CHAPTER V

HALTING THE TREND TOWARD TECHNICALITIES IN ARBITRATIONS

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Much of arbitration's effectiveness may be credited to its simplicity and informality. Not having to administer an elaborate code of procedure, arbitrators with the advantage of a clear understanding of the industrial scene, are able to render decisions with a dispatch that is all but incredible to those who are familiar only with ordinary courtroom litigation.

To the extent that a dross of technical procedures and formalistic approaches may form on the surface of the arbitration cauldron, boiling and bubbling as it is with an ever-increasing number of cases, this simplicity and informality which is such an attribute of arbitration may become submerged.

It is a common experience of arbitrators that those who present arbitrations for the parties tend to become more technical and legalistic in their approach. Human nature is all too prone to be led off into the woods of complications. An arbitrator often finds that unless he keeps a firm checkrein on a hearing, he is drawn into technical complications which should not have arisen.

"Simplicity is the character of the spring of life, costliness becomes its autumn," wrote Longfellow. Arbitration actually antedates our court systems, but its renascence in our time has been a springtime now maturing into summer. Will its autumn find that those forces which seem to complicate the affairs of men have eliminated many of the advantages it once held over more cumbersome and costly procedures of ordinary litigation? It seems a worthwhile goal for arbitrators and parties alike to try to maintain this strength and suppleness of arbitration's vigorous youth.

John Ruskin said that, "It is far more difficult to be simple than to be complicated; far more difficult to sacrifice skill and cease exer-

tion in the proper place, than to expend both indiscriminately." Justice Harlan F. Stone, when he was attorney general of the United States, lectured in the Hewitt series at Columbia University on "Law and Its Administration," about the period English law had to go through when the tendency toward legal formalism reached its height in the system of procedure at common law.[1] It is a cycle arbitration ought to avoid if it can.

It was found that at least 60 per cent of the decisions of the courts related exclusively to points of practice, and there was a far greater chance of a matter being disposed of on a point of practice than on its merits. This led to the development of the Chancery courts to help remedy the situation. In a sense, arbitration has fulfilled such a role today.

But it is the disconcerting aspect of almost all human endeavors that they start out simply enough in order to meet a felt necessity, and then begin to proliferate complications until the new is almost as bad, if not worse, than the old. With arbitration as it still is today, however, its practitioners should be able, with reasonable effort, to halt any trends toward over-complication before it goes too far.

It is reminiscent of the story of an old mountaineer in one of our hilly sections, who had learned that a letter had arrived for him at the crossroads post office. He pulled himself together and started down the mountain, breaking into a slight jog. "What's the matter, Uncle Jed?" called out a youngster. "Ye in a hurry?" "Nope," was the answer. "Jest too *tired* to hold back!"

Those who have seen what arbitration can do with simplicity and informality, must have the energy to hold back against breaking into a trot that will land it in the same thorny thicket of unwanted complexities that plague other litigation devices evolved in the never-ending search for a more perfect administration of justice.

In a sense, these opportunities for technicalities and complications lurk along the whole path of an arbitration from its very inception to the granting of the award. Every juncture bears watching to see that it does not begin accumulating an encrustation of technical barnacles, but there are several points where the attack already seems to

[1] Harlan F. Stone, *Law and Its Administration* (New York: Columbia University Press, 1924), p. 11.

have begun. These involve the submission, time limitations, efforts at discovery procedures, the "rules of evidence," citations of past precedents, and the use of the record.

The Submission

As the point where the switch is thrown to shunt a matter down the track toward arbitration, the submission always has involved technicalities, and necessarily so. In commercial arbitration, it is here that the contractual requirements of legal competency of the parties, legality of object, and even requirements of memoranda under the Statute of Frauds, come into play; because, of course, the authority of an arbitrator cannot rise higher than its source. Fortunately for labor arbitration, these matters tend to take care of themselves.[2]

Labor arbitration, however, does encounter technical menaces at this point. Just as the small town lawyer once explained that he started every case the same way, "by moving to quash the indictment!" many respondent parties now make it virtually a routine to raise the issue of arbitrability at the outset, with the result that the proceeding is launched upon a legalistic footing.

