Kluwer Arbitration Blog

The U.S. Law of Arbitration: From 1925 to 2019

Thomas E. Carbonneau (Penn State Law) · Sunday, November 17th, 2019

The progression of arbitration law in the American legal system has been steadfast. Despite a few uneasy rulings, the U.S. Supreme Court ("SCOTUS" or "the Court") has provided resolute support for arbitration and proclaimed the legitimacy of its enhanced adjudicatory role. The few rulings that strayed from the contemporary judicial evaluation of arbitration[1)] eventually were reconsidered and their impact on the law significantly lessened or entirely redefined. For example, the *Rodriguez* Court reversed *Wilko v. Swan*; *Bernhardt Polygraphic* was replaced with the Federalism Trilogy; *Volt Information Sciences* was recast as a contract freedom case; and *Sutter* virtually reversed *Stolt-Nielsen*.[2)] U.S. law provides that arbitral adjudication can apply to all civil disputes and, once chosen by the contracting parties, will yield binding determinations at a lower cost and more quickly than its judicial counterpart.

The *Steelworkers Trilogy*[3)] in 1960, along with the cases on international litigation and arbitration[4)] foreshadowed the *Federalism Trilogy*[5)].

The federalism cases spread the Court's new assessment of arbitration to all levels of the American legal system. A contractual reference to arbitration could achieve what had eluded the American dispute resolution system throughout its history: efficient and effective adjudication. The law, in effect, had failed society by demanding that the legal system provide absolute procedural rectitude in the trial, extensive adversarial discovery in building the record, and appeal on the merits. By contrast, the characteristics of arbitral adjudication constituted, in and of themselves, a functional form of due process. Domestic civil justice and functional global commerce could best be realized through the submission of disputes to arbitration.

The revamped arbitration doctrine survived the periodic changes in the Court's composition. A majority of the justices consistently agreed that arbitration was an effective solution to the problem of the inaccessibility of civil justice. As in other Western democracies, American society had evolved and changed significantly in terms of population, structural character, and its need for resources. The entanglements and leaden pace of the legal methodology was having a ruinous impact upon the social order. Adjudication, therefore, needed to be altered and made more accommodative of societal needs. The demanding burdens of civil litigation were neither tolerable nor workable. American society could not constitutionally abandon its obligation to provide fair and impartial civil justice by accepting or acquiescing to the operational dysfunctionality of the civil adjudicatory process. For the Court, arbitration could remedy the problems of civil litigation. The judicial commitment to arbitration would, over time, bring about a systemic revolution in

American law.

SCOTUS' faith in arbitral adjudication evidently influenced the substance of its rulings on arbitration. Prior to their ascension, no member of the Court ever professed an in-depth knowledge of or a strong interest in arbitration. In fact, the opinion in some cases, *e.g.*, *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), demonstrated a spotty knowledge of arbitration. Justices were on the Court because of their legal skills, their familiarity with judicial litigation, and their political involvements. Prior to their period of service, few, if any, members of the Court ever touted non-judicial adjudication. The leadership of the Court, in particular Chief Justice Warren Burger, wanted all its members to become aware of the grave failings of the legal process and to join the effort to eradicate them. During their tenure, a number of justices bettered their understanding of arbitration and developed a much deeper appreciation of the remedy and its beneficial impact upon the legal process.

Political convictions, however, generated consternation about arbitration. The unilateralism of adhesion reduced the majority in favor of arbitration. The long-standing social justice contention between the 'haves' and 'have-nots' cooled the attention given to judicial reform through private contract. While a majority could still be constituted in favor of arbitration, opposing political persuasions created a sense of disunity among the justices. Despite the political differences, the Court continued to sustain party recourse to arbitration. Law and policy would need to be reconciled to maintain a majoritarian position on arbitration. Subsequent rulings established a more measured balance between law and arbitration, but also intensified the critique of law and the support for litigation through arbitration. Rulings depended upon the current and evolving needs of the legal system and society. Legal positions often varied by circumstance and group dynamics within the Court. Be that as it may, a majority of justices continued to favor arbitration strongly because it harbored a 'real' solution to the need for effective civil litigation.

Throughout his tenure on the Court, Justice Thomas objected to arbitration and the application of the FAA on a states' rights basis. Like Justice Scalia and O'Connor, Justice Thomas believed that the federal statute was never intended to apply in state courts. In his view, state courts were free to apply state law in arbitration cases and reach results different from those likely in federal courts. Nevertheless, Justice Thomas voted with the majority in the class waiver cases. Since Justice Scalia's death, Justice Thomas has resumed emphasizing that the FAA is federal law that is not binding on state courts. For the sake of accuracy, any assessment of Justice Thomas' position on arbitration should take into account his dissent in *Mastrobuono* because it is a powerful statement of the standing of the prior decision in *Keating.* Justice Thomas convincingly argues that the two opinions cannot be reconciled.

Justice Alito is as reluctant as Justice Thomas on the topic of arbitration, if not more so. He appears to be the most likely justice to oppose the "emphatic [strong, liberal] policy favoring arbitration." He came to the Court from the Third Circuit, a federal appellate court that frequently advocates for restrictions on arbitration and arbitrability—a position also espoused by the Ninth Circuit. Justice Alito's opinion in *Stolt-Nielsen v. AnimalFeeds* was an unequivocal criticism of arbitration's trespass on the legal system's jurisdiction, mission, and authority. In *Stolt-Nielsen*, the Court held that a special jurisdictional award rendered by an AAA Panel was null and void because the arbitrators failed to provide a legal basis for their ruling—in effect, amounting to a form of merits review of the award prohibited by current law and strongly disfavored by judicial policy. In effect, the Court deemed that the arbitrators should rule as judges would have ruled. By disappointing that expectation, the arbitrators' conclusions were deemed unenforceable. This view of arbitration is

antiquated and should no longer be possible in the contemporary legal regulation of arbitration.

Nonetheless, the future of arbitration in the U.S. and like-minded legal systems seems to be strong. Judicial hostility is seen as an outdated and arthritic position. International commercial arbitration is more developed and well-established than its domestic counterpart. There is long-standing and significant legal and political support for arbitration in Western European democracies (*e.g.*, France, England, Switzerland, The Netherlands, and Belgium). Court acceptance of and support for arbitration is critical. The courts enforce both arbitral agreements and awards. Law firms have developed departments in arbitration. International commercial litigation is basically conducted through arbitration. States even use arbitration to resolve foreign investment and related problems; it has proven successful, but sovereignty nonetheless remains an obdurate obstacle to adjudicatory civilization. Arbitration is the most energetic development in law in a very long time.

Arbitration is an area of legal practice that promises great professional opportunities. The allure of arbitration has become virtually impossible to resist. For these reasons, this author decided to write his Seventh Edition of the "Law and Practice of United States Arbitration".

References

?1 Wilko v. Swan, 346 U.S. 427 (1953); Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989); Stolt-Nielsen S.A. v. Animal Feeds, Int'l, 559 U.S. 662 (2010)

?2 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) and Oxford Health Plan, LLC v. Sutter, 133 S. Ct. 2064 (2013)

?3 United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car, 363 U.S. 593 (1960) Corp)

?4 Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972)

?5 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Southland Corp. v. Keating, 465 U.S. 1 (1984); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)

This entry was posted on Sunday, November 17th, 2019 at 9:16 am and is filed under Domestic arbitration, Federal Arbitration Act (FAA), United States
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.