Speech to Turkish Confederation of Employer Associations (TSK)

by

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It is a pleasure to return here to Turkey for my second visit to your country, as the first one occurred just a half year ago in late 2010. Thank you, Bülent Pirler, and your organization, the Turkish Confederation of Employer Associations, for your gracious invitation to speak here.

In a period of ever growing globalization, the proposition that we can learn from one another has never been more accurate. And, I must confess, I possess not only an interest in labor globalization but also globalization in sports in my country and in Turkey. I very much regret that Semil Erdan, is no longer with my beloved Boston Celtics, whose fortunes I have been identified with ever since the club was founded in 1946. Still, I hope to meet Mr. Erdan's colleagues and his associates on this and future visits. And, shortly after my return I look forward to celebrating the Celtics' 18th World Championship and the recruitment of more Turkish players – and, what about games here in Turkey between the Celtics, NBA and Turkish teams! A real World Championship!

Turkey, always a subject of fascination and curiosity for this and other Americans, is in a period of transition. Looking out at so many portions of the globe, particularly in Europe and the Middle East, labor law reforms now both enacted and considered constitutionally and at the statutory level are of considerable interest to me and, I think, others in my country. For the "Turkish model" itself is of increasing interest in the United States. As the *London Economist* said recently:

> "Turkey's high-profile diplomacy, its successful economy and its drive for new markets have made it the envy of many Arab leaders. It is little wonder that so many pundits have taken to talking up a 'Turkish model' as a way forward for Egypt."[1]

As many of you probably know, the American system of labor management relations is not susceptible to easy generalization. Over the past half century trade unions have declined

[1] "A Muslim democracy in action," *The Economist*, Feb. 19, 2011, at p. 59. *See* also, "Anchors aweigh," (A special report on Turkey), *The Economist*, Oct. 23-29, 2010.

precipitously in the United States, constituting between 11-12% of the workforce and slightly under 7% in the private sector. If unions in the public sector had not grown so rapidly in the ‘60s, ‘70s and ‘80s, the decline would be even more considerable.

American unions were principally craft or occupational unions until the Great Depression when industrial unions covering entire industries, representing and brokering the competing interests of the skilled, semi-skilled and unskilled in one “appropriate unit” became more important. Nonetheless, the system is decentralized with most collective bargaining and representation of employees at plant level – a phenomenon which seems to be responsible for both some of the difficulties that unions have in obtaining and maintaining representative status and for the development of detailed and sophisticated arbitration procedures, the spontaneity of which allows them to be responsive to the idiosyncrasies and peculiarities of employees’ particular establishments.

Majority rule – manifested through both voluntary recognition on the basis of union authorization cards as well as employee petitions and secret ballot box elections conducted amongst the workers – is the order of the day and it has been for the past 76 years. Sometimes these procedures can lead to more than one union in a facility – though only one union acts as the exclusive bargaining representative for the “appropriate unit” of employees who share a community of interest with one another. Even with this system of exclusivity, where there have been a multitude of unions as in construction, maritime, municipalities and state government, and newspapers for instance, there have been problems aplenty because of demarcation disputes and a desire by each union to lead the pack.

Whatever the failings of the American system – and they are considerable – its main strength lies in arbitration and the system of dispute resolution which has emerged in the United

States. That will be the main focus of my remarks here, though I would be pleased to entertain questions which you have on any aspect of the system.

Long before the advent of modern labor legislation in the United States, principally in the form of the National Labor Relations Act of 1935 (regulating unfair labor practice conduct by employers and union as well as representation elections in the private sector) dispute resolution machinery had begun to emerge in labor-management relationships in the United States.[2] This began in the 19th century in both anthracite and bituminous coal – indeed there was an Anthracite Coal Commission created in 1903 – and, during World War I, these processes spilled over into the hosiery and apparel industries where Justice Louis Brandeis played a leading role.

These early systems were frequently called "impartial chairmen" procedures or characterized as "umpire systems" which then and today means a permanent appointment of one individual who is sometimes flanked by labor and management representatives. This is to be contrasted with an ad hoc appointment of an arbitrator to deal with a particular dispute (that individual also can be flanked by labor and management representatives but usually is not) rather than one individual for a set period, usually the life of the contract between the parties.

Almost simultaneous with the development of these procedures on a voluntary basis there emerged sporadic Congressional intervention through a number of statutes in emergency disputes arising over the new terms of a contract – generally they were on the railroads – to impose solutions.[3] A particularly prominent one occurred in connection with differences between labor and management over the eight hour day, an important demand of organized labor

[2] For more detail on the American system, you may wish to consult Gould, A Primer on American Labor Law (4th ed., 2004).