Just a year ago, Jules Justin gave a valuable summary of how arbitrators are coping with that issue.[3] This is as good a place as any to point out that halting a drift which can be deleterious to all of arbitration is not solely the responsibility nor even entirely within the power of arbitrators; the parties themselves have a big stake in it. Suffice it to say here, that to raise the issue of arbitrability should be regarded as strong medicine to be used only where it is truly significant. To abuse it as a trumped up plea in abatement or a harassing tactic is to encumber arbitration with the very sort of technicality that should be eschewed by all those interested in its continued effectiveness.

Stipulations

The greatest potential danger at this stage is, however, the matter of stipulations. Many parties with much arbitration experience take

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[2] 3 *American Jurisprudence* 865, "Submission Agreements."

[3] Jules J. Justin, "Arbitrability and the Arbitrator's Jurisdiction," in *Management Rnghts and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 1-40.

to stipulations like ducks to water. With the permission of the arbitrator, those in charge of the respective presentations proceed immediately to eliminate from controversy and the need of proof all the undisputed facts and contentions. If they strike a snag and are unable to stipulate on a point, it is saved for proof and argument until later. The issues are narrowed and the hearing is effectively expedited.

There is a growing school of arbitration technique, however, which holds that the arbitrator should at this point insist upon the parties agreeing upon exactly what is in issue between them. Some arbitrations have been delayed a day or even two or more while the parties try to agree upon what to disagree about, and how. Also, in the same general category, are the increasing number of quibbles which are arising over the *form* of grievance statements. It is true that many of these are hurriedly and not too expertly written under shop conditions, and they are vulnerable to criticism as to form.

These latter two situations afford an entering wedge into labor arbitration of the age-old abomination of courtroom litigation, the requirement of "stating a good cause of action," or the case will be summarily dismissed. In embryo form, arbitration offers a clinical example of the beginnings of the classic old common law actions.[4] If arbitrators do not press the parties unduly to arrive at an exact statement of their submission, and are liberal in their construction of grievance statements and replies, matters purely of form will not crowd out those of substance and merit. The law courts have remedied this situation in our time with a liberal policy of permitting amendments even on the face of the pleadings, and arbitrators might take refuge in this also. However, it is better to avoid altogether if possible the time-consuming distractions of what amounts to the development of a concept of a "cause of action" in arbitration.

Time Limitations

In this same general category, parties appear increasingly inclined to plead "statutes of limitations." If the parties have observed quite faithfully the time schedule set up in their agreement for grievance filings and arbitration demands, the arbitrator usually applies the rule as a matter of course. However, where both parties have been

[4] Harlan F. Stone, *ibid*, 105f. Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1946).

quite casual toward the time schedule, there is good authority to support an arbitrator's proceeding to hear the grievance on the merits.[5]

Discovery

There is a mounting pressure upon arbitration to provide a machinery for discovery of documents and to ascertain the gist of adverse testimony before the hearing. This is a natural concomitant of the emphasis on this pre-trial procedure in the newer rules for state courts and the Federal rules of civil procedure. In the absence of statute to that effect, arbitrators lack the power to compel witnesses to attend a hearing or to subpoena documents.[6] If this power is added, it will broaden inevitably the complexity of arbitration.

Discovery proceedings have much to recommend them, because of the full and frank disclosures which often result and the elimination of surprise. However, there also is the strong point that the parties in an arbitration—particularly in a labor arbitration—occupy quite a different relationship from most litigants in the courts. They live and work together from day to day; are in possession of most if not all of the common papers between them in the pending matters, and in prior negotiations and the steps of the grievance procedure have as a practical matter had an opportunity in most instances to make "discoveries."

Again, the parties in this connection have an important stake in keeping arbitration as simple and informal as possible. Expenses are sure to mount if arbitrators have to supervise what amounts to a deposition procedure as well as to conduct ordinary hearings. Parties wishing to keep their arbitrations essentially as they are today may well plan to base their proof on their own witnesses and papers, carefully and effectively organized, and upon cross examination of such opposing witnesses as are presented.

