held that

Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to

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under section 301(a). See, e.g., *Swanson Painting Co. v. Painters Local 260*, 391 F.2d 523, 524-25 (1968). Where the defendant is a corporation authorized to do business in the forum state, service of process is simplified by provisions in state corporation statutes which require the designation of agents to receive process. See, e.g., ABA-ALI MODEL BUS. CORP. ACT § 115 (1969).

106. 357 U.S. 235 (1958).

107. *Id.* at 253. It should be noted, however, that where plaintiff's injury does not arise out of something done in the forum state, the other contacts between the defendant and the forum state may need to be fairly extensive before the burden of defending a suit there will be imposed on defendant. These extensive contacts are necessary so that "traditional notions of fair play and substantial justice" are not offended. The matter is one of fairness in balancing interests, hardships, and advantages. F. JAMES, CIVIL PROCEDURE § 12.8 (1965).

108. *Swanson Painting Co. v. Painters Local 260*, 391 F.2d 523, 526-27 (9th Cir. 1968).

109. Quoted in *Norwood v. Kirkpatrick*, 349 U.S. 29, 34 (1955).

grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.<sup>110</sup>

One recurring reason for plaintiff's choice of an inconvenient forum is to obtain the benefit of a more favorable statute of limitation than those found in states where the suit would be more convenient and would ordinarily be brought. For example, a party adversely affected by a late award would be interested in finding a state that renders an arbitration award void if it is not issued within three months of the completion of the hearing.<sup>111</sup> The prevailing judicial attitude has been one of "indulgent tolerance toward such forum-shopping as is induced by the vagaries of limitations in the conflict of laws."<sup>112</sup> This attitude has found expression in various devices for allowing the plaintiff to keep the legal advantage which he gained by his original choice of forum where that was a permissible choice. Thus, some courts which apply *forum non conveniens* have declined to dismiss on that ground,<sup>113</sup> and others have made their dismissals conditional.<sup>114</sup> Under section 1404(a), several courts have exacted as a condition of transfer a stipulation that the defendant would not plead the statute of limitation.<sup>115</sup> And some courts have held that the law of the transferor court continues to apply after the transfer.<sup>116</sup>

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110. *Id.* at 32. See also *All States Freight v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952); *Jiffy Lubricator Co. v. Stewart-Warren Co.*, 177 F.2d 360 (4th Cir. 1949).

111. Of course, the petitioning party would still have to argue that the requirement is mandatory, and not merely directory. See text accompanying notes 131-33 *infra*.

112. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 474 (1955).

113. *Id.* at 471 n.148 (collecting cases).

114. See F. JAMES, CIVIL PROCEDURE § 12.17 (1965).

115. See, e.g., *Hokanson v. Helene Curtis Indus.*, 177 F. Supp. 701 (S.D.N.Y. 1959).

116. See, e.g., *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950), where plaintiff, a Missouri citizen, brought an action in a New Mexico state court against a Kansas railroad corporation doing business in New Mexico for injuries sustained in California. The defendant removed to the United States District Court for the District of New Mexico. The court of appeals held that the district court erred in assuming that, upon transfer to the District of California under section 1404(a), the California statute of limitations would be applicable. It has been urged, however, that results like this one are open to question where the transferor court has no connection with the controversy beyond the fact that plaintiff chose to sue and defendant could be served with process there, and where the transferee court has substantial contacts with the case and therefore a much more legitimate interest in applying the law which implements its own policies. See C. WRIGHT, FEDERAL COURTS § 44 (1963);

Important considerations in deciding whether to transfer a case include

the relative ease of access to sources of proof . . . and the cost of obtaining attendance of willing witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive . . . . The court will weigh relative advantages and obstacles to fair trial. . . . *But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.*<sup>117</sup>

Thus, because this presumption favors the plaintiff's choice of forum, he is frequently able to resist transfer from a favorable court. Plaintiff would want to argue in the alternative, however, that if the case is transferred, the law of the transferor court should be applied in the new forum.<sup>118</sup>

## 2. *Applying the Procedural Standards of the Forum*

The uncertainty as to the law governing appeals of arbitration awards creates an equal degree of uncertainty as to the applicable procedural requirements for making an appeal. If the Federal Arbitration Act is found to be applicable, section 301 actions to vacate or modify an arbitration award may be precluded. This result would eliminate the possibility of forum shopping, since the appeal would have to be commenced within three months in "the United States court in and for the district wherein the award was made . . ." <sup>119</sup> The best approach for the litigant interested in forum shopping may be to argue that while the federal act's specific standards regarding vacation, modification, and correction of the award should be adopted into federal substantive law by analogy, the Act is not specifically applicable.

Procedural standards of the forum state may be consulted if the Federal Arbitration Act is not deemed to be controlling. For example, in *UAW v. Hoosier Cardinal Corp.* the Court held that the timeliness of an action within the ambit of section 301(a)

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Currie, *supra* note 112, at 463: Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 350 (1960).

117. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (emphasis added).

118. See note 116 *supra* and accompanying text.

119. 9 U.S.C. §§ 10-12 (1970). 9 U.S.C. § 9 (1970) contains similar language. However, in *UAW v. White Motor Corp.*, 85 L.R.R.M. 2548 (D. Minn. 1973), the court held that an action to enforce an arbitrator's award may be brought either under the Federal Arbitration Act or section 301. This decision implies that alternative sets of procedural standards are available, thereby making forum shopping possible even where the Federal Arbitration Act is found to be specifically applicable.

must be determined, as a matter of federal law, by reference to the appropriate state statute of limitations.<sup>120</sup> In so holding, the Court refused to devise a uniform time limitation as part of its body of federal substantive law under section 301. The Court reasoned that the need for uniformity is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitation come into play only when these processes have already broken down, and lack of uniformity in this area is therefore unlikely to frustrate labor policy in any important way. Thus, although stating that a uniform limitations provision for section 301(a) suits might well constitute a desirable statutory addition, the Court concluded that there is no justification for the drastic sort of judicial legislation that was urged upon it.<sup>121</sup> Under the *Hoosier Cardinal* doctrine, then, where (1) there is no applicable federal statute of limitations, and (2) a state statute of limitations is found to be applicable, the state statute of limitations becomes a part of the federal substantive law to be applied in that state. The difficulty, as far as the appealability of arbitration awards is concerned, lies in the determination of whether or not a state statute of limitations is applicable.