[3] See generally, Federal Legislation to End Strikes: A Documentary History prepared for the Subcommittee on Labor of the Committee on Labor and Public Welfare, Part 1, May 1967. See also, Federal Legislation to End Strikes: A Documentary History prepared for the Subcommittee on Labor of the Committee on Labor and Public Welfare, Part 2, May 1967.

in the early part of the previous century, which was instituted during the administration of President Woodrow Wilson.[4]

At the outset, it is important to understand a number of points to which we will return frequently. The first is that the American labor dispute resolution system has always established a demarcation line between disputes arising under a negotiated agreement where the parties, inevitably in generalized language, have established rules and requirements themselves and therefore the job of the arbitrator is to interpret the meaning of the contract – which contains those rules, etc. This is to be distinguished from so-called interest arbitration where the third party neutral is called upon to devise new terms, generally within parameters established by the parties or by the state where this process is mandated. The former has come to be called "grievance" or "rights" arbitration and the latter, interest arbitration.

And there is another important distinction as well. Though most arbitration in the United States is voluntarily negotiated between the parties sometimes it is mandated by state legislation (a disproportionate portion of it is public sector cases particularly in police and fire) – in approximately 24 state jurisdictions interest arbitration is mandated – on the ground that a strike simply cannot be tolerated by society and that a system must be imposed.

And there is a third preliminary matter. I have referred to these procedures as arbitration which means a binding decision which can be imposed upon the parties, generally with a limited review by the courts. In the early years, particularly in coal and hosiery, the boundary line between arbitration and mediation where a third party neutral attempts to resolve a dispute more informally were considerably blurred – and the umpire or impartial chairman system sometimes utilizing suggestions, prodding of the parties and cajoling them as well as using formal or

[4] Wilson v. New, 243 U.S. 332 (1917).

informal recommendations to induce the parties to settle their differences.[5] Even in the 1940s as new machinery was emerging in basic manufacturing, of which automobiles were a prominent example, some third party neutrals like Dean Harry Shulman of the Yale Law School (a prominent arbitrator in his time) tended to merge these skills together into more of an informal system than is known today.

Today mediation stands on its own. The Federal Mediation and Conciliation Service (FMCS), part of the United States Department of Labor involves itself in labor disputes, generally of the interest variety over new contract terms. During this year, the FMCS has involved itself, through the parties' invitation, in the most publicized football dispute between the National Football League and the National Football League Players Association. President Obama, pronouncing himself a football fan and stating that he could not involve himself in the dispute because he had other matters taking up his attention, had earlier appointed the FMCS director, George Cohen, who is ably bringing his skills to bear through good listening, patience, upbeat optimism and perhaps the occasional proposal to the parties.[6]

State mediation agencies exist as well – and they provide the same kind of mediation service for parties within their boundaries. Also, the parties call upon private mediators which they finance through their own resources. Finally, mediation is sometimes invoked prior to proceeding to arbitration where the issue is a grievance dispute or, less frequently, in the midst of or subsequent to the arbitration process itself.

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[5] Though private third party intervention is rare in union organizational disputes where the union is attempting to establish exclusive bargaining representative status, for the past three years I have served as Independent Monitor for First Group, a large British multinational corporation employing approximately 100,000 employees in the United States, with the authority to issue public non-binding recommendations. In the majority of cases the company accepted my recommendations and the unions involved appeared to have approved of the process. This is discussed in detail in William B. Gould IV and Andrew J. Olejnik, "Beyond Labor Law," 87 Ind. L.J. (forthcoming 2012).

[6] Sam Farmer, "NFL labor talks mediator is down in the trenches," *L.A. Times*, Mar. 5, 2011.

As I have noted, sometimes arbitration proceedings wind up in court though, in the overwhelming number of instances, this is not the case. Initially, the law in the United States was hostile to arbitration in the workplace, an attitude inevitably rooted in the assumption that the process represented usurpation of judicial functions.[7] The law has nonetheless become more receptive, beginning with the Federal Arbitration Act of 1925[8] – a provision which covers commercial arbitration and was not deemed (by most observers that is) to be applicable to the bulk of labor and employment arbitration until the Supreme Court addressed this matter a decade ago in 2001 and instructed us otherwise.[9]

A second involvement of the law with arbitration took the form of the enactment of the War Labor Disputes Act of 1943[10] during the emergency conditions of World War II. In these circumstances the United States encouraged and in some instances mandated arbitration as well as other contract clauses which enhanced trade unionism. In some respects, the union gains of the 1940s were even greater than during the Great Depression of the 1930s – in substantial part because of the procedures under this statute adopted by the War Labor Board. When the war came to an end in 1945, there existed a corps of third party neutrals who had previously been employed by or operated under the auspices of a War Labor Board for the preceding years. This accident of history created an environment where a goodly number of experienced and professional arbitrators were known to both labor and management which had considerable confidence in them and the expertise that they had derived from their exposure to plant conditions.

