

## **First Contract Arbitration: Issues and Design**

Arnold Zack<sup>1</sup>  
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The proposed Employee Free Choice Act calls for mediation and arbitration of first contracts if the parties do not reach a negotiated agreement within 90 days. By so ensuring an initial contract, the framers of the bill hope to successfully establish the beginnings of collective bargaining institutions and relationships in newly unionized workplaces. Although the bill draws on the experiences and practices of interest arbitration that have developed over many decades, as currently drafted, the bill does not spell out the particular design features of an arbitration system nor clarify how arbitration would relate to mediation, strikes, or lockouts. Addressing these issues and several others will help to show how the processes envisioned by this bill should operate. Such details could be made explicit either as part of the final bill or in the rules prepared by the agency (or agencies) Congress assigns to administer and enforce the law. In addition, many of these issues could be dealt with by agreement of the parties themselves, as they face the possibility of using the statutory arbitration system.

This paper lays out some of the issues that should be considered in this design process, drawing on years of experience and evidence with interest arbitration, mediation, and other features of dispute resolution in both the private and public sector settings. The paper seeks to show how many features of traditional arbitration and mediation practice would prove particularly well-suited to the context of first contract disputes envisioned by the proposed Act.

### The Issues

Many issues have been raised in the long history of debate around the appropriate role of interest arbitration. They include:

*Will arbitration encourage or reduce the incentive to reach voluntary agreements in negotiations and/or mediation?*

The basic reason for providing for arbitration of first contracts is to assure that a contract is reached should the parties be unable or one or both parties be unwilling to reach a negotiated agreement. Failure to reach an agreement has been a serious problem in first contract negotiations. Federal Mediation and Conciliation Service data on first contracts show that between one third and 46 percent of certified bargaining units failed to reach a

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<sup>1</sup> Arnold Zack is a former president of the National Academy of Arbitrators and teaches dispute settlement system design in the Labor and Worklife Program at the Harvard Law School.

first agreement in recent years. Cases involving an unfair labor practice charge have had an even lower probability of reaching an agreement.<sup>2</sup>

At the same time, there is universal agreement on the principle that an agreement negotiated by the parties is preferable to an arbitrated decision. There is a long history of debate over whether particular arbitration systems will “chill” or enhance the effectiveness of negotiations and/or mediation. Therefore, arbitration systems should be designed in ways that encourage the parties to reach voluntary agreements in negotiations and/or mediation but that also provide a fail/safe agreement making process if the parties cannot agree on their own.

Evidence from public sector arbitration in the U.S. provides the longest time frame for answering the question of whether arbitration encourages or discourages negotiated or mediated agreements. In the early years of these statutes between 10 and 30 percent of negotiations required arbitration. Over time, however, these numbers appear to have declined to the single digit range. The evidence from New York State is again illustrative of the overall record: During the first three years under the arbitration statute (1974-76), 26 percent of firefighter and 31 percent of police cases were resolved by arbitration; between 1995 and 2007 only seven percent of firefighter and nine percent of police negotiations required arbitration. All others were resolved through negotiation and/or mediation.<sup>3</sup>

The New York experience also indicates that mediation preceding arbitration and in some cases extending into the arbitration process was successful in resolving over 70 percent of the cases where it was used. This suggests that with proper care to the design and use of mediation it can be an effective tool in overcoming concerns that existence of arbitration will “chill” the incentive to bargain and reach voluntary settlements.

The Canadian private sector evidence is very similar and particularly relevant. The labor relations statutes of six Canadian provinces and the Federal Sector provide for first contract arbitration, closely mirroring the arrangements intended by the Employee Free Choice Act. Across these seven jurisdictions (some with more than 30 years experience with such first contract arbitration) the arbitration rates (percent of cases in which an award was required to resolve the negotiations) ranged between a high of eight percent and lows of less than one percent. Moreover, the use of mediation prior to or during the arbitration proceeding was successful in resolving the vast majority (in British Columbia just under 90 percent) of the cases without resort to an arbitration award.<sup>4</sup>

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<sup>2</sup> John-Paul Ferguson, “The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004,” *Industrial and Labor Relations Review*, Vol. 62, No. 1 (October, 2008), 3-21.

<sup>3</sup> Thomas Kochan, David Lipsky, Mary Newhart, and Alan Benson. “The Long Haul Effects of Arbitration: The Case of New York State’s Taylor Law,” Draft manuscript, January, 2008.