Rules of Evidence

The "rules of evidence" always haunt arbitration as a threat of complexity to be avoided. It is all very well to give lip service to the truism that the "rules" do not govern arbitration, but underlying them are so many widely accepted attitudes toward proof and believability that

[5] Frank Elkouri, *How Arbitration Works* (Washington: BNA Incorporated, 1952), pp. 81-88.

[6] 3 *American Jurisprudence* 109.

the rules of evidence always seem close at hand, bidding to be recognized.

For instance, almost everyone has a negative reaction to someone testifying about what someone else told somebody else, and so on—the "hearsay rule." When a witness talks about a particular piece of paper or document, it is natural to think that the paper itself should be produced as the best possible indication of what it really stands for —the "best evidence rule." We are not receptive to people trying to change the terms of a written instrument which seems to be full and complete on its face, by relating that it did not *really* represent the agreement—the "parol evidence rule."

If those who present arbitrations would recognize these general principles and organize their testimony along those lines—not technically but generally as a common-sense proposition—the rules of evidence would not be constantly knocking on the door. In demonstration arbitrations, labor-management conferences, and in other forums where arbitration is discussed, the opportunity could be seized for rudimentary training in the presentation of arbitrations, having in mind these things.

As for the arbitrator in the actual conduct of a case, however, he opens the door to complication if he tries to apply them, even by another name. Much argument is heard currently about "burdens of proof" and "weight of the evidence" in arbitrations. An American Arbitration Association tribunal clerk related some time ago that he grew gray hairs while in a particular hearing an arbitrator ruled out one item of evidence after another, "because it was not part of 'the *res gestae*' "! During an intermission, the man presenting the case took the clerk aside and asked, "Hey! Who is this Res Gestae?" Res gestae, of course, has its dark corners for lawyers with long trial experience. It is a technical hobgoblin to be avoided in an arbitration.

Precedent

The accumulation of reports of past decisions constituting the Anglo-American common law has been described as a great coral reef of precedent, with each case dropping its shell to help form the great barrier reef. Such coral reefs now are building up in arbitration, although of course, the doctrine of *stare decisis,* which commits the Courts, all things being equal, to adhere to past precedents, does not apply with the same force to arbitrations.

Nevertheless, there is a great prospect of arbitration shouldering a huge pack of custom and precedent on its back, enough to all but break it down in time. This was ably discussed at these meetings two years ago by Benjamin Aaron.[7]

The regular reporting of decisions is a great service, and, so long as the parties do not object, is wholly desirable. Taking cognizance of past practices within the particular plant where an arbitration is being held is particularly pertinent. But we can be aware of the precedents, and even use them, without erecting them as a great panoply of authorities without which no arbitration can be held, brief written, or award prepared.

Contrary to the widely held belief in this country and England that the Continental countries of Europe, and other peoples following so-called Code legal systems, do not respect precedent, that is not entirely so. In France there is a public official who appeals a case on the Government's initiative if he believes it is contrary to precedent, even if the parties do not wish to do so. The review does not alter the decision as to the parties in such a case, but the precedent is kept straight. That in a system said not to be concerned with precedent! The point is that in a code system each case stands on its own feet as to the facts and law, without borrowing from past reports. So it is with arbitration.

John F. Sullivan, the former American Arbitration Association regional manager in Chicago who taught me much about the practical aspects of arbitration, passed on to me the praise of *both* parties which had received one of my first awards and opinions, "because it was so short and to the point." I doubt that I have written as short an Opinion since, or incidentally, received a more favorable reaction. I guess that I have been adding complications—succumbing, as I am sure virtually all of us must at one time or another, to over-complicating this process we all regard so seriously and respectfully.