[7] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).
[8] 9 U.S.C. Section 1 et seq.
[9] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[10] CH. 144, 57 STAT. 163

More than anything else, the new environment of the 1940s produced a framework in which the parties, labor and management, negotiated arbitration procedures. Quickly than in the 1950s, collective bargaining agreements contained arbitration clauses in approximately 90% of existing contracts. (All of this occurred when trade unions were at their zenith in America, representing approximately 35% of the workforce in contrast to the 11% which they represent today.) Arbitration procedures, applicable in the main to disputes about the interpretation of an agreement, became enormously popular. Viewed as an extension of the collective bargaining process, the arbitrator and the process surrounding him or her became a substitute for self-help economic pressure utilized by both sides.

Meanwhile, our National Labor Relations Act was amended through a series of provisions which came to be known as the Taft-Hartley Act and one of the new amendments provided that agreements between labor and management could be enforced in the federal district courts, the trial courts of the United States from where appeals could be taken to the intermediate level, the Circuit Court of Appeals. (In rare instances the United States Supreme Court itself may grant certiorari). The language of the amendments made any agreement between labor and management enforceable even if the arbitration process was not involved and the parties resolved their differences independently or with the help of a mediator.[11] Nonetheless, the main impact of this provision was upon arbitration procedures and their promotion – and the Supreme Court in 1960, in the landmark Steelworkers Trilogy[12] held that doubts about whether a party had consented to submit the matter to arbitration (usually it was the employer that was resisting) could be resolved in favor of a mandate by the judiciary that the

[11]Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17 (1962); Groves v. Ring Screw Works, 498 U.S. 168 (1990).
[12] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).*Cf.* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).

arbitrator should take jurisdiction of the matter. The Court also held that, subsequent to the issuance of an opinion and an award by the third party arbitrator, the arbitrator's award should be enforced so long as it did not manifest actual infidelity to the contract itself even if the reviewing court would have come to a different result.

The Steelworkers Trilogy reasoning was predicated upon the view that the parties had selected the arbitrator as the third party to resolve their disputes because of their confidence in his or her expertise – a characteristic which it would be difficult, if not impossible, for the judiciary to replicate. The United States Supreme Court was of the view that labor or collective bargaining agreements were more likely than their commercial cousins to contain ambiguities and gaps which were particularly susceptible to resolution through a third party expert.[13]

The Court's view was that the grievance-arbitration machinery contained in those collective bargaining agreements was a kind of quid pro quo for a no-strike clause, again contained in most agreements, providing the employer with the enforceable promise of uninterrupted production without resort to strife by either side in the form of strikes, slowdowns or lockouts for a period of time, generally two to three years at a minimum.[14]

Finally, the legal backdrop for arbitration is set forth in a series of statutes enacted at the state level – government employees are not covered by federal labor law – particularly applicable to police and fire and sometimes other public employees such as teachers, providing for so-called interest arbitration because of the undesirability of strikes in these areas at any time – during the contract or subsequent to it! A number of states enacted such statutes in the wake of the rise of

[13] The Court seemed to base its view upon the dynamics, both industrial relations and statutory, which impelled the parties to resolve their differences within a relatively short period of time: (1) the duty to bargain provisions of the National Labor Relations Act which oblige "good faith bargaining" on the part of both sides and inevitably force parties to the bargaining table; (2) the labor tradition, though less frequently followed today, which abhorred working without a contract – "no contract, no work" was the slogan, promoting eleventh hour intensive bargaining without time for reflection which might be available without such time constraints. Out of this emerged gaps and ambiguities which could be resolved only by an expert neutral third party.

[14] General Cable Corp., 139 N.L.R.B. 1123 (1962).

public employee unionism in the 1960s – a phenomenon, as President Obama recently noted, now under "assault" by a number of states like Wisconsin, Ohio, Indiana, Iowa and New Jersey.[15] Meanwhile, at the federal level, postal workers and the U.S. Postal Service are under a statutory obligation to submit to interest arbitration at the expiration of their agreement – and this process has proceeded for more than four decades!