After *Hoosier Cardinal*, the applicable statutes of limitation are those of the forum state, notwithstanding any provision

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120. 383 U.S. 696 (1966). While *Hoosier Cardinal* involved an agreement to provide accumulated vacation pay to qualified employees upon termination of their employment without any arbitration clause applicable to the dispute, the holding clearly encompasses all section 301(a) actions—including actions brought to vacate, modify, or correct an arbitration award allegedly made pursuant to an arbitration clause in the collective bargaining agreement.

121. *Id.* at 702. Presumably, this same rationale could be applied to other state procedural provisions. Justice White, joined in his dissent to *Hoosier Cardinal* by Justice Douglas and Justice Brennan, disputed the majority's claim that fashioning a uniform federal limitations period would be too bold an exercise of judicial innovation, noting that "here there is no dispute concerning whether a statute of limitations is to be fashioned—the choice is between one statute or 50." *Id.* at 713. Indeed, the Court's approach adopts hundreds of limitations statutes where many states have different limitations provisions for different types of section 301 suits. See *id.* at 798 n.1.

The dissent says that state law should be applied in section 301 situations only to the extent that it supplements and fulfills federal policy; the ultimate question is what federal policy requires. Justice White made a strong argument that federal policy requires the Court to establish, under its authority to develop the substantive law of labor contracts, a single uniform limitations period.

in the collective agreement that the agreement shall be governed by the laws of a different state.<sup>122</sup> However, it would seem that the common-law presumption against applying state arbitration statutes to collective bargaining agreements would preclude an application of the appeal deadlines contained in these acts. Nevertheless in *Hill v. Aro Corp.*,<sup>123</sup> with no evidence in the record that the parties had intended any arbitration statute to be applicable, the court in providing that a motion to vacate the award must be served on the adverse party within three months, found both the state and federal acts consistent with the policy of the national labor law. The court concluded that the failure of petitioner to act within the three-month time limitation of these acts constituted a bar to his action.<sup>124</sup>

If the time limitations of the arbitration statutes are not found to be applicable, the aggrieved party may seek judicial impeachment of the arbitration award by a suit in equity or by an action at law. A suit to enforce an equitable claim may be barred by laches.<sup>125</sup> Equity courts may also adopt the time fixed by the statutes of limitation for barring claims at law in analogous cases as the period after which they will preclude a recovery in equity.<sup>126</sup> This variation of the defense of laches is

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122. State law was also used in *Howerton v. J. Christenson Co.*, 76 L.R.R.M. 2937 (N.D. Cal. 1971), where a federal district court, relying on *Hoosier Cardinal*, applied a state statute requiring petitions to vacate an arbitration award to be filed within 100 days after its issuance.

123. 275 F. Supp. 482 (N.D. Ohio, 1967).

124. *Id.* at 487. *Accord*, *Howerton v. J. Christenson Co.*, 76 L.R.R.M. 2937 (N.D. Cal. 1971) (100 day requirement for petitioning to vacate or correct an award). Support for the adoption of a short limitations period can be found in *Hoosier Cardinal*. There the Court stated that the six-month provision governing unfair labor practice proceedings (29 U.S.C. § 160(b) (1970)) suggests that relatively rapid disposition of labor disputes is a goal of federal labor law. 383 U.S. at 707. Furthermore, there is in general considerable judicial reluctance to leave an area uncontrolled by any limitations period whatever. See *Hill, State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 79-80 (1955).

125. See 27 AM. JUR. 2d *Equity* §§ 130, 153, 154, 163, 176 (1966). The elements of the laches defense have been listed as including: (1) conduct of the defendant giving rise to the situation of which complaint is made, (2) complainant's delay in asserting his rights after notice of the defendant's conduct and an opportunity to institute suit, (3) defendant's lack of knowledge that complainant would assert the right on which he bases his suit, and (4) injury to defendant in the event relief is accorded. See *id.* § 162. The principle of the doctrine of laches is similar to those inherent in such terms as "acquiescence," "estoppel," "ratification," and "waiver." See *id.* § 152.

126. See *id.* § 159.

normally applied only where a considerable period of time has elapsed.<sup>127</sup>

While it is far from certain that the Federal Arbitration Act will control in situations involving the appeal of a labor arbitration award based on a procedural decision of the arbitrator, the petitioning party would want to register his appeal of the award within three months after it is made. Additionally, since many state and federal courts have required strict compliance with the procedural requirements of the state or federal arbitration statutes,<sup>128</sup> the petitioner should carefully inspect these provisions and comply if possible. He should also look for possible violations of these requirements by the arbitrator or by his adversary, for even though the statutes may not be controlling, the particular procedural provisions, if compatible with the emerging federal law, may be adopted by the court as part of federal substantive law.<sup>129</sup>

In dealing with statutory procedural provisions, courts are not limited to either accepting or rejecting particular provisions; a third option exists—the particular provision may be deemed to be directory. For example, many state statutes specify a time period after the close of the hearing during which the award must be completed.<sup>130</sup> In *International Association of Machinists*

