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QUESTION, *Mr. Groetzinger*: Let us say I am establishing my program and you are telling me that the arbitrators have all the rights available to it. The one thing I want to avoid is punitive damages. That is always the risk in going to court, you can have a runaway jury or a judge who does not understand the facts, and that is the risk that I always try to avoid. You may think you have a 50/50 shot at winning, but if there is a chance that there is going to be a multimillion dollar award for punitives, I do not want any part of it. Am I nuts to give an arbitrator that power to award punitives, or should not I worry about that?

ANSWER, *Mr. Meade*: The fact of the matter is, other than New York state, unless your contract specifically disallowed punitive damages, arbitrators in general have been able to award them right along in all contexts. The only area I am aware of where it has become sort of a troublesome thing is in the securities area, where the SROs have had a string of punitive damage awards by industry arbitrators against the brokerage houses where they find the trading practices of the traders have been unconscionable. But in all of the other areas; construction, commercial finance, etc., where the arbitrators have, for years, had that authority, it really has not developed to be a practice. And I think the view is, and this was expressed by Bank of America about eight or so years ago, when they put an arbitration clause in their commercial loan agreements and open it up for the possibility of punitive damages, they are saying they would much rather take their chances before a panel of three knowledgeable attorneys and business people on the punitive damage issue than before a jury. So far, it has not become a practice, but yes, arbitrators can award punitive damages, and it is a factor.

COMMENT, *Mr. Chiasson*: I have one case ongoing now and I have had another case within the last year involving American parties and allegations of breach of the obligation of good faith and fair dealing, which immediately puts you into the tens of millions of dollars in claims, and so the parties have had no problem advancing these claims into the arbitration process. And I agree with Bob. I think in the commercial world with that kind of damage exposure, it is not unusual to have arbitrators deal with it.

COMMENT, *Mr. Meade*: For the companies that were tempted to preclude punitive damages from the employment context, if they did so there would be nothing to prevent the individual, once the arbitrator decided, from going on to court to recover those damages that would

have been available through court, so you are not really precluding it.

QUESTION, *Professor King*: Are the decisions written? Are they published? Do you have panels of three arbitrators or one arbitrator? Have people, the individuals, uniformly accepted the decisions of these arbitrators? I assume they are final and not appealable, at least within that context; is that right?

ANSWER, *Mr. Meade*: Yes. There has been some talk about publishing decisions, but there has been no conclusion yet. I did mention one employer who will publish the decisions within their own company.

Last year we only had 850 cases in the employment dispute area. So there has been no movement yet to publicize, however the question was raised in the conclave in September, particularly the plaintiffs' lawyers would like to see a publication where they could decide whether Henry King always decides in favor of companies or the individuals.

COMMENT, *Professor King*: I think that is very important, and I want your comments on that, too.

COMMENT, *Mr. Meade*: And with regard to the panels, I am not aware of any program that provides for more than one arbitrator.

COMMENT, *Mr. Chiasson*: I cannot speak to it in the employment context, but in the international commercial arbitration field, as you are probably aware, people like the ICC publish awards, again, blocking the names of the parties, et cetera, and I think it usually includes the name of the arbitrators. That is done, in part, to let arbitrators have a feel for how other arbitrators have dealt with a particular problem, although it has no real precedential value.

In the Iran/United States Claims Tribunal, their awards were published. Some of the ICSID awards were published. So although arbitration is said to be completely private, there is some publication ongoing, and I think we will see more publication of arbitration awards. In Canada, I do not know how it is in the United States, but in Canada, in the labor arbitration field, awards are published.

COMMENT, *Mr. Meade*: We have several award publications in the labor management arena in the United States.

QUESTION, *Mr. Wismer*: I am just curious, CAMCA, I see, has only been in existence for I guess about three months. Is there a permanent secretariat that does not have that type of thing? That is one question.

And I am curious, too, whether the other organizations that make up CAMCA, are finding a greater recourse to arbitration in commercial disputes than you would normally expect, if you will in trade with Canada and the United States, or in the United States and Mexico, and Mexico and Canada.

And then I am also curious, whether some of these ongoing trade

disputes, very sticky things we have — steel and soft wood lumber, and all of that — whether there has ever been, to your knowledge, any attempt made on either side of some of those issues to look to alternative dispute resolution at all. Has consideration been given, to your knowledge, to using ADR for some of those very complex and difficult trade disputes.

ANSWER, *Mr. Chiasson*: There is a secretary at CAMCA, and there are a certain number of individuals from each of the organizations that are in support, and there is a rotating chairperson. This year, the chairman is the head of the British Columbia Center. In fact, I think next near it is Mike Holering from the AAA. So yes, there is a secretariat, but I do not know the details.

In terms of things like the soft wood lumber and steel, et cetera, I am not aware of any commercial ADR technique, but of course there is Chapter 19, which is a form of alternative dispute resolution, pulling it out of the courts and putting it into a neutral environment.