The Record

Finally, the "record" of the hearing is a fruitful source of impending complication to arbitration. Just as a spirited clash over the form of the submission sets the stage for later objections to evidence and argument on the ground that they do not come within the issues delineated there, more and more objections are being heard to oral argument which

[7] Benjamin Aaron, "The Uses of the Past in Arbitration," in *Arbitration Today* (Washington: BNA Incorporated, 1955), pp.1-23.

the opposite party contends relates to matters not brought out in the hearing. Supplemental briefs are being filed with increasing frequency to contend that matters referred to in opposing briefs go beyond the record of the hearing.

Not nearly all arbitrations are stenographically reported, but this does not deter such objections, which often lead to long and inclusive recapitulations of everyone's memory as to just what *was* said! An unpleasant experience of this kind can well lead to the parties resolving in the future always to have a record taken. But then the plot is likely to thicken, because now there is a transcript against which to compare what comes afterward. The complications of appellate procedure in the regular courts arise as a grim spectre for arbitration when the stenographic record assumes such importance.

Conclusion

If I have made out a prima facie case that it is inherent in human nature to complicate those things which start out refreshingly simple and informal, and that arbitration, unless we watch out, may fall victim to this natural gravitation toward technicalities and complexity, then there remains the question what to do about it.

By preserving an informal and nontechnical tone in their hearings, and indicating to the parties that while they will duly note technical objections to forms of submission, arbitrability, time limitations, and the like, their concern chiefly is to cut through to the merits of the matter, arbitrators can do much to preserve the present character of arbitration.

There is no requirement that arbitrators observe technical rules and formalities, so long as the proceedings are honestly and fairly conducted, and this is fully supported by legal authority.[8] Even where arbitrations have wound up in the courts, it has been held that no inference is raised that the arbitrators have gone beyond the submission from the mere fact that they have admitted so-called "incompetent evidence."[9]

Formal rules as to admissibility and the weight and sufficiency of evidence do not bind arbitrators. Arbitrators are the judges both of the "law" and the "facts," and the parties may well be reminded of this. Arbitrators can take full cognizance of all these things, and the precedents too, but they need not be bound by them.

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[8] 3 *American Jurisprudence* 101.

[9] 3 *American Jurisprudence* 106.

The stake in keeping arbitration a non-technical means of adjudication of disputes is as great, if not more so, for the parties as for the arbitrators. Hence, it is appropriate for the parties in their presentations to see that arbitration cleaves to the merits, rather than becoming preoccupied with technicalities.

Finally, we as arbitrators would do well to make sure that we do not become so beguiled by the possible technicalities which may be applied, or so infatuated with the complications of our calling and our accretion of knowledge concerning it, that we do not effectively resist whatever inclinations arbitration has to take on a bewildering array of complexities.

To this end, it would be well to make a survey of the reported awards and opinions to determine how many of them are grounded upon the merits or upon the procedural aspects, and to regard any rise in the latter as a "fever chart" indicative of a condition not conducive to maintenance of our present concepts of arbitration as a simple and essentially informal procedure for deciding issues promptly and economically.

Discussion—

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I extend to Mr. Sembower my thanks for expounding in this paper, in the terse manner in which he wrote one of his first decisions and opinions, on a subject which has been of growing concern to me on many of those occasions in the past half dozen years that I have stepped briefly out of the relatively luke warm "pot" of Impartial Chairmanship and Umpireship arbitrations into the "boiling and bubbling . . . cauldron" of ad hoc arbitration. As I have been called to participate in more and more "one case" arbitrations, I have many times stood aghast at what, today, is considered proper arbitration procedure in many areas and relationships, when I recall my first arbitration cases just twenty years ago.

On occasions I have felt I have failed to change with the times, have neglected to improve my approaches in fulfilling the function expected of me by those who have, themselves, grown "modern" in their arbitration procedures; in short, have become an "old fuddy-

duddy." On still other occasions, I am certain that my attempts to steer the parties into my old and simple methods of procedure have caused counsel for both union and management to doubt my competency. It is indeed a reassuring thing to me that the Academy has recognized the growing trend toward technicalities and complexities in arbitration and has chosen Mr. Sembower to present this paper on that subject.