127. See, e.g., *Murray v. Hawkins*, 144 Ga. 613, 87 S.E. 1068 (1916); *George v. Johnson*, 45 N.H. 456 (1864).

128. See, e.g., *International Ass'n of Machinists v. General Elec. Co.*, 406 F.2d 1046 (2d Cir. 1969), where commencement of an action to compel arbitration by petition under section 4 of the Federal Arbitration Act instead of by complaint under section 301 was held to be valid in that the Arbitration Act had been recognized as applicable to labor cases. At the district court level, 282 F. Supp. 413 (N.D.N.Y. 1968), the court held that an action to stay must be filed within the state statutory time limits. In *Fischer v. Guaranteed Concrete Co.*, 276 Minn. 510, 514, 151 N.W.2d 266, 269 (1967), a request for vacation of an award was denied under a provision of a Minnesota statute. The argument that the Minnesota statute was not applicable was rejected by the court, citing *Lincoln Mills*, with this observation: "[T]he controlling substantive law is Federal law," but "state law, if compatible with the purposes of § 301, may be resorted to in order to find the rule that will best effectuate the Federal policy." A New York court, in *2166 Bronx Park East, Inc. v. Local 32E, Building Service Employees*, 45 Misc. 2d 492, 257 N.Y.S.2d 192, 193 (Sup. Ct. 1965) held that a motion to compel arbitration must be served on the other party in technical compliance with the state statutory requirements.

129. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

130. For example, in Pennsylvania, PA. STAT. ANN. tit. 43, § 213.12 (1964), and Connecticut, CONN. GEN. STAT. REV. § 52-416 (1968), the statutes require that a written decision shall be rendered within 60 days, and in Washington, WASH. REV. CODE ANN. § 7.04.090 (1961), within 30 days after the close of the hearing. Similarly, the rules of the American Arbi-

*v. Geometric Tool Co.*,<sup>131</sup> the court of appeals, in dealing with the 60-day provision in the Connecticut act, held that it was not proper to adopt such a state statute as part of the federal law in view of the strong need for federal uniformity in this area. A better rule, said the court, is that any limitation on the time in which an award may be rendered should be considered directory, rather than mandatory, thereby giving the court discretion to uphold a late award.<sup>132</sup> The court distinguished the case from *Hoosier Cardinal*:

[W]e are not dealing with the time within which a party must commence a suit in court or be time-barred. Rather, we are dealing with the time in which an arbitrator can render a valid award, and private settlement of a dispute is one of the most desired federal goals and is well within the policy of furthering consensual processes. Thus, unlike the *Hoosier* situation, we have a very strong need for federal uniformity here, and an incorporation of this Connecticut statute into labor-management resolution in that state derogates from that need.<sup>133</sup>

The court concluded that it should always be within a court's power to uphold a late award if no objection to the delay has been made prior to its rendition or if there is no showing that actual harm to the losing party was caused by the delay. Thus, any appeal seeking to vacate an arbitrator's award because of its lateness should either (1) be preceded by an objection, before the award is rendered, that the award is untimely, or (2) be accompanied by a showing that the appellant has been caused actual harm by the delay. Where either of these conditions are satisfied, the case for adopting into federal substantive law a time limit for the rendition of an award would be considerably stronger than it was in *Geometric Tool*.

To the extent that the procedural standards of state courts are adopted into federal substantive law, the predictable effect is

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tration Association establish a time limit of 30 days following the close of the hearing, unless the parties agree to the contrary, AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES § 37 (1968). About one-half of the state statutes give specific power to the parties by agreement to limit the time within which the award must be rendered. See FAIRWEATHER, *supra* note 49, at 334; Kagel, *Labor and Commercial Arbitration Under the California Arbitration Statute*, 38 CAL. L. REV. 799, 823 (1950); Comment, *State Arbitration Statutes Applicable to Labor Disputes*, 19 MO. L. REV. 280, 292 (1954). At common law, an award rendered after the expiration of a time limit specified in the collective bargaining agreement is considered void. Annot., 154 A.L.R. 1392 (1945). There are, however, a substantial number of decisions taking the contrary view. See FAIRWEATHER, *supra* note 49, at 366.

131. 70 L.R.R.M. 2228 (2d Cir. 1968).

132. *Id.* at 2229.

133. *Id.*

to impose upon the arbitrator and both parties the most stringent procedural requirements of all districts in which jurisdiction and venue can be maintained. This will necessarily result since the party seeking review has the sole option to shop for a forum,<sup>134</sup> and, where economically feasible, will most certainly seek to bring his action in the forum with the strictest standards in order to facilitate vacation, modification, or correction of the award.

### III. SCOPE OF REVIEW

#### A. SUBSTANTIVE CONSIDERATIONS: EVALUATING THE DECISION OF THE ARBITRATOR

In maintaining that an arbitrator's award must be vacated, modified, or corrected, the petitioning party may wish to argue that the decision is contrary to the well established custom, or past practice, of the parties. Additionally, the results of prior arbitrations involving similar disputes, while not binding, may properly be cited as examples of just awards. Finally, since the nature of the relationship between the parties is largely a matter of contract, the agreements between the parties must be analyzed for explicit or implicit limitations on the jurisdictional and procedural powers of the arbitrator.

##### 1. *The Past Practice Standard*

In evaluating a petitioner's appeal, one factor the reviewing body must consider is the past practices of the parties. If arbitration proceedings have always been held at a particular location within a certain number of days after the filing of a grievance, a petitioner objecting to the time and place of a hearing will have a considerably weaker case than if the proceedings have

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134. See *Holmsten Refrigeration Inc. v. Refrigerated Storage Center, Inc.*, 357 Mass. 580, 260 N.E.2d 216 (1970) (until the three month period for urging vacation, modification, or correction has expired, the court is without power to confirm the arbitration award). The right to forum shop will have real meaning only for those who are able to obtain jurisdiction and venue in more than one state (e.g., employees of an employer doing business in more than one state). The advantages of forum shopping are also limited by the fact that many courts hold that procedural defects have been waived where such defects are not objected to before the award is received. *National Cash Register Co. v. Wilson*, 8 N.Y.2d 377, 171 N.E.2d 302, 208 N.Y.S.2d 951 (1960). But see *Hellman v. Wolbrom*, 31 App. Div. 2d 477, 298 N.Y.S.2d 540 (1969); *Consolidated Carting Corp. v. Teamsters Local 282*, 28 App. Div. 2d 667, 280 N.Y.S.2d 872 (1967).



traditionally been held at a site and time acceptable to all parties or selected by the arbitrator.

