ARIZONA ADR FORUM

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FROM THE CHAIR

ALONA M. GOTTFRIED

Are you finding listening more difficult in the Zoom era? Listening is difficult under normal circumstances. We can think we are listening when we are actually: (1) thinking of our response to what we think the other person is saying; (2) hearing only what we want to hear to confirm what we already believe; or (3) deciding which new Netflix series to binge.

Video meetings, mediations, and arbitrations add the challenge of forging a connection remotely. Also, we can miss out on non-verbal communication when we are cannot see people in person. Finally, the temptation to multitask during video conference calls is real, and multitasking makes good listening difficult.

As conflict resolution professionals, we strive to leave people feeling heard and understood, so we may have to work extra hard to listen and demonstrate listening online. What does it mean to truly listen? I like the following definition: "To listen is to continually give up all expectation and to give our attention, completely and freshly, to what is before us, not really knowing what we will hear or what that will mean. In the practice of our days, to listen is to lean in, softly, with a willingness to be changed by what we hear." Mark Nepo, *The Exquisite Risk: Daring to Live an Authentic Life* (2007).

On a different note, I would like to thank Robert F. Copple, Lee L. Blackman, and Jerome Allan Landau for their engaging presentation at the ADR Section of the Bar's most recent CLE: *Mediation Preparation for Lawyers & Mediators, Including How Any Lawyer Can Become a Mediation Advocate.* If you learned something interesting in the field of alternative dispute resolution, please share it with the rest of the Section through the online forum, the newsletter, or by offering to present a CLE.

— Alona M. Gottfried
ADR Section Chair
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STATE BAR OF ARIZONA

EDITOR | JEREMY M. GOODMAN

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Jeremy M. Goodman at jeremy@goodmanlawpllc.com.

NICHOLAS JASON ENOCH is the President of Lubin & Enoch, P.C. Mr. Enoch's practice focuses on the representation of labor unions and he routinely appears before arbitrators as well as all courts and administrative agencies in matters arising under traditional (*e.g.*, National Labor Relations Act, Railway Labor Act, Labor-Management Reporting and Disclosure Act) and non-traditional labor and employment law. Mr. Enoch previously served on the Executive Council, including as the Chair in 2018-2019, for the 550-member Employment and Labor Law Section of the State Bar of Arizona and he currently serves as the Chair of the Civil Jury Instruction Subcommittee for Employment Law Jury Instructions.

CHLOE DIAZ is a 2nd year law student at Sandra Day O'Connor College of Law. Her 1L summer, she had a fellowship with Harvard Law's COVID-19 Summer Institute, clerked at the Center for Workers' Rights, and did research for ASU Law's Immigration Clinic. Last fall, she clerked at the Arizona Center for Economic Progress. Currently, she's a law clerk at Lubin & Enoch and an organizer for Harvard and Howard Law's Justice Initiative.

BY NICHOLAS J. ENOCH, LUBIN & ENOCH, P.C. and CHLOE DIAZ, SANDRA DAY O'CONNOR COLLEGE OF LAW, CLASS OF 2022

The History and Distinction Between Labor and Employment Arbitration

Although labor and employment law are interchangeably used terms, arbitration within these fields of law are distinct from one another. Employment arbitration centers issues arising from the relationship between individual employees, employers, and their statutory rights, while labor arbitration focuses on issues arising from the relationship between organized workers, employers, and their collective bargaining agreements. This article will first outline how arbitration developed into a necessary aspect of labor law. Afterwards, the article will contrast labor to employment arbitration.

LABOR ARBITRATION HISTORY

Although arbitration laws emerged as early as 1632 in Massachusetts, American courts often greeted arbitration with hostility because it was perceived as an intrusion on their jurisdiction. Martin Malin, et. al., *A Brief Overview and Historical Background on Labor and Employment Arbitration, Part I* (2015); Steven Certilman, *New York Dispute Resolution Lawyer*, 3 NYSBA 9, 10 (2010). The negative stigma surrounding arbitration began shifting once the Federal Arbitration Act of 1925 established that arbitration agreements, including collective bargaining agreements, are enforceable. *Id.*; 9 U.S.C. §§ 1-14 (2012). By the 1980s, over 95% of collective bargaining agreements contained arbitration provisions. *Id.*

Currently, Section 301 of the 1947 Labor Management Relations Act ("LMRA"), 29 U.S.C. § 301, is the principal statutory provision covering contract enforcement between organized workers and employers. Malin, *supra* at 3. The statute grants federal courts jurisdiction over suits on labor contracts. *Id.* In Section 203(d) of the LMRA, 29 U.S.C. § 173(d), Congress declared that "[f]inal adjustment by a method agreed by the parties … [is] the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *See also id.*, § 171(c) (similar). In the 1960s *Steelworkers Trilogy*, the Supreme Court expanded on Congress's preference for arbitration by voicing rationales in support of it, such as: (1) preventing worker strikes and (2) arbiters' increased likelihood of having an intimate understanding of collective bargaining agreements. Id. The Court later reaffirmed its support of arbitration in the 1986 case, *AT&T Technologies v. Communications Workers*, when it established a presumption in favor of collective bargaining agreements' arbitrability. Ann Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 Chi.-Kent. L. Rev.631, 636 (1990). Furthermore, the Court increased deference towards arbiters in *Paperworks v. Misco, Inc.* and *Eastern Associated Coal Corp.* by holding that judicial review of arbitral awards is unnecessary as long as there was not fraud, denial, or excessive use of authority. Malin, *supra* at 3. Overall, courts shifted from being unsupportive of labor arbitration to promoting and protecting its legitimacy in recent years.

