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QUESTION, *Professor King*: What about the greater use of employment contracts? Do you suggest that individual employment contacts are advisable to a growing extent?

ANSWER, *Mr. Connors*: That is advisable, certainly down to the middle manager level. One beneficial aspect of an employment agreement is that at the time it is drawn up the parties are anxious to complete the labor agreement. The conditions of termination can be spelled out under the agreement and arbitration provisions can be included.

QUESTION, *Mr. Siber*: To what extent are arbitration clauses challenged on the basis that the contracts need to be for lower level employees as well?

ANSWER, *Mr. Connors*: The challenges are not infrequent. The typical first line of attack is to claim that the contract is one of adhesion. What that means in effect, is that it is a "take it or leave it" offer. Therefore, there was no equality in the bargaining process and thus the document should be unenforceable. But even if it is found to be a contract of adhesion, there are various procedures to be followed. If the agreement meets the fundamental fairness test or reasonableness test it will be enforceable, even if it is found to be a contract of adhesion.

COMMENT, *Mr. Whitehill*: A case is now pending in the U.S. Supreme Court that will decide the issue as to whether an employee can agree at the time of employment to arbitrate all disputes, including federally protected rights such as Title VII.

RESPONSE, *Mr. Connors*: This case is another look at the *Gardner/Denver* case to see whether, when the parties agree to arbitrate everything arising from the employee's contract, that will block a person's subsequent attempt to file an employment discrimination case.

COMMENT, *Mr. Rogers*: The advisability of arbitration provisions in employment contracts is not something that we see in Canada. What we have seen, particularly in the Court of Appeals in Ontario, is a progressive movement in favor of the employer. When a plainly worded contract providing for termination circumstances is brought to the attention of the employee at the time he joined the corporation, it will be enforced. In several cases where the provisions for notice of termination failed to meet minimum statutory standards, the court held that the intention of the parties was that the least available notice would terminate the relationship.

Canadians do not use arbitration provisions in our individual agreements. We tend to stipulate the events which will constitute cause for termination. In the absence of cause, compensation or arrangements which would be sufficient to terminate the relationship are defined.

COMMENT, *Mr. Connors*: I have been drafting employment agreements lately where severance pay is provided as a matter of course for three months, six months, or a year for a higher ranking executive. Regardless of what the United States Supreme Court does as far as allowing people to agree to waive their employment discrimination rights ahead of time, normally what I do is create a "carrot." I call it a "carrot" because in the event that employment is terminated for no reason, the individual will receive six months of salary. But that salary will be conditioned upon the employee signing a release of any and all claims arising from employment including, but not limited to, the ADA and the ADEA. At the time the employee is terminated, the person can either accept the money or forego that money in order to pursue an administrative charge.

QUESTION, *Professor Shanker*: When an ADR process utilizes an arbitrator or some other type of third party, nothing suggests what type of qualifications the third party adjudicator should possess. What guidelines must be followed?

ANSWER, *Mr. Connors*: You have paraphrased a fellow that I have heard a little about. His name is William O. Douglas, and he issued a United States Supreme Court decision in 1960 in a case called *Enterprise Wheel & Car*. That decision essentially made arbitrators what they are today - overpaid and underworked. He said that an arbitrator does not sit to dispense his own brand of industrial justice. When an arbitrator's award manifests an infidelity to that obligation, courts have no choice but to overturn that award. What does that mean? The courts in the United States have told us that they will close their eyes to arbitration awards, in the employment context at least, unless no rational reading of the applicable labor agreement or employment agreement will uphold that arbitration labor decision.

As I have indicated, you can set your own rules that the arbitrators must follow, whether or not it is a unionized situation. If the arbitrator exceeds his jurisdiction as set forth by the written document the award can be overturned.

COMMENT, *Mr. Rogers*: First, arbitrators are not bound to follow precedent, but arbitrators, at least in Canada, tend to do so. More importantly, arbitrators in Canada, and perhaps in the United States as well, like to be paid. To get paid, they must be used. If an arbitrator is not acceptable to the parties, that arbitrator will not be used. If an arbitrator makes irrational decisions more often than rational decisions, the arbitrator will starve. That tends to have a very salutory effect.

As far as the legal test is concerned, it is very much the same in

Canada, for the language that our courts use is "patently unreasonable." An arbitrator will be permitted to make errors as long as what he says about the collective agreement is not patently unreasonable.

COMMENT, *Mr. Connors*: There is a caveat. Yes, arbitrators like to be paid. But the other point is that if an arbitrator evaluates his record and sees that he has given too many to the companies, he starts fearing that he is going to throw one the union's way. Once he throws one the union's way, he will always have to be a trifle paranoid about future partialities and slanted decision-making. If there is a bottom line message that we want to emphasize, it is that you only get to dispute resolution procedures when you have got a dispute. Let us not forget perhaps the best thing to do is avoid problems.