The arbitrators under a collective agreement are

indispensable agencies in a continuous collective bargaining process. They sit to settle disputes . . . that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.<sup>135</sup>

Furthermore, the Court in *Warrior & Gulf* recognized that "[g]aps may be left [in a collective bargaining agreement] to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement."<sup>136</sup> Arbitrators are thus not confined to the express provisions of the contract, but may look to "the industrial common law" since it is, by implication, incorporated into the collective bargaining agreement.<sup>137</sup>

In examining this past practice standard, it should be noted that not every practice is binding. The argument that past practice requires a particular result is frequently made by at least one of the parties involved in an arbitration proceeding, but to give the argument effect, the proponent must provide "full, complete and clear proof" of the existence of a well established custom.<sup>138</sup> Sylvester Garrett, in one of the most widely quoted decisions on this subject, stated:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.<sup>139</sup>

Thus, the arbitrator must determine whether the alleged practice is merely one of the courses of action followed from time to time by the parties, or whether it is the exclusive response of the parties. In so doing, he must consider many factors of

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135. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596.

136. 363 U.S. at 580.

137. *Id.* at 581-82.

138. *Sioux City Battery Co.*, 20 Lab. Arb. 243 (1953) (Updegraff, Arbitrator).

139. *U.S. Steel, National Tube Div.*, 2 STEELWORKERS ARB. BULL. 1187 (1953).

varying importance, including the express terms of the written contract, the prior negotiations of the parties, the degree of its mutual "acceptance," the duration over which it has been followed, and any unique facts in the tradition of that particular industry.<sup>140</sup>

The effect of the past practices may be modified by agreement of the parties. In order to eliminate it, however, the contract language must be clear, strong, and unequivocal. Clauses providing that the written agreement is the "entire understanding" of the parties and that nothing outside the agreement is binding will not dissolve the past practice standard.<sup>141</sup> Conversely, the union may seek to include certain clauses preserving unwritten practices which employees have come to consider as part of their employment contract.<sup>142</sup>

The past practice standard provides one of the most troublesome problems in reviewing an arbitrator's award. While the courts recognize that the express terms of a contractual agreement may be altered through the practice of the parties,<sup>143</sup> the complexities of judicial review are compounded to the extent an arbitrator relies on such practices in making the award. There are two landmark cases concerning this problem, *H. K. Porter Co. v. United Steel Products Workers*<sup>144</sup> and *Torrington Co. v. Metal Products Workers Local 1645*.<sup>145</sup> In *Porter*, the arbitrator, who based his decision on the practice of the union and a company acquired by Porter, had his award vacated in part because the court found that part of the award did not draw its essence from the collective agreement or the practice of the parties.<sup>146</sup> In *Torrington*, the arbitrator held that past practice placed the burden on the company to negotiate away the practice if it desired to discontinue it. Having failed to do so, said the arbitrator, the company was obliged to continue the practice. The court refused to enforce the award on the grounds that the matter had been brought up in negotiations but not incorporated into the

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140. McLaughlin, *Custom and Practice in Labor Arbitration*, 18 *ARB. J.* 205, 207 (1963). Lester Block concluded that three essential ingredients must be found: (1) the practice must be unequivocal, (2) it must have existed over a reasonably long period of time, and (3) it must have been mutually accepted by the parties. Block, *Customs and Usages as Factors in Arbitration Decisions*, 15 *N.Y.U. CONF. LAB.* 311, 313 (1962).

141. McLaughlin, *supra* note 140, at 218-19.

142. *Id.* at 219.

143. *See In re Borrazas*, 50 *L.R.R.M.* 2891 (1962).

144. 333 F.2d 596 (3d Cir. 1964).

145. 362 F.2d 677 (2d Cir. 1966).

146. 333 F.2d at 602.

contract. Therefore, as a matter of law, it was neither a part of the contract nor a proper matter for the arbitrator to rely upon.<sup>147</sup>

It may be argued that both *Porter* and *Torrington* fully reviewed the merits of an award, contrary to the Supreme Court directive in *Enterprise Wheel*<sup>148</sup> to avoid such review. However, in *Porter* the sole requirement imposed by the reviewing court was that the practice to which the arbitrator referred be historically factual. One commentator has urged that review in this narrow context is desirable, even though allowing it results in the anomaly that, while the arbitrator is the supreme fact finder in most situations, his findings of historical fact are subject to review when they are the basis for implying a contractual condition. This difference, it is argued, is justified by the fact that the latter is a more inclusive finding, relating not only to a particular factual situation but also to the complete agreement between the parties.<sup>149</sup>

When the arbitrator is admittedly relying not on the written words of the contract, but on the practice of the parties to infer an agreement or to modify the clear words of the contract, there is no need to place a burden on the opponent of the award to show that the printed contract does not support the award. In these cases, the burden should be on the proponent to show that the practice was indeed relied on by the parties in defining their relationship. The burden should then shift to the opponent to prove that the facts relied on do not exist.<sup>150</sup> Another problem arises concerning who—court or arbitrator—should ultimately interpret the significance of the practice of the parties, and, more specifically, what practices are to be incorporated into the contractual obligations of the parties. Because this requires a thorough understanding of collective bargaining relationships, the arbitrator's findings should be final because of his expertise concerning the common law of the shop. He is better not only at determining what actually occurred, but also in interpreting facts in light of the relationship between the parties. Thus, the inference drawn by the arbitrator from the practices of the parties would not ordinarily be open to the opponent to attack or the court to overrule.<sup>151</sup>

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147. 362 F.2d at 682.

148. 363 U.S. at 596.

149. Griffin, *Judicial Review of Labor Arbitration Awards*, 4 *SUF-FOLK U.L. REV.* 39, 59-60 (1969).

150. *Id.* at 68.