COMMENT, *Mr. Meade*: With regard to the use of arbitration clauses between U.S. and Canadian companies, we administer about 300 international cases a year and we have a breakdown of the countries and the parties. Canada has more cases than any other country, so I know there is a fairly high level of use of commercial arbitration.

QUESTION, *Ms. Wright*: The last research I have done on the AAA statistics suggest that you do about 60,000 arbitrations a year?

ANSWER, *Mr. Meade*: 62,000.

QUESTION, *Ms. Wright*: And 850 of those were non-union arbitrations?

ANSWER, *Mr. Meade*: Non-union employment disputes.

QUESTION, *Ms. Wright*: How many would be union?

ANSWER, *Mr. Meade*: 15,000.

QUESTION, *Ms. Wright*: 15,000?

ANSWER, *Mr. Meade*: Yes. Labor management contracts.

QUESTION, *Mr. Barrett*: My question is for Mr. Chiasson. I went through international arbitration training up in your BC center three or four years ago and it is my recollection that at least some of the Canadian provinces in certain areas, and I think labor law was one of them, did not require arbitrator impartiality in terms of each side appointing one person, and then there was a third arbitrator that you are allowed to have as a winger. You indicated the need of the arbitrator to ultimately take an unbiased view. I was just wondering if you could clarify my confusion.

ANSWER, *Mr. Chiasson*: It is a bit of a tricky area and I am reaching into my memory. There was a case out of the Province of Alberta. The son of a lawyer appeared before his father who was an arbitrator, and somebody suggested that might give reasonable apprehension to bias. The courts held that in the labor context on the basis

that it was the law. I have a vague recollection the case was *Riley*. So historically, in the labor field, and by labor we are speaking of unionized labor, the courts have recognized that the appointees of the parties to the board serve the role as advocates of the parties with the chairperson being neutral. That is not dissimilar, or at least it is in the same world of some U.S. jurisprudence in the purely domestic commercial arbitration field, and that is why our American friends use the word "neutral." It is a term of art in American jurisprudence. It is not a term of art, or has not been a term of art up to this point in Canada.

In the commercial field, my understanding of our law is that it always has been a requirement that the arbitrators be neutral, all of them, whether they be party-appointed or not. In the international context, in both Canada and the United States, they must be, quote, "neutral."

QUESTION, *Mr. O'Grady*: I ask this question in the spirit of being a devil's advocate. It is one thing to have a consentual arbitration, where the parties willingly come before an arbitrator and forsake the normal process of the courts; it is kind of a halfway house to have a statutory arbitration before a labor relations board where there is a collective agreement reviewable on judicial review. But for the sake of argument, could it not be said that it is a very fundamental abridgement of human rights and civil liberties to, in effect, force an arbitration on an employee in a non-unionized setting; to take away from him the right that he might want to exercise to have his case tried by a jury or a judge of the Supreme Court, and characterize it as a matter of contract in a set of employment terms that had not been agreed to even by a trade union? I guess I am interested in how you would respond to that.

ANSWER, *Mr. Meade*: That is at the very heart of the controversy, and it is why you have the EEOC, NLRB, the plaintiffs lawyers, and certain legislatures involved. I think it is the view of the corporations that all they are doing is shifting the forum; they are not taking away rights and remedies; they are shifting the forum to private arbitration. And part of what they talk about, and this is part of the debate we have had with the NELA lawyers, is most individuals would not have the resources to pursue their average-type claims to a result in court or before an administrative agency. I mean, we have all heard the horror stories about the EEOC, the hundreds of thousands of cases they have and your various state human rights commissions which are constantly backed up. And by and large, the number of cases coming in and the types of issues being resolved in these programs are not of such weight that they would have gone through the litigation process.

I mentioned last year we had, roughly, 850 employment disputes. Only fifty-nine of those cases involve statutorily protective rights. Others were issues less important than that. And those certainly would

probably not have been litigated.

But, you know, that is the controversy, should an employer be able to require an employee to arbitrate as a condition of employment? So far, the state and federal courts and the U.S. Supreme Courts have said yes.

COMMENT, *Mr. Chiasson*: Could I just add to that? In the Canadian context, I do not think it is correct, and I am not a labor lawyer, although I practiced labor law many years ago, but I do not think it is correct to say that arbitration takes place before the Labor Board. Arbitration takes place before arbitrators, and I do not think it is susceptible to judicial review, other than in certain statutory regimes. Sometimes there is an appeal process built in and sometimes not.

That does not completely answer your concern, because there are very different policy reasons for that structure in the unionized industrial relations context that do not necessarily apply in the non-union sector.

COMMENT, *Professor King*: Jon, I think that one of the things that would be very helpful would be to have Mr. Meade give us a typical case, a sample case, which might be involved, and that might tend to resolve Mr. O'Grady's anxiety about it, which I think is quite logical.

COMMENT, *Mr. Meade*: I pulled a listing of the cases, the issues, for the first six months of 1995. We had about 850 cases for the year.