<sup>4</sup> Susan Johnson, “First Contract Arbitration: Effects on Bargaining and Work Stoppages, Paper presented at the Labor and Employment Relations Association, January, 2008 available from the author at Department of Economics, Wilfrid Laurier University, Canada.

*Does arbitration expose the parties to the risk of having an unworkable or otherwise deleterious settlement imposed by an arbitrator who may lack comprehensive knowledge of the parties' economic or other circumstances?*

Another longstanding principle in labor relations is that the parties themselves, as opposed to individuals not directly exposed to their particular organizational and economic circumstances, are the best judges of what outcomes will serve their needs and, conversely, alternative outcomes that might be harmful to them. A number of approaches have been developed over the years to minimize, and to a large extent, eliminate the risk that an arbitrator will impose an unworkable outcome.

Qualifications and Selection Process. Perhaps the most important means of avoiding the risk of having an unworkable or otherwise deleterious settlement imposed by an arbitrator who lacks sufficient knowledge of the parties economic or other circumstances lies in the qualifications of the arbitrators. Labor-management arbitration is a recognized professional field, with well-established professional norms, standards and practices. Neutral agencies such as the Federal Mediation and Conciliation Service (which is given rulemaking authority under the bill) and the American Arbitration Association have many decades of experience in creating and maintaining rosters of arbitrators whom by education, experience, and the recommendation of both labor and employer professionals, have met the qualifications required to serve as expert, reliable, and neutral arbitrators. Moreover, the National Academy of Arbitrators, a professional association of the most highly respected and experienced arbitrators, has even more stringent eligibility criteria. Therefore, a screening and qualification process similar to the ones used by these organizations can and should be used to create a pool of qualified and experienced arbitrators who can be selected by the parties or, in the absence of agreement, assigned by the agency to resolve specific cases.

Arbitration Structure. The use of tripartite panels rather than a single neutral arbitrator is another way to ensure that a neutral arbitrator will not impose an unworkable resolution of outstanding issues. Tripartite panels are composed of one or more neutral arbitrators and one or more arbitrators chosen by each party to represent its interests in arbitral decision-making process. This allows for information to be conveyed to the neutral and discussion of the likely consequences of alternative resolution options and often results in further mediation in the executive sessions of the arbitration panel and sometimes results in unanimous decisions.

Mediation after Arbitration. It should be emphasized that, after an award is issued, the parties always will have the option of negotiating and agreeing to modification of that award to suit their own needs. Thus, to the extent that an award adopts terms unpopular or unworkable to both parties, it can be corrected. But beyond this, various formal arbitration processes have been developed to promote agreements by the parties in light of the arbitrator's reactions or decisions in the case.

One approach provides that after the arbitrator has issued a draft award, the parties have the opportunity to negotiate amendments to that award, or even to reject it altogether in

favor of an alternative which better suits their circumstances. A variant on this approach is for the arbitrator to seal the award, providing that it shall be disclosed to the parties and become binding on them only if they cannot negotiate their own agreement. Both of these methods permit negotiation and/or mediation after the conclusion of the arbitration, so that the parties can negotiate with full knowledge of the data available to the arbitrator in an additional effort to resolve their dispute in lieu of an imposed award.

*Will arbitrators impose wage increases that put a business at risk by raising wages beyond what would otherwise be achieved through collective bargaining or impose wage increases below what workers could expect to achieve through collective bargaining?*

The well understood goal of arbitrators in interest disputes has long been to fashion an agreement which the parties would have been likely to reach had they bargained to agreement. This overall standard explains the continued use of the process and its expansion into the public sector where statutory guidelines, with some variation from jurisdiction to jurisdiction, enumerate the various traditional elements that arbitrators should consider in that pursuit. The result is that most of the particular standards found in public sector statutes mirror those used in private sector disputes. *See Elkouri & Elkouri, How Arbitration Works* (6<sup>th</sup> ed. 2003) at 1407-1444 (discussing prevailing practices and standards applicable in both private-sector and public sector interest arbitration). *See also id.* (2008 Supplement), at 518 (noting that factors in public sector statutes “are very similar to the standards used in private sector interest disputes”).

These criteria, along with deep seated norm of the arbitration profession to avoid breaking new ground the parties were unable to agree to voluntarily, explain why econometric evidence has found that the long run effects of arbitration on public sector wages (e.g., comparing police wages in arbitration and non-arbitration states) to be essentially zero. Moreover, because arbitrators rely heavily on comparability, studies consistently find that there is no significant difference in police or firefighter settlements that are negotiated and those that are arbitrated.<sup>5</sup> The opportunity to negotiate and mediate following the arbitration hearing would provide an additional opportunity for the parties to settle on a contract without the arbitrator(s) having to issue an award.