151. *Id.* at 60, 68.

The result in *Torrington* places far greater restrictions on the powers of the arbitrator to consider the past practices of the parties. Because the historical facts were apparently uncontested in that case, the court itself decided what in the practice of the parties was to be considered as part of the agreement. This broad review usurps the function of the arbitrator and, like a full review on the merits, is at odds with the Supreme Court holding in *Enterprise Wheel*.<sup>152</sup> The more desirable approach would be to incorporate the *Porter* requirement that the past practice relied on by the arbitrator be historically factual as a limited exception to the traditional deference given arbitrators' decisions on the merits. Such an approach properly recognizes that once the facts are established, the inferences to be derived therefrom are those determined by the arbitrator.

## 2. Precedent

Closely related to reliance on past practice in the making of arbitration awards is the use of precedent: rather than looking at what the parties have done in the past, the arbitrators look at what interpretation previous arbitrators have given to the actions of other parties. The law regarding the application of precedent to arbitration proceedings is clear. Arbitrators are not bound by law to follow precedent in the sense of *stare decisis*; they are left free to decide each case on its own unique facts. Thus the fact that a past arbitrator, faced with a similar situation, decided that his proceeding should be held at a particular time or place which made it impossible for a key witness to attend, will not bind a later arbitrator. Nevertheless, the petitioning party would want to cite any favorable decision as evidence both of the prevailing practice in the industry and of a procedurally fair and uncontested decision. Later use of the favorable precedent in arguing that a contrary decision is unfair, however, would probably be regarded as an attempt to extend the use of precedent beyond its limited applicability in rendering an arbitration award.<sup>153</sup>

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152. See text accompanying notes 22-24 *supra*.

153. While precedent in arbitration cases is never *stare decisis*, it may be *res judicata*. When the same parties are involved, arbitrators are willing to follow prior awards even though they would not have rendered the same award if they had heard the prior case. In such cases it is often held that adherence to precedent is desirable in order to maintain stable labor-management relations. *Brewers Board of Trade, Inc.*, 38 Lab. Arb. 679 (1962) (Turkus, Arbitrator); *Cities Service Oil Co.*, AAA Case No. 13-13 (1959) (Wirtz, Arbitrator); FAIRWEATHER, *supra* note 49, at 339.

There are strong arguments against any extension of the applicability of precedent in arbitration proceedings. Such an extension would diminish the flexibility of the arbitration process, where, since arbitrators are commonly hired for their special knowledge of an industry and the special needs of the particular parties involved, flexibility is particularly desirable. Furthermore, fairness would be subordinated to uniformity, labor-management difficulties would be fostered, the role of the arbitrator would be substantially reduced, and inapt awards would be repeated rather than ignored. Clearly, arbitration would rapidly lose its claim as a swift, inexpensive, and impartial means of settling labor disputes.<sup>154</sup> Under the present system, while precedent is not controlling, it is one of the guides which both the parties to the dispute and the arbitrator may consult for aid in arguing and deciding disputes.

### 3. *Agreements Between the Parties*

In view of the conflicting theories as to the applicability of the Federal Arbitration Act, state arbitration acts, and the common law, it is essential that the parties decide in advance what types of disputes they wish to submit to arbitration and under what body of law the arbitrators must act. The parties, if they wish to be bound by the federal act or a state arbitration act should so state in explicit terms in the collective bargaining agreement (or, if applicable, in the employment contracts). A general provision to the effect that the agreement has been made under and shall be governed by the laws of a particular state is subject to challenge.<sup>155</sup>

In addition to the arbitration statutes, the parties may incorporate other statutes into the agreement which the arbitrator will interpret. The parties should also consider adopting the rules of procedure set forth by organizations such as the American Arbitration Association.<sup>156</sup> The parties should explicitly de-

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154. McMillan, *Role of Precedent in Labor Arbitration* 6 (typewritten manuscript in Univ. of Minn. Law Library).

155. *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (1974).

156. The Voluntary Labor Arbitration Rules of the American Association provide for representation by counsel, AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES § 20 (1968), fixing the time and place of hearing, *id.* § 19, requesting a stenographic record, *id.* § 21, attendance at hearings by persons having a direct interest, *id.* § 22, serving notice, *id.* § 36, order of proceedings, *id.* § 26, use of affidavits, *id.* § 29, reopening hearings, *id.* § 32, written awards, *id.* § 37, and establishing time limits, *id.*, e.g., § 37. One possible disadvantage, however, is the fact that where parties agree to arbitrate under these rules they

termine the extent to which the arbitrator shall be free to ignore established standards, both as to procedure and substance, and incorporate this into their agreement. Finally, they may mutually agree to resubmit an issue to an arbitrator and thereby (1) obviate the need to petition the court and (2) expand the arbitrator's powers of review.

## B. PROCEDURAL CONSIDERATIONS: UNFAIRNESS AND THE CASE FOR A LIMITED EXTENSION OF JUDICIAL REVIEW

While the parties to a collective bargaining agreement often agree to submit certain disputes to final and binding arbitration, such agreements are limited by interpreting them to incorporate an intent by the parties to have a full and fair proceeding, even where procedural limitations on the arbitrator are absent. In deciding whether this procedural fairness is present, the policy behind the traditional deference given by the courts to arbitrators—respect for their special knowledge of the common law of the shop—may not be applicable. In matters of procedural fairness, where the courts have the special knowledge, an expansion of the review function may be appropriate.