This then is the legal backdrop and the framework for the use of third party impartials or neutrals. But who are these arbitrators and what is the arbitration process? In the first place, it is important to note that there is no system of licensing for arbitrators or mediators in the United States. There are no specific qualifications as such – and no institution, public or private, defines them. Most of the prominent arbitrators are lawyers but there is no requirement that an arbitrator be a lawyer – even though in recent years a number of disputes have involved public law considerations as well as contractual issues. (Some illustrative examples of these public law cases involve discrimination on account of race, sex, disability, medical and family leave issues and the like.)

How does one become an arbitrator if there is no test to be passed or license to be obtained? Arbitration lists are maintained by such organizations as the American Arbitration Association,[16] a private so-called non-profit entity with headquarters in New York City, as well as the Federal Mediation and Conciliation Service, an autonomous branch of the United States Department of Labor. A large number of states have their own state mediation agencies which, like their federal counterparts, perform mediation services but also maintain the same lists of arbitrators from whom private parties may choose.

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[15] Steven Greenhouse, A Watershed Moment for Public-Sector Unions, *The New York Times*, February 19, 2011, A12; William B. Gould IV, The Essence of Democracy, Room for Debate: A Running Commentary on the News, *The New York Times*, February 19, 2011 (Op-Ed).

[16] American Arbitration Association website: http://www.adr.org/.

The arbitrators on the lists, or otherwise available for the parties to choose, are generally private citizens like myself. How does one get listed with such organizations? Generally through exposure to the parties and experience with them something that, in Catch-22 fashion, can be obtained primarily by being on the lists! Some arbitrators are able to enter the field by being so-called apprentices to senior arbitrators and thus are able to learn about the procedures and have the parties learn about them! In the 1960s, I worked for a senior well-known mediator and arbitrator in New York City and, from time to time, conducted hearings in his absence in industries like maritime and pocketbook which gave me my first exposure to the process as a neutral and to the parties themselves.

Occasionally, universities, like the University of California at Berkeley and some in New York City have offered special training courses for aspiring arbitrators. The rapid growth of the public sector in the '60s and '70s – 41 of the 50 states have public employee labor legislation with, for the most part, dispute resolution machinery – provided new opportunities for young neutrals. And the Civil Service Reform Act of 1978 brought a measure of collective bargaining to federal employees, including grievance arbitration.

A so-called Blue Ribbon organization of senior arbitrators (as you can surmise from my gray hair, I have been a member since 1970) the National Academy of Arbitrators[17] is particularly prominent. The Academy consists of approximately 600 members and some parties will not select an arbitrator unless he or she is a member.

The virtue and strength of dispute resolution procedures, whether they be mediation or arbitration, are bound up with their informality and the consequent confidence which the parties invest in them. Subsequent to a selection – this could occur through receiving a letter or e-mail requesting one's services as well as through the above-mentioned lists of organizations, I will

[17] National Academy of Arbitrators website: http://www.naarb.org/.

travel by automobile or plane (infrequently train) to the location for the hearing designated by the parties – it is usually at the premises of the employer, though the union may want neutral ground in which case it will be at a hotel or a motel or even Stanford Law School if the parties will allow my students to attend. In the overwhelming number of instances the process is a private one controlled by the parties themselves even where the public sector is involved.

There are some state statutes which provide for what we call discovery, *i.e.*, the production of information which is a prerequisite to effective presentation of evidence, prior to the hearing itself. But in grievance or rights arbitration, most of the discovery takes place as a result of the grievance procedures which are invoked prior to the arbitration hearing itself. (This is why the process is called a grievance-arbitration process.) The grievance steps in the ladder prior to arbitration itself generally begin with a discussion between the employee (sometimes, but not always) with union representation, *i.e.*, a union shop steward who is a full-time employee, and the supervisor. If this discussion cannot resolve the difference between the parties the matter goes to the next step which will involve more senior officials on both sides. Finally, at either the third or fourth step before arbitration, senior officials from both the union and the employer may come in from outside the enterprise itself.

The overwhelming number of cases are resolved prior to arbitration through these lower steps. This is one of the great strengths of this kind of machinery. Moreover, if the matter goes to hearing the grievance will be illuminated by discussions that have taken place so that the issues can be narrowed and the kind of detailed wrangling that so frequently goes on between lawyers in judicial proceedings is not usually present. The settlement of most grievances – sometimes collective bargaining agreements will provide for mediation prior to arbitration

produces a cost burden that, because the system is privately financed, would be thrust upon the parties themselves.

Generally, the process also benefits from the fact that the machinery moves expeditiously, *i.e.*, in the time limitations or, what lawyers call a statute of limitations. This, typically requires that a grievance be filed within five to ten to twenty days of the time of the conduct was engaged in and the various steps in the grievance ladder contain a relatively short number of days in which the parties are required to resolve the matter – notwithstanding the fact that the time periods can be extended by mutual agreement.