First, let me dispel some of the reactions that might otherwise be engendered by my remarks by noting that I am not against technicalities in arbitration in all situations. In some areas of the country, arbitration has undoubtedly been a World War II (War Labor Board) phenomenon, almost imposed on labor and management through government edict. In many such areas, the arbitration process started off on a technical footing with counsel present for one or both sides almost from the beginning. It was quite natural in such instances that use would be made of the technical procedural details of the submission stipulation, "statutes of limitations," arbitrability arguments, swearing of witnesses, informal use of "rules of evidence," stenographic record of the proceedings, post-hearing briefs, etc. Where the parties initially adopted an arbitration process inclusive of such technicalities I, for one, find no room for argument.

Second, may I further try to dissipate the concern of my good friends in arbitration as to my fuddy-duddiness by observing that we old-timers in arbitration can gain much in bowing to some of the technicalities relatively new to arbitration. While it may be a trite cliché to observe that experience is a good teacher, I am certain that those of us who have been in this work for many years will find in some of these technicalities real help in resolving more readily and equitably many of the issues that are submitted to us.

In this connection, I have particular reference to the assistance which attorneys or skilled advocates can render in arbitration hearings in developing the facts of the case more clearly and expeditiously than is possible by those advocates not skilled in separating fact from opinion, fact from argument. Additionally, I agree that there are many advantages in the submission of post-hearing briefs, particularly in those ad hoc cases in which no record is made of the proceedings.

I would also agree that in many cases an arbitration stipulation is of significant meaning in the completion of the arbitration process, though it is ofttimes true that a particular case is submitted to arbitra-

tion because the parties cannot agree as to the exact nature of the issue between them. In such cases, if the parties were able to agree upon the issue, there would be no need for arbitration.

Third, and last, I am well aware that some of the use of technicalities in arbitration is dictated by the need to observe the requirements of arbitration statutes in particular states. Failure to adhere to certain procedural technicalities can result in the setting aside of arbitration decisions in particular states. Our colleagues from New York seem most aware of these legal pitfalls in the arbitration process and seem to us in the "hinterland" to be overly occupied with such matters. Perhaps the "buzzing around" of some of the hinterland "flitter" arbitrators that sometimes finds them "raiding" the territory of their New York colleagues for the "honey" cases so prevalent there, in retribution for the "raids" much more numerous in the opposite direction, causes some of these technicalities to stick to the "fur" of the "flitters" to be transported back to their home hives.

With the areas of technicalities in arbitration that I have just expressed, I am in reasonable accord. But it is against the trend toward the greater use of technicalities and complexities in arbitration that I join Mr. Sembower today.

We in arbitration should not lose sight of the fact that arbitration is simply an adjunct to the collective bargaining procedure and not a substitute for it. When the parties to a labor agreement adopt a grievance procedure with arbitration as the final step thereof, they ordinarily do so as a means of settling their day-to-day disputes without recourse to the economic weapons of strike and lockout. Arbitration is a kind of safety valve that permits the whole grievance procedure to function in resolving disputes without the blow-up that might otherwise occur if the union had to resort to strikes or the company to lockouts to enforce their respective positions on particular issues. When the parties adopt arbitration as that safety valve, they choose a particular type of arbitration which best suits their mutual interests. From time to time they change or modify that type of arbitration as their relationship matures, but it is always to their own mutually satisfactory pattern that they seek to change it.

The argument which I have with the growing trend toward technicalities in arbitration is that a large part of it comes from persons external to the parties to labor agreements who have originally fashioned their arbitration procedures to suit themselves. Persons with

growing skill in advocacy—lawyers, "shop lawyers," consultants, and plain laymen, alike—are increasingly injecting into arbitration the techniques and procedures well suited to court litigation but glaringly out of place in the simple arbitration procedures which many unions and managements have initially adopted. And, as Mr. Sembower suggests, much of the trend toward technicalities is encouraged if they are not outright introduced by arbitrators "infatuated with the complications of our calling."