### 1. *The Right to a Fair Hearing*

A reasonable construction of any collective bargaining agreement is that the parties intend the arbitrators of their grievances to adjudicate within some procedural rubric. Although it was agreed that the arbitration decisions were to be final and binding upon the parties, implicit in such an agreement was the concept of decisions reached by a fair means.<sup>157</sup>

Since judicial control and review prior to arbitration is very limited, the post-award review procedures are of great importance.<sup>158</sup> In determining whether there has been basic procedural fairness in an arbitration proceeding under section 301, the courts have recognized that the Federal Arbitration Act is "a part of the body of the federal labor law to which courts may look in

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may be authorizing the American Arbitration Association to administer the arbitration, since a provision in the Rules so states: "When parties agree to arbitrate under these Rules and an arbitration is instituted thereunder, they thereby authorize the AAA to administer the arbitration. . . ." *Id.* § 3.

157. *Central Packing Co. v. United Packinghouse Workers*, 195 F. Supp. 188, 192 (D. Kan. 1961). *Accord*, *Weyerhaeuser Co. v. International Bhd. of Pulp Workers*, 190 F. Supp. 196 (D. Me. 1960); *Ingraham Co. v. Local 260, Int'l Union of Elec. Workers*, 171 F. Supp. 103 (D. Conn. 1959).

158. Note, *Judicial Supervision of Commercial Arbitration*, 53 *Geo. L.J.* 1079 (1965).

defining federal law under [section 301] . . . ."<sup>159</sup> Furthermore, where not inconsistent with federal law, the state arbitration acts may also be consulted in defining a fair arbitration proceeding. Although subject to somewhat less weight, the standard procedures promulgated by organizations such as the American Arbitration Association may be used, as may specific procedures prevalent in the industry or other comparable industries. Finally, a labor arbitration decision, in contrast to commercial arbitration, is normally accompanied by a written opinion of the arbitrator. Use of the opinion as a basis for an appeal, however, is of very limited value since the expressed policy of the courts is that there will be no review on the merits.<sup>160</sup> Nevertheless, the opinion may be cited as evidence of one of the grounds necessary for vacation, modification, or correction of the award. The above approach assumes, of course, that no specific set of standards is found to be controlling, thus requiring evaluation and possible incorporation of certain established standards into the body of federal substantive law.

The basic right to a fair proceeding springs from the due process guarantee of the United States Constitution, although this right has been a part of the common-law tradition for centuries. However, due process is not a single, static concept. There is due process in criminal proceedings, in civil litigation, and in administrative hearings. What passes for procedural regularity in one forum does not necessarily so pass in another. In the arbitration context, the phrase "due process" does not evoke the strict legal sense in which the term is often defined, but rather a type of informal proceeding which nevertheless provides the framework for a fair and equitable result.<sup>161</sup> The very nature of arbitration tends to limit the extent to which its proceedings and its concluding award should be subject to review by the courts. It is conducted informally by persons not necessarily trained in the law. The evidence heard need meet none

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159. *Ingraham v. Local 260, Int'l Union of Elec. Workers*, 171 F. Supp. 103 (D. Conn. 1959), citing the pre-*Lincoln Mills* case of *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956).

160. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

161. See *Stone, Due Process in Labor Arbitration*, 24 N.Y.U. CONF. LAB. 11, 12 (1971).

of the technical evidentiary requirements imposed by courts of law.<sup>162</sup> Contrary to administrative actions, where questions of due process are raised with considerable frequency, appeal of an arbitration award is seldom based on procedural unfairness. One commentator attributes this to the fact that it is not the state that is deciding the issue, but rather individuals selected by the parties themselves pursuant to a mutual agreement.<sup>163</sup>

There are several areas in which a reviewing court will scrutinize the decision of the arbitrator. The court's considerable deference to the decisions of arbitrators operating in their own domain will not prevent the court from intervening to correct manifest error or injustice.<sup>164</sup> It is said that judicial scrutiny makes for better judgments,<sup>165</sup> although it has also been suggested that a greater deterrent to indifferent arbitration awards is the factor of acceptability—arbitrators wishing to be called upon again are desirous of having their actions approved by both parties.<sup>166</sup>

162. *Compania Panemena Maritima v. J.E. Hurley Lumber Co.*, 244 F.2d 286 (2d Cir. 1957). In an action to enjoin arbitrators from proceeding further it was held that there could be no application to the district court to review rulings of arbitrators on admissibility of evidence regarding fraud while the arbitration was in process. The party must wait and attack the award when made. *Accord*, *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957). Respondent sought to make use of the federal discovery rules by serving notice on the other party as to the taking of depositions. He was denied this privilege, for "respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations." 20 F.R.D. at 361. The opinion outlines with clarity the differences between arbitral and court procedures.

163. Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 521-22 (1960).

164. See *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967), where the United States Supreme Court held that an arbitration award based on manifest disregard of the law would not be enforced; to set aside an award of arbitration, the error must be palpable and must be more than what is required to set aside a jury verdict. *John W. Daniel & Co. v. Janaf, Inc.*, 169 F. Supp. 219 (D. Va. 1958), *aff'd*, 262 F.2d 958 (4th Cir. 1959). See also *Electronics Corp. v. Local 272, Int'l Union of Elec. Workers*, 492 F.2d 1255, 1257 (1st Cir. 1974), where the court held that there was a gross mistake: "Where the 'fact' underlying an arbitrator's decision is concededly a non-fact and where the parties cannot fairly be charged with the misapprehension, the award cannot stand."

165. However, the discovery of a technical error will not constitute an adequate basis for vacating an award. See *Stereotyper's Local 18 v. Newark Morning Ledger Co.*, 397 F.2d 594 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968).