The type of cases which are most likely to end up in grievance arbitration involve discharge and discipline (these constitute the largest number of cases in most facilities), disputes about which employee is to be promoted (very often the collective bargaining agreement provides for some kind of balance between seniority and qualifications in some sense of the word),[18] the scheduling of vacations, disputes about whether a particular employee is working in the correct job classification (they have diminished over the past decade or two with a reduction in a number of classifications where their large number was thought to impede efficiency and competitiveness) as well as the contracting out of work and a plant closure itself. In most of these cases the employee or union carries the burden of proof, generally by establishing that there has been a violation of a collective bargaining agreement (either express terms or implied) through a preponderance of evidence. Some procedures provide that employers may bring their own grievances, frequently in the case of violations of no-strike clauses which exist for the term of the agreement.

[18] A great controversy now exists in the United States over the "last hired – first fired" principle contained in collective bargaining agreements and, in 14 states, mandated by state law for public employees.

In dismissals and discipline, most contracts provide that the employer must establish "just cause" or "proper cause" to take such action. Here the burden is placed upon the employer in most cases unless the contract states otherwise (which it rarely does) and the burden for management is complicated by the fact that arbitrators have established a kind of common law of industrial jurisprudence which incorporates a concept of progressive discipline into such matters. That is to say, the employer must show that it has put the employee on notice and has taken proper intermediate steps such as counseling or warning and, in the case of discharges themselves, a suspension. There are exceptions to the progressive discipline principle in the case of, for instance, dishonesty, theft, fraud on the part of the employee as well as violence – particularly when engaged in against supervisory personnel. The underlying assumption here is that management dismissals of employees constitutes the most severe sanction which can be imposed upon an employee, *i.e.*, a kind of capital punishment or nuclear option within the workforce and thus can only be undertaken as a last resort. This contrasts with most employment public law statutes where the employee or the government must carry the burden in all cases, even where dismissals are involved.

Generally a hearing will take place with a variety of degrees of formality or informality and most of them are completed within a day or 2. Though lawyers are not required to represent either side, over the past few decades legal representation has been increasing. This tends to increase the cases where examination or cross-examination of witnesses (usually taken under oath by the arbitrator) will take place with frequent objections interspersed by either side. More often than not a court stenographer is present – though this is not always the case and generally one of the parties or the other must take responsibility for having a stenographer appear and the

availability of the transcript. But the rules of evidence applicable to a court are not required. When and how they are to be utilized will be a matter for arbitral discretion.

Subsequent to the close of the hearing when parties have an opportunity to make a closing or a summary of their statement or position, a brief (particularly when lawyers are in the picture) will be submitted, even though in most cases the contract issue is not complex and the question is simply one of fact and credibility. (These are vexatious and difficult to resolve – but do not generally present complex contract or legal argument which lawyers are called upon to address in most briefs). Subsequent to either the close of the hearing or the submission of briefs the arbitrator renders a written opinion and award. Sometimes the contract itself will govern the period of time in which the arbitrator must do it, *e.g.*, 30 to 60 to 90 days subsequent to the hearing's close. Sometimes the contract is silent and the arbitrator, with or without the parties' request, will undertake to issue an opinion and an award within a given period of time.

Again, the point is that the process moves more quickly than would generally be the case in a court, particularly because the discovery process is avoided or diminished because of the availability of the grievance steps prior to the arbitration hearing itself. The entire matter should be disposed of within inside of a year, and sometimes sooner. This is particularly true where no appeal to a court is taken which, far more often than not is the case.

An important point here – one which relates to the entire discussion is that not all arbitration cases and opinions and awards are reported. Indeed, only a small percentage of them are published in any form. When they are, they appear in volumes maintained by such organizations as the Bureau of National Affairs in Washington, D.C. Therefore, it is impossible to set forth definitive statistics and characteristics relating to any aspect of the overwhelming number of proceedings. True, organizations like the previously mentioned American Arbitration

Association and Federal Mediation and Conciliation Service compile their own reports which provide much information. But those cases constitute only a small percentage of the total universe. Indeed, no one really knows how much arbitration goes on because there is no central statistical process.

Beyond the speed with which the process moves there is another important consideration alluded to briefly above, *i.e.*, cost. The system, in contrast to the courts and administrative agencies like the National Labor Relations Board, is privately financed. This means that, aside from the cost generally associated with representation, costs such as a fee to be paid in connection with the room, the fee of the court's stenographer and the fees and cost of the arbitrator himself or herself, are paid by the parties, in contrast to public law proceedings where this would not be the case. (Of course in the judicial process if a party wants a copy of the transcript they must pay for it, just as it is true in arbitration.) The fees of the arbitrator are generally in the order of $2,000 per day a fee which is below lawyer market rates if one computes time at eight hours but above if the hearing lasts for an hour or two. (The same fee is charged in either instance.)