*Will arbitration prevent work stoppages?*

Another goal of arbitration is to avoid reliance on strikes or lockouts. Therefore, one question is how does arbitration relate to strikes and is it an effective way of assuring an agreement is reached without a work stoppage.

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<sup>5</sup> For the two most recent econometric studies of this issue see Orley Ashenfelter and Dean Hyslop, “Measuring the Effect of Arbitration on Wage Levels: The Case of Police Officers,” Working Paper #421, Industrial Relations Section, Princeton University, July, 1999, and Kochan, et al “The Long Haul Effects of Arbitration.”

A longstanding principle, reinforced by the Supreme Court<sup>6</sup> views arbitration generally as a quid pro quo for strikes/lockouts. Although the Supreme Court decisions focus on arbitration of rights disputes this principle is similarly implied in the choice of arbitration for first contracts.

Once again the best evidence on whether arbitration has in fact been successful in deterring work stoppages in settings where implemented in the U.S. comes from public sector settings where arbitration has been in place for a long time as the dispute resolution system governing police and firefighters or other essential services, although there is also extensive experience in using interest arbitration for resolution of private-sector disputes in Canada as well as in various sectors in the United States, including the private transit and newspaper industries. The overall record is clear. Strikes under arbitration statutes are very rare; it has proven to be a strong deterrent and alternative to strikes/lockouts. For example, no strikes have occurred over the thirty four year history of arbitration of police and firefighter negotiations New York State, while over this same period the state experienced approximately 40 teacher strikes.<sup>7</sup> Teachers are covered by a non-binding mediation and factfinding procedure.

The Canadian experience with private sector first contract arbitration provides even more direct evidence. The most comprehensive study of first contract arbitration in Canada (six Canadian Provinces and the Federal Sector in Canada have experience with first contract arbitration) found that the prospect of arbitration has reduced strikes by over 50 percent.<sup>8</sup>

In summary, the evidence from the history of private and public sector arbitration over the past thirty years in the US and Canada indicates that:

- a. Arbitration provides assurance that an agreement will be reached but is only invoked only when the parties are unable to reach agreement on their own.
- b. Arbitration systems can be designed to reduce likelihood of use, to maximize the incentives on the parties to negotiate their own agreements, and to maximize control of the parties over the final award.
- c. Only a small minority, in most cases well under 10 percent, of negotiations under arbitration actually end up requiring an arbitration decision.
- d. Arbitrators do not issue awards that prove to be unworkable.
- e. Arbitration does not significantly alter wages above or below the levels one would expect to achieve in collective bargaining.
- f. Arbitration significantly reduces the probability of strikes or lockouts.

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<sup>6</sup> See *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962). As the leading text on arbitration states: "An agreement to arbitrate effects a complete surrender of any right of the employer to determine the controversy by unilateral action and of any right of both parties to support their contentions by a show of economic strength." (Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> edition, Washington, D.C.: Bureau of National Affairs, 2003, p. 9.

<sup>7</sup> Kochan et al, "The Long Haul Effects of Arbitration."

<sup>8</sup> Johnson, "First Contract Arbitration."

- g. The arbitration award would strive to achieve the resolution the parties would have been expected to achieve had they bargained in good faith to reach their own final agreement.

This base of evidence and experience needs to inform the design of the full dispute resolution process that includes a meaningful role for negotiations, facilitation and mediation, and arbitration. The next section of this paper outlines the design features of a dispute resolution system for first contract arbitration that addresses each of the issues noted above.

## Arbitration System Design

### Initial Negotiations and Mediation

The National Labor Relations Board (NLRB) shall convey to the Federal Mediation and Conciliation Service (FMCS or the Agency) in a timely fashion information on each new bargaining unit certification. The Director of FMCS shall immediately assign a mediator to each newly certified bargaining unit and instruct the mediator to hold a joint meeting with union and management representatives to offer the full range of education, training, interest based bargaining, facilitation, and mediation services provided by the Agency. The mediator shall work with the parties in whatever capacity is deemed appropriate to assist them in reaching a negotiated agreement.

In the event that a labor organization is recognized by an employer as the representative of employees of that employer in the absence of NLRB certification, and either the employer or the labor organization requests the Director of FMCS to assign a mediator to assist their negotiations, the Director shall proceed in the same fashion as if the labor organization had been certified.