166. See SIMKIN, ACCEPTABILITY AS A FACTOR IN ARBITRATION 11-12 (1952).



Arbitration awards may also be set aside where the regulation of the proceedings by the arbitrator is so unfair that it denies one party a fair hearing. In *Harvey Aluminum v. United Steelworkers*,<sup>167</sup> the arbitrator did not consider testimony of a witness because the testimony was untimely under a rule of evidence not normally binding in arbitration proceedings. Refusal to hear pertinent and material evidence when no warning was given as to the evidentiary rules to be followed was deemed to be a denial of a fair hearing and the arbitration award was vacated. Similarly, no finality is due an award rendered by a corrupt, bribed, or biased arbitrator. None is due an award otherwise infected by fraud or venality. Commitment of a decision to final and binding arbitration presupposes an honest presentation to an honest trier. Nothing less will do.<sup>168</sup>

The question is more difficult when the issue changes from blatant dishonesty to a claim by the losing party that there has not been a full and fair hearing for reasons such as inadequate notice, insufficient time to prepare, or exclusion of evidence. Notice, scheduling, postponements, and evidentiary rulings are the procedural incidents of any proceeding and are within the natural control of the trier. An arbitrator chosen to make a "final and binding" decision on the merits is also arguably chosen to make "final and binding" procedural decisions. It is equally arguable, however, that the parties have agreed to a decision on the merits which is "final and binding" only if it is preceded by a hearing which is full and fair.<sup>169</sup> This issue is often reduced to a question of the extent to which parties may contract away due process.

The main argument favoring judicial *laissez faire* with respect to arbitration has been that it is a voluntary form of dispute settlement based upon a contract,<sup>170</sup> having even greater force when the parties agree to arbitrate after the dispute has arisen. This argument assumes that a person may waive statutory and constitutional rights by contract. Even if that were true, however, the argument that one may contract away rights by agreeing to arbitrate may be a contradiction in terms. An ar-

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167. 263 F. Supp. 488 (C.D. Cal. 1967).

168. *Commonwealth Coatings Corp. v. Continental Gas Co.*, 393 U.S. 145 (1968) (the elementary standards of impartiality normally associated with judicial proceedings are not suspended when the parties agree to resolve a dispute through arbitration).

169. Dunau, *supra* note 41, at 186-87.

170. Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 682 (1950).

bitration agreement, while having the formal aspects of a contract, assumes by its very nature the absence of any agreement between the parties—except that they agree to a particular method of settling the dispute. Thus an arbitration agreement looks not to the creation of such social relationships as normally fall within the sphere of contract, but rather to repairing the breakdown of those relationships after they have been established by contract.<sup>171</sup> The extent to which the parties have surrendered the safeguards incident to arms-length negotiation of contracts for a final determination by an arbitrator must also be considered.<sup>172</sup> To ensure that the decision of the arbitrator will be enlightened rather than arbitrary, the procedures of the arbitration process must be such that a fair hearing will be held.<sup>173</sup>

In attempting to define the limits of judicial inquiry into procedural unfairness, the scope of the problem is reduced by recognizing that procedural error which has not prejudiced the outcome need not be addressed by the courts. The size of the problem is further reduced by recognizing that arbitrators must have wide procedural latitude, consistent with express federal policy to this effect.<sup>174</sup> But while the problem can be reduced, it cannot be eliminated. Suppose that the testimony of a pivotal witness has been erroneously excluded. Section 10 of the Federal Arbitration Act requires that the arbitrator engage in “misbehavior by which the rights of any party have been prejudiced”<sup>175</sup> before judicial review is appropriate. As a matter of construction it is unclear whether “misbehavior” or “misconduct” entails a showing of moral culpability or merely means the commission of a serious prejudicial error. It has been urged that no showing that the error flowed from independent moral culpability should be required, for if the standard is one of a full and fair hearing and a serious prejudicial error infects the proceeding, the standard for finality has not been met regardless of whether the

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171. Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP. PROB. 631, 632 (1952).

172. One student commentator states that where the parties agree to settle a particular dispute by arbitration, they are declaring that the benefits of arbitration, whether favorable or unfavorable, are such that they are irrevocably consenting to the results of a system which is unpredictable and which may incorrectly interpret their legal rights. Note, *Commercial Arbitration: Expanding the Judicial Role*, 52 MINN. L. REV. 1218, 1232-33 (1968).

173. Carlston, *supra* note 171, at 632.

174. See Dunau, *supra* note 41, at 187.

175. 9 U.S.C. § 10(c) (1970); Section 12(a) (2) of the Uniform Arbitration Act contains a similar provision, *i.e.*, “misconduct prejudicing the rights of any party.”

error results from an honest mistake or from some ethical failure.<sup>176</sup> This approach recognizes that insistence upon procedural regularity is essential to the interest of securing a "final and binding" decision on the merits of the controversy. In agreeing to be bound by an award, the parties, although agreeing to an informal, nonjudicial proceeding, nevertheless consent with the expectation that the proceeding will give them a full and fair opportunity to be heard. Where this does not occur, judicial intervention is necessary. There is nothing to be gained by protecting a faulty award; so long as a court recognizes the arbitrator's broad discretion and vacates his award only where the error has been prejudicial, the interest in finality is not likely to be damaged.

A special question of procedural fairness arises in the settlement of claims of individual employees where both the union and the employer have interests other than those of the individual employee.<sup>177</sup> Courts have declined to confirm awards where both union and management sided against the individual employee and his rights were not otherwise adequately represented. This approach recognizes the inherent unfairness in a proceeding where an individual party at interest does not receive adequate representation.<sup>178</sup> Additionally, the National Labor Relations Board will not defer to the decision of the arbitrator in such cases.<sup>179</sup> Thus, if grounds for alleging an unfair labor practice can be found, a victim of such a proceeding can appeal to the Board to intervene in his behalf.<sup>180</sup>

## 2. *Judicial Review of the Fairness Question*

Arbitrators are recognized, at one and the same time, as both experts and mere neophytes.<sup>181</sup> They are considered experts on the custom and practices of a particular industry,<sup>182</sup> and in matters involving interpretation and integration of the "common law of the shop," their authority is recognized:

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176. See Dunau, *supra* note 41, at 187-88.