A listing of the issues: breach of employment contract; (this is in descending order of the number); wrongful termination, where a statutory right was not raised was an issue; (this represents the highest number of cases); breach of employment contract; nonpayment of wages and expenses; employment discrimination; sexual harassment; contract disputes regarding severance pay, which are nonstatutory; applying for money damages under a written contract of employment; commissions owed; failure to reimburse for expenses, things like that. That is going down the list.

It is also important to note that there has been only one employer who has had enough cases to report anything, and that is Brown & Root. What they have discovered is, in spite of the fact that their program is well-written and in spite of the fact that they offered the individual up to $2500 to hire a lawyer, they have not had a run on that system. Over 500 cases entered it and they had something like forty-plus mediations and a dozen arbitrations. They won some and lost some, so it has not created a run.

In all these 300-some odd cases that I had listed, one employer had eight cases; one employer had five; one employer had four; one employer had two; and then there were two or three pages of employers that had only one case during that period of time. So what is happen-

ing is that you are not having a lot of cases generated by these systems.

What we are doing when we review these programs is first take a close look at the in-house process, whether it is ombudsman, open door, in-house mediation, or peer review; and we beef that up. We do not create a system that is going to cause parties to go to the outside mediator or to the arbitrator. We create a very good communication piece, whether it is a booklet similar to the one Brown & Root did or whether it is a videotape.

The idea is to create a system which helps them resolve disputes in-house before they get outside. Brown & Root reported that during a twelve-month period, the EEOC claims against them specifically went down twenty-seven percent while claims going to the EEOC went up twenty-two percent. So they are resolving their problems in-house. That is really the emphasis of these programs, not to create something where you are going off and arbitrating every issue that arises. But again, there are only one or two employers who have had these up and running long enough with enough of a result to even start talking about what is happening.

QUESTION, *Mr. Groetzinger*: I would like to ask a question dealing with mediation versus arbitration, we have been focusing a bit on arbitration. As I recall, the numbers on successful mediations run well over eighty percent.

ANSWER, *Mr. Meade*: Yes.

QUESTION, *Mr. Groetzinger*: I understand there is limited experience in these types of programs, but if you were going to recommend to me how to structure a program, would it be mediation alone, mediation plus arbitration, arbitration binding, nonbinding, what is your recommendation?

ANSWER, *Mr. Meade*: My role is strictly to lay out the options and let you decide what fits the culture of your company.

I guess I can mention the Pizza Hut experiment. In Florida, they have a mediation-only program; there is no arbitration. If you mediate and you do not resolve it, that is it. So the options are available to you. Not all of the programs end in arbitration. Not all of the programs go outside mediation, some just have an in-house mediation step. So there is a whole series of options. One of the programs has mandatory in-house staff mediation, mandatory external mediation, and mandatory arbitration, but the decision of the arbitrator is not binding on the individual unless he or she signs a release, so that you can walk away from it once you get the decision. So there are all sorts of variations, and when we work with companies, we try to select what best fits their culture.

QUESTION, *Mr. Groetzinger*: Do you think there is, based on your cultural discussion, any difference between how a Canadian program might be set up versus one in the United States? Are Canadians

generally less litigious and more prone to a mediation approach, or do you think it is a pretty common employee base?

ANSWER, *Mr. Chiasson*: I think that what we are seeing in Canada is quite a lot of activity in the mediation field, and so it seems to me that would be something that would be welcomed in the workplace. When we move to arbitration there will be, we think, quite a bit of sensitivity about going to the extreme that is represented in some of the U.S. jurisprudence where the mandatory arbitration provisions are there, in, for example, the employee's handbook. And so if you take it at one extreme where there is an executive package with an arbitration clause, I do not think the Canadian court will have a lot of problems enforcing that arbitration clause. If you go to the other extreme, where it is, in a sense, implied or brought in directly to the relationship, our sense of it is the Canadian courts would have a bit of a problem with that.

I think in terms of mediation there are all sorts of programs going on across the country of mediation training, and I thought it would be the kind of process that one would begin to see in the non-unionized workplace.

COMMENT, *Mr. Meade*: There has been another development which I think dramatically expands the scope of these programs. I think we all felt it has been well-settled under Gardner-Denver for years that you cannot force an employee, subject to a collective bargaining agreement, to arbitrate a statutorily protected right.

On March 12, the Fourth Circuit, covering Washington, Virginia, and Maryland, decided a case involving Owens-Brockway Glass, where a woman, subject to a collective bargaining agreement, had a disability, and ultimately, after a series of events, was terminated. She sued in the Western District of Virginia under the Americans with Disabilities Act, and the company cross-moved to have the matter arbitrated under the collective bargaining agreement because they had negotiated language in the agreement to the effect that the company will adhere to all the requirements. Title VII, ADA, further provided that any dispute involving those statutes will be subject to the grievance and arbitration mechanism in the collective bargaining agreement. And the Fourth Circuit agreed that they would arbitrate that dispute.

I understand, and I have not seen it yet, in the last week or ten days the Fourth Circuit again came down with another decision right on target in the same area.