The fees and costs of the arbitrator are generally divided fifty-fifty. The collective bargaining agreement will usually speak to this matter. Sometimes the loser pays or sometimes the employer pays more – for instance, 66%. But the last two possibilities occur in a minority of bargaining relationships.

Notwithstanding the fact that the system is privately financed – something that is important for employers because the union, as exclusive bargaining representative for all employees, acts as a kind of broker for competing interests in the workforce or screen to

determine which cases are worthy of processing to the higher levels of the machinery or to arbitration itself – in most circumstances it is more inexpensive than the judicial process itself.

A third particularly invaluable ingredient is informality. Again, the arbitrator, a private citizen selected by the parties, does not wear a robe or adhere to the formal rules of evidence in all instances. Laypeople (full-time or part-time union representatives who are employees) may appear – and many of them are the most skilled, though in recent decades lawyers have become more dominant.

Fourth, the process contains finality, notwithstanding the fact that an appeal is available. The finality is presumed because of the difficulties in reversing an arbitrator. That said, however, an increasing concern in recent years is the number of reversals of arbitrators that have been obtained at the judicial level, notwithstanding the Supreme Court proclamations against judicial substitution for arbitral expertise.

Finally, as the Supreme Court itself emphasized in Steelworkers Trilogy, the process acts as a substitute for industrial strife and the employer benefits from uninterrupted production under most circumstances. Again, the grievance arbitration machinery is the quid pro quo for the no-strike clause and its promise of uninterrupted production upon which a business may engage in long-range commercial contracts and planning.

Though most of my comments have focused upon grievance arbitration some have applicability to interest arbitration, *i.e.*, disputes over new contract terms. It too, whether privately negotiated or imposed by a statute, takes the place of a strike which might otherwise occur. But there are differences between the two processes aplenty and some of them matter a great deal.

In the first place, interest arbitration, less frequent in the United States than its grievance cousin, is more basic and complex than the latter. There a wide variety of issues which proceed to this kind of arbitration and not just one or two (grievance arbitration can provide for multiple grievances in one proceeding) but rather a wide variety of issues dealing with wages, hours and a variety of forms of working conditions. For the arbitrator and the parties too this is a more perilous venture and one which affects the parties' relationship for a period of time.

But there is another consideration as well and that relates to the fact that the collective bargaining process normally handles such matters. If the parties know that the matter is proceeding to arbitration the impact upon their respective postures may not be a good one in the sense that it promotes the actual bargaining that is supposed to take place in the collective bargaining process. That is to say, if the parties know that an arbitrator will attempt to find consensus or engage in the compromise himself, each party will be as uncompromising as possible in the hope that the arbitrator shades the matter a bit more towards its own position. This means that the collective bargaining process is stultified and that the potential for the voluntary resolution of the differences between the parties is diminished as well.

This has led to frequent adoption, sometimes by the parties themselves and sometimes it is written into public employee state statutes, which incorporate a so-called final offer approach. That is to say, if the parties proceed to arbitration the arbitrator must select the position of one side or the other and not something which represents a compromise. This is so-called baseball arbitration, the theory first employed in connection with disputes between clubs and players over the individual salaries of players. The theory is that each side will attempt to make its position more reasonable – not more unreasonable – so that the arbitrator will adopt its own final offer to the exclusion of the other party. In baseball salary arbitration the arbitrator selects a so-called

breakpoint or midpoint which is predicated upon salaries earned by players who are roughly comparable. Whoever, club or player, comes closer to that mid or breakpoint wins – in this case, a windfall or a penalty is inflicted because the award is not at the midpoint or anything close to it but rather the party's own final offer.

And this encourages negotiations and, in the process, and produces voluntary resolution of disputes in many circumstances without the need for arbitration – just as has been the case in connection with the grievance procedure in rights disputes. The reason is that the parties are coming closer together and the basis for compromise on their own initiative increases. And in baseball this appears to have reduced dramatically the number of cases that go to arbitration in those salary disputes.

Of course, in the baseball salary cases there is only one issue where the arbitrator has to make a selection of the final offer. In collective bargaining there are a multitude of issues and the difficulties in selecting from one final offer is more complex and the potential for a result which is unworkable is more substantial. Both packages may contain elements in them which are unsuitable and impractical.