If the parties are unable to reach an agreement within 90 days from the date of initial certification or recognition of a labor organization, or if within this 90-day period the mediator determines that an impasse has been reached and so notifies the FMCS Director, either party can at this point request the Agency to appoint an arbitrator to issue a binding decision on the issues that remain unresolved.

### The Arbitrator/s

The parties, by mutual agreement, may select a neutral arbitrator of their choice, or they may choose their own method of selection. If they do so, the Agency shall appoint their chosen arbitrator. If the parties do not mutually agree on a neutral arbitrator, the following selection process will apply.

The Agency, in consultation with employer and labor representatives, shall assemble and maintain a roster of arbitrators whom it certifies have the appropriate expertise,

experience and acceptability to serve as interest arbitrators in first contract disputes. Within five days of receipt of a request for arbitration, the Agency shall submit the names of five (5) arbitrators from their roster. The parties shall have ten days to select their mutual choice of arbitrator using current Agency procedures for arbitrator selection. The Agency will designate the arbitrator so mutually selected. Failing that mutual selection the Agency shall promptly designate an arbitrator from its roster who (1) is a member of the National Academy of Arbitrators, and (2) was not earlier offered to the parties. If one or both of the parties wish to have a tripartite arbitration panel, each party may designate a representative to that panel. The neutral arbitrator will serve as Chair of the panel.

In the event an arbitrator is unable to complete the assignment, and the parties have not chosen a method to select a replacement, the Agency shall appoint a replacement at its discretion.

The parties shall share the reasonable fees and expenses of the neutral arbitrator, and shall be responsible for paying any costs associated with their appointees on a tripartite panel.

#### Authority of the Arbitrator/Chair

The Arbitrator/Chair shall have full discretion to set the date, time, and location of the hearing(s), and to conduct the hearing. Unless otherwise agreed to jointly by the parties, the scope of issues to be arbitrated shall be limited to wages, hours, and other terms and conditions of employment.

The arbitrator must issue an award within 30 days of the close of hearings unless the parties have agreed to a later date.

The decision of the arbitrator shall be final and binding. In the case of parties electing to use a tripartite panel, the arbitrator shall issue the award, with the parties having the option to concur or dissent on each issue. If the arbitrator deems it appropriate, the arbitrator may issue a draft award for the parties to consider in further mediation or negotiations. If no further modifications of the award are agreed to by the parties, the draft award will become final and binding ten days after issued, unless this time period is extended by mutual agreement of the parties. Alternatively, if the neutral arbitrator deems it appropriate, the arbitrator may write an award and seal it for ten days to allow for further mediation or negotiations. If no agreement is reached within those ten days the award will be opened and serve as the final binding decision.

In determining the basis for the award the Arbitrator/Chair shall be guided by those factors that would normally be taken into consideration by similarly situated parties seeking to resolve a collective bargaining disputes over wages, hours and conditions of employment and foster a productive collective bargaining relationship, including the following:

- a. the financial and economic conditions that affect the employer and its industry/sector;
- b. the overall compensation presently received by the employees, including vacations, holidays, leave days, pensions, healthcare, and other benefits;
- c. a comparison of wages and benefits, hours and conditions of employment of employees engaged in similar work in the same industry and/or geographical area;
- d. the average consumer price for goods and services, commonly known as the cost of living;
- e. changes in any of the foregoing circumstances during the pendency of the arbitration proceedings;
- f. any stipulations of the parties;
- g. and such other, similar, factors, not confined to the foregoing, which are normally or traditionally taken into consideration by arbitrators, mediators, and fact-finders seeking to resolve collective bargaining disputes or which will foster a productive collective bargaining relationship.

#### The Award

The award shall incorporate any agreements reached by the parties prior to or during the arbitration proceedings, and shall constitute the collective bargaining agreement between the parties. The agreement shall take effect immediately and absent joint agreement on a different duration, shall remain in force for two years unless amended by mutual agreement between the parties. The agreement shall be enforceable as a contract between an employer and a labor organization pursuant to section 301 of the National Labor Relations Act. In any proceeding to enforce the agreement, the award will be treated as final and binding, except that the court may set aside any portion of the award shown to be the product of corruption or fraud or to be in manifest disregard of the law.

#### Strike and Lockout Prohibition

During the period commencing with the Agency's assignment of an Arbitrator and continuing through the issuance of a final award by the Arbitrator(s) neither party may engage in a strike or lockout.