CONTRASTING LABOR AND EMPLOYMENT ARBITRATION

1. Differing Authority

Unlike the federal regulation of labor arbitration, individual, nonunion employees' arbitration agreements are typically governed by state law. Malin, *supra* at 5. Generally, the Supreme Court has reasoned that nonunionized employees may waive their statutory right to sue through mandatory employment arbitration agreements. *Id.* The standards for mandatory employment arbitration agreements and arbiter selection varies among jurisdictions. *Id.* For example, only some jurisdictions require nonunionized employees to have a meaningful say in arbiter selection. *Id.* On the other hand, labor arbitration standards are clearly defined by the Supreme Court in *Steelworkers Trilogy*, *AT&T Technologies*, *Paperworks*, etc.. Malin, *supra* at 3. Ultimately, labor and employment arbitration vary due to employment arbitration's stronger reliance on state law.

2. Varying Bargaining Power

Unionized workers tend to have stronger bargaining power in labor than employment arbitrations due to the nature of collective bargaining agreements. Karla Gilbride, *'Forced' is Never Fair: What Labor Arbitration Teaches Us About Arbitration Done Right—And Wrong*, Econ. Pol'. I. (2019). Collective bargaining agreements allow unions to negotiate the terms of arbitration for their union members *Id.* On the other hand, nonunionized workers have less bargaining power because they are subject to their employer's terms and are less experienced with legal jargon as well as the arbitration process. *Id.* For example, employers have increasingly implemented terms prohibiting nonunionized employees from pursuing collective actions since the Supreme Court permitted such terms in 2018. *Id.*; *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Due to unequal bargaining power, nonunionized employees tend to recover only 11% of their claims while unionized employees recover 48% of their claims. Lisa Amsler, *Employment Arbitration: Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'. J. 189 (2009). Overall, workers involved in labor arbitration maintain stronger bargaining power than their nonunionized counterparts.

CONCLUSION

Over time, arbitration has evolved into an integral aspect of labor law due to growing support from the federal government and the nature of collective bargaining agreements. Such agreements are generally regulated by federal authority and maintain equal bargaining power between unions and employers. Contrastingly, employment arbitration is subject to a broader variety of authorities and the power structures weigh in favor of employers rather than nonunionized workers.

Powers Of An Arbitrator Are What You Give The Arbitrator

BY GREG GILLIS

An arbitrator is vested with the powers bestowed by the parties. In the recent case of *Spaulding v. Miller*, 7 CA-CV20-0046 (December 23, 2020), the Arizona Court of Appeals confirmed that an arbitrator doesn't need subject matter jurisdiction because the arbitrator has the power to decide disputes as granted by the parties to the arbitration agreement.

In *Spaulding*, both Spaulding and Miller were members of Dynamite, a limited liability company that owned a parcel of vacant land. Dynamite's land was encumbered by a deed of trust which was personally guaranteed by Miller. After Dynamite was unsuccessful in rezoning the property, a trustee's sale was noticed. Miller purchased the debt from the lender and acquired the property. Miller, as Dynamite's manager, then quitclaimed the property in successive transfers to entities owned by Miller and his sons without notifying the other member of Dynamite.

Subsequently, when Spaulding learned the Pinnacle Peak Patio restaurant was closing, Spaulding suggested Dynamite reopen the restaurant on the vacate property, unaware that Dynamite no longer owned the property. Miller liked the idea and agreed to increase Spaulding's ownership interest in Dynamite to 8.6% if the concept was successful. The City of Scottsdale rezoned the property from residential to commercial in 2015 increasing the value of the property from $300,000 to $5,000,000.

Spaulding ultimately learned Dynamite no longer owned the property and filed suit in Maricopa County alleging fraud, breach of fiduciary duty and related claims and that Miller usurped Dynamite's asset for his own personal benefit and gain. The parties stipulated to stay the lawsuit and proceed to arbitration.

The arbitrator awarded Spaulding an 8.6% interest in the property and ruled that Miller intended to conceal the transfers. Spaulding then sought to confirm the arbitration award. Miller contested confirmation of the arbitration award on the basis the arbitrator exceeded his authority by awarding an 8.6% interest in the property (rather than in Dynamite which had no assets) and that the arbitrator lacked subject matter jurisdiction because Spaulding's claims were essentially derivative claims belonging to Dynamite and Spaulding failed to follow the derivative claim process. The arbitration award was confirmed and Miller appealed.

The Court of Appeals noted that Miller confused two distinct concepts of subject matter jurisdiction and a private arbitrator's authority under an arbitration agreement. The Court held an arbitrator is empowered to hear and decide disputes by mutual assent of the parties who voluntarily agree to arbitrate a defined universe of disputes. By contrast, courts are authorized to hear and decide disputes under their subject matter jurisdiction, which represents the scope of their constitutional or legislature authority to hear cases. Arbitrators do not have or need subject matter jurisdiction.

Parties should carefully review the breadth and scope of their arbitration agreement if they wish to place limitations on the authority of the arbitrator to decide the dispute. ADR

GREG GILLIS is a member of the American Arbitration Association's Construction and Commercial Panel of Neutrals and the National Academy of Distinguished Neutrals. He practices construction law, commercial litigation and alternative dispute resolution with the Scottsdale firm of Sacks Tierney P.A.