Another approach, attempting to avoid the problem of impracticality, might be to allow the arbitrator to go issue by issue and select the final offer on each side in that manner. But the difficulty here is that this would allow each side to take an unreasonable position on the issues which are less important to it and to only bargain seriously about the more important matters. This would effectively stultify the bargaining process. The theory for each side would be that it is willing to throw away and lose on issues that are less important and will try to win on those that possess more significance. The difficulty here is that, at least in part, rigidity into the process is re-introduced and the potential for settlement is diminished.

An intermediate possibility sometimes employed[19] is to mix mediation into arbitration – not prior to the invocation of arbitration as is sometimes done in rights as well as interest arbitration but rather subsequent to it. The difficulty with utilizing mediation in advance of arbitration is that the mediator, who relies upon confidences of the parties who are willing to tell him or her all their deep dark secrets, will lose that ability to obtain the parties' confidences if the parties know that the third party is going to act in a more adjudicative manner subsequent to mediation. It is difficult to ride these two horses under these circumstances.

When I was Chairman of the National Labor Relations Board we introduced the concept of settlement judges amongst our administrative law judges who go into the field and hold trials. The Board explicitly gave such judges the authority to mediate unfair labor practice disputes where we or the chief administrative law judge was of the view that there was a potential for negotiation and compromise. If the mediatory process was unsuccessful, we selected a <u>new</u> administrative law judge so as to avoid the problems outlined above.

In the "mother of all strikes" involving baseball in 1994-95 the NLRB intervention in federal court before Judge Sonia Sotomayor (President Obama has since named her to the Supreme Court) created an environment in which collective bargaining was promoted and, subsequent to the 1996 labor contract, the parties have enjoyed 16 years of peace and prosperity in a $7 billion industry – all of us are hoping that the National Football League will be able to go and do likewise in their rich $9 billion industry!

In connection with final offer arbitration itself, might be desirable to introduce mediation <u>after</u> the arbitration award had been rendered in the form of a kind of recommended settlement. This "draft award" or recommended settlement has sometimes allowed both the third party

[19] Stephen B. Goldberg, A Modest Proposal for Better Integrating Collective Bargaining and Interest Arbitration, 19 LAB. LAW. 97 (2003).

neutrals to be more effectively informed about his judgments, to invite the parties to modify their positions and in any event, to give them an opportunity to come together and negotiate without the need for any kind of award at all. The objective in all forms of arbitration as well as mediation is to allow the parties an opportunity to operate effectively, independently and autonomously.

Thus far the focus has been upon relationships between unions and employers. But let us not forget that in the United States, in what the Europeans have referred to as a weak and less muscular version of labor-management relations we have witnessed the above-mentioned decline in trade union representation. Now, as you may have read, a number of Republican governors have initiated an assault, to use the parlance of President Obama, against collective bargaining in the public sector in Midwestern states like Wisconsin, Ohio, Indiana and Iowa and the full result of which is not yet clear.

There is an attempt to eliminate collective bargaining all together now in Wisconsin.[20] In Ohio "[m]ost significant for local workers like police officers and fire fighters was the change that would give elected officials the power to decide labor impasses, something that is currently handled by neutral third parties … "[21] The proponents of attack upon both public employee unions and arbitration have run into some unexpected resistance.[22] Perhaps most important in this debate are the outsized so-called fringe benefits in the pension and health care arena in the public sector.[23]

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[20] Michael Cooper and Katharine Q. Seelye, "Wisconsin Leads Way As Workers Fight State Cuts," *The New York Times*, Feb. 19, 2011 at pp. A1 and A12.
[21] Sabrina Tavernise, "Ohio Public Worker Bill Revised To Retain Bargaining But Bar Strikes,"*The New York Times*, Mar. 2, 2011 at p. A16.
[22] Michael Cooper and Megan Thee-Brenan, "Majority in Poll Back Employees In Public Unions," *The New York Times*, Mar. 1, 2011 at pp. A1 and A16.
[23] As David Leonhardt has written, in one of the most thoughtful pieces on this subject:

> "The solution is to get rid of the deferred benefits that make no sense – the wasteful health plans, the pensions that start at age 55 and still let retirees draw a full salary elsewhere … "

Finally, and most important, there are two developments which have emerged in the 1960s, the late '70s and '80s which have made arbitration as it relates to the individual employee-employer relationship in the non-union sector particularly significant. The first is the enactment of fair employment practice legislation, particularly at the federal level, which has prohibited discrimination on the account of race, sex, religion, national origin and ultimately disabilities and, in some measure, sexual orientation. As the result of amendments to this legislation in 1991 these cases can go to jury trials with the prospect of recovery of attorneys' fees and costs for the prevailing parties, punitive as well as compensatory damages beyond back pay which are available. (Only back pay with interest is available in arbitration involving collective bargaining agreements discussed above.) These laws applied, of course, in the unionized sector also to organized labor and management, frequently through the negotiation of a no-discrimination clause purport to prohibit discrimination in accordance with the standards of public law.[24]