177. See Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

178. See *Bieski v. Eastern Auto. Forwarding Co.*, 396 F.2d 32 (3d Cir. 1968), noted in 55 VA. L. REV. 368 (1969).

179. See text accompanying note 86 *supra*.

180. *Id.*

181. Jalet, *supra* note 163, at 557.

182. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.<sup>183</sup>

Thus, if the arbitrator has been empowered to construe the terms of the contract and his award constitutes a construction that is a reasonable one, it should be sustained although the court may disagree, even violently, with that construction.<sup>184</sup> The arbitrator must be considered the expert in this matter. However, it is submitted that where questions of basic procedural fairness are involved, the courts, and not the arbitrator, must be considered the experts. While contrary arguments have been advanced to the effect that a just result can be achieved by the arbitrator without the observance of legal intricacies—and hopefully this will be the case in the vast majority of decisions—the reasoning of the *Steelworkers Trilogy*, by analogy, suggests that in matters dealing with procedural due process the scope of judicial review should be expanded.

In the *Steelworkers Trilogy* the Court recognized the special knowledge of the arbitrators in dealing with matters common to a particular industry. Clearly their specialized knowledge should be given effect through a grant of broad discretionary powers to deal with their area of expertise. Conversely, in matters of procedure, the judiciary is better suited to determine what constitutes a fair hearing within broad due process guidelines. By asserting a more active role in reviewing arbitration awards which may have depended upon certain procedural decisions of the arbitrator, courts will not only do much to remedy particular procedural infirmities, but will also expand the body of substantive arbitration law in the area in which it most needs expansion. It should be noted, however, that any attempt to expand the role of judicial review in this area is limited by the fact that only a very small fraction of the awards made by arbitrators are ever contested in the courts.<sup>185</sup> Thus, in the vast majority of cases the parties abide by their promises and are satisfied with the arbitration process. But when it is other-

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183. *Id.* at 599.

184. Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 354 (1958).

185. “[I]t is impressive how fully these adjudications are observed. A study some few years ago revealed that out of thousands of arbitration awards only 3/10 of one per cent are not voluntarily complied with and require the aid of court enforcement.

Matthews, *Critical Issues in Arbitration Practice: Seniority and Discharge Cases*, 32 ROCKY MT. L. REV. 37 (1959).

wise and the participants are before the court, there is cause for concern and, as one article urges, judges should scan what has transpired with a practiced eye. For them to do so is not undesirable, it notes, since the advantages of arbitration may already have been lost.<sup>186</sup> On the other hand, closer judicial scrutiny of appealed awards would probably result in a greater number of appeals.

If the courts expand their role in reviewing arbitration hearings, they should keep the informal nature of the proceeding in mind. If they do so, they will refrain from exacting adherence to all of the legal intricacies involved in a courtroom proceeding. They also should make a distinction in regard to the types of procedural violations involved, keeping in mind the judicial policy of deciding controversies on the merits, rather than on procedural technicalities, so long as basic fairness is preserved. Thus, where the alleged grounds for vacating or modifying the award would, if sustained, prevent a decision on the merits (e.g. where a motion is filed one day late), the courts should be hesitant to overturn the decision of the arbitrator. On the other hand, where the reversal of an arbitrator's decision would facilitate a decision on the merits (e.g., where pivotal testimony has been excluded), the courts should be more willing to intervene. As one commentator has noted,

an allegation that an award is unenforceable because of want of due process in the hearing and determination of the case obviously is a legal question that courts will determine independently. This is the orthodox arbitration law, and we are confident it will become part of the federal substantive law.<sup>187</sup>

There remains today considerable room for additional judicial contributions to the substantive standards which presently guide the conduct and review of arbitration proceedings.

#### IV. CONCLUSION

In selecting a forum to which an arbitrator's award will be appealed, the first consideration must be whether the dispute can be resubmitted to the arbitrator. The fact that the arbitrator may have made a manifestly unfair procedural decision is normally not ground for obtaining a rehearing order. In that case, the appeal should then be made to either state or federal court. However, since an action may be removed to federal court, it would seem that there would be no real advantage in forum

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186. Smith & Jones, *supra* note 38, at 307.

187. Jalet, *supra* note 163, at 556.

shopping for a favorable set of state, rather than federal, procedures. There may, however, be a distinct advantage in bringing an action in the federal or state court of a particular state, since certain procedural rules of the state become a part of the federal substantive law in the jurisdiction. Finally, where the conduct allegedly constituting a breach of the collective bargaining agreement is also an unfair labor practice, and the arbitration proceeding can be shown to have been basically unfair or irregular, the National Labor Relations Board may be petitioned to intervene on behalf of the aggrieved party.

The precise substance of existing arbitration law is unclear. A specific statement as to the applicability of existing statutory law to labor disputes is needed. While ideally this should come from Congress, the conflicting pressures on that body are such that, absent a united proposal by unions and management, it is unlikely that such a legislative clarification will be forthcoming. The Supreme Court must therefore rise to the task of interpreting this area of ambiguity. To invoke in this instance the standard canon of deferring to the legislature is to acquiesce to ambiguity and uncertainty. A decision that the Federal Arbitration Act is applicable to collective bargaining agreements would do much to make explicit and specific the common-law standards evolving from the *Lincoln Mills* and *Enterprise Wheel* decisions.<sup>188</sup>

State arbitration acts, the past practices of the parties, and precedent, while not controlling, should be considered in deciding whether the arbitrator has met the test of basic procedural fairness. The Supreme Court's preference in the *Steelworkers Trilogy* for letting the expert decide favors a judicial determination of the procedural fairness issue, for it is the judiciary, and not the arbitrator, that is the expert in such matters. Such an extension of judicial review would promote basic procedural fairness in labor arbitration proceedings.

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188. However, if the Federal Arbitration Act is found to be specifically applicable, a jurisdictional problem may arise in some cases now covered by federal law under section 301, since the Federal Arbitration Act does not provide an independent source of federal jurisdiction while section 301 does. *Victorias Mill Co. v. Hugo Neu Corp.*, 196 F. Supp. 64 (S.D.N.Y. 1961). It should also be noted that forum shopping might be eliminated under such a decision. See note 119 *supra* and accompanying text.