The second development which in some instances has overlapped with the first consists of cases involving a large number of exceptions to the Anglo-American principle that the individual contract of employment between employer and employee is terminable – at will – a principle which, amazingly, still exists in the United States. But, public policy exceptions which enhance whistleblowing or similar employee protests as well as contractual obligations imposed in some circumstances through unilaterally promulgated handbooks provided to employees have created liability for employers in some circumstances. These cases constitute fairly major

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David Leonhardt, "Union Pay Isn't Busting State Budgets," *The New York Times*, Mar. 2, 2011 at pp. B1 and B7. *See* also, Steven Greenhouse, "Pensions on the Move," *The New York Times*, Mar. 1, 2011 at p. B1; Steven Greenhouse, "A Watershed Moment for Public-Sector Unions," *The New York Times*, Feb. 19, 2011 at p. A12.

[24] I have discussed this at some length in the 1960s in, for instance, Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 118 U. of Pa. L. Rev. 40 (1969) and more recently in my Keynote Address to the National Academy of Arbitrators in 2010. *See* Gould, "A Half Century of the Steelworkers Trilogy: 50 Years of Ironies Squared," Annual Meeting of the National Academy of Arbitrators (May 27, 2010) (to be published in the Annual Proceedings of the National Academy of Arbitrators in April 2011).

exceptions to the terminable at will principle. In response to this, as the 1980s came to a conclusion[25] and the early '90s began to play out, a number of employers devised so-called employer promulgated arbitration procedures which the Supreme Court held in 2001 were enforceable under the Federal Arbitration Act of 1925, that is, if they met some kind of standards.

The lower courts have struggled with a wide variety of issues in this area and though numerous issues remain unresolved, what seems to have emerged thus far is the principle that procedures which incorporate the standards of public law contained in both anti-discrimination legislation as well as wrongful discharge litigation, if incorporated in the arbitration process itself, will allow for judicial enforcement. Yet, there is one aspect of these cases which can never be obtained in arbitration procedures – this is the principal reason that employers are looking for arbitration in this arena – *i.e.*, the presence of a jury, also part of the Anglo-American tradition. Corporations fear juries and their proclivity for fashioning damage awards imposed upon corporations who are perceived to have "deep pockets."

A major unresolved issue in this area is the question of whether employees may use these new arbitration procedures to maintain so-called class actions against employers. The engine for enforcement of anti-discrimination law, in particular, has been the availability of class actions brought by groups where the issue is in common to hundreds and sometime thousands[26] of employees driving up employer liability and employee leverage in any settlement discussions.

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[25] I chaired a State Bar of California Ad Hoc Committee which recommended statutory arbitration for so-called at will employees in 1984 – but California, like 49 of the 50 states, did not accept these ideas. *See*, Ad Hoc Comm. on Termination at Will and Wrongful Discharge, State Bar of Cal., To Strike A New Balance (1984), http://www.law.stanford.edu/directory/profile/26/William%20B.%20Gould%20IV/.

[26] Dukes v. Wal-Mart Stores, Inc. 603 F.3d 571, 9th Cir.(Cal.), Apr. 26, 2010 (A divided *en banc* court ruled, 6 to 5, that the district court did not abuse its discretion in certifying a class of as many as 1.5 million female employees. The employees worked in Wal-Mart's 3,400 stores at any time after December 1998.) See, Wal-Mart Stores, Inc v. Dukes 131 S.Ct. 795, U.S., Dec. 06, 2010, Supreme Court granting *certiorari*.

This matter is before the United States Supreme Court at present in a case where the High Tribunal will issue a ruling within weeks or months of our meeting here.[27]

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Again, thank you very much for your invitation to Ankara and to present you with this overview of American dispute resolution with particular emphasis upon arbitration. As I have said, this is the most valuable part of our system, one which may have particular interest to you, given your difficulties with developing arbitration as the result of Constitutional Court decisions.

I welcome this opportunity to see old friends as well as to make new ones and look forward to future dialogue which can only enhance understanding between the United States and Turkey. Thank you very much.

[27] Laster v. AT & T Mobility LLC 584 F.3d 849 (9th Cir. 2009) *cert* granted sub nom AT & T Mobility LLC v. Concepcion, 130 S.Ct. 3322 __ U.S. __ (May 24, 2010).