If the parties to a labor agreement start out with a simple arbitration procedure, or one with a minimum number of technicalities, and are satisfied with the results thereof, the injection of technicalities by outsiders can serve no useful purpose. When the local union representative and company personnel manager, who initially handled arbitrations directly with the arbitrator, find themselves shunted down the arbitration table several seats, with skilled counsel, advocates and consultants sitting between them and the arbitrator, it can be understood if doubts crop into their minds about the process they have thus far found so acceptable. When the simple, inexpensive and expeditious procedures they previously followed in securing their arbitration decisions have substituted for them the complex, expensive and time-consuming procedures of pre-hearing briefs, arbitration stipulations, arbitrability arguments, stenographic records, post-hearing briefs, rebuttal briefs, etc., their growing consternation can be readily appreciated. When, in addition, the actual arbitration hearing is conducted in a pseudo-court atmosphere, with swearing of witnesses, examination, cross-examination, re-examination and re-cross examination of witnesses, objections to witnesses' competency, objections to witnesses' expressions of opinions instead of facts, objections to the witnesses' lack of responsiveness to questions, objections to the leading of witnesses, objections for the record, exceptions noted in the record because of the arbitrator's ruling or refusal to rule on objections—when these occur, the growing lack of confidence in the arbitration process by the union and the company personnel may well reach the breaking point.

Frustration of the arbitration process through technical procedures, pseudo-court-like in intent or implementation, may eventually destroy that process and force labor and management to resort to some other process in culminating their collective bargaining on unresolved grievances. No-strike, no-lockout provisions of labor agreements can be expected to exist only as long as the orderly steps of a grievance pro-

cedure continue to serve the function of resolving day-to-day disputes in an expeditious and equitable manner. Extreme legal technicalities, mannerisms or hocus-pocus injected into the final step of the grievance procedure—arbitration—may well lead to the destruction of arbitration as an effective support of the grievance procedure. Persons who introduce overly technical approaches and complexities into the arbitration process should weigh carefully the alternative process they are thus encouraging, resort to the right to strike and lockout.

Most day-to-day grievances that arise under a collective bargaining agreement concern a company and a union interlocked in an intimate working relationship. These day-to-day problems require solutions that are formulated on a recognition of the fact that the relationship between the principals in most cases is a continuing one. Solutions that are based on the cleverness or astuteness of representatives or counsel of one or the other party in raising technical barriers to the development of a fully factual presentation by the opposite party are not solutions that will sustain a sound day-to-day relationship between a company and a union. Such solutions may be evidence of the skill of the representative or counsel or one of the parties to the arbitration, but they seldom enhance the status of the relationship between the company and union who somehow must continue to live together.

Some disputes are presented in arbitration by representatives or counsel for the two parties as though these two individuals are "champions" selected by the parties to serve them in a joust. It seems almost as though they charge at each other on their trusty steeds (of pseudo-court procedures) with their spears (of legal technicalities) thrust out before them to unseat the opposing "champion." If they succeed in unseating their "worthy opponent" (and "win" the case), the result takes on the aura of a worthy joust "won" by him who is still seated on his charger, the true "champion."

The parties to a labor agreement ordinarily want a grievance settled on its merits in a manner that will be fair and equitable, and which will encourage the right development of their day-to-day relationships. Usually they are not interested in a solution based on procedural maneuverings, as Mr. Sembower so ably suggests. A "champion" who "wins" a case in arbitration through resort to technical or procedural maneuverings encourages nothing but ill will on the side of the opposition which will be well aware of the unfairness of the "win."

Technical procedures in arbitration that evidence the skill of the

individual protagonists likewise fail to recognize the continuing nature of the relationship between a company and a union. Of course, if that relationship is based on a shotgun wedding which one party is anxious to dissolve as soon as possible, overly technical procedures in arbitration are peculiarly suited to encouraging such a dissolution. But where parties evidence any real intent to live together in a sound working relationship, individuals who encourage technical procedures in arbitration are usually more concerned with furthering their own self-interests than they are in encouraging the expressed intent of the parties.

Litigants before a court usually leave the court proceedings with a permanent rift between them. Parties who seek solution of their problems through the arbitration process are not litigants before a court expecting to have their relationship permanently dissolved. Technical procedures such as are followed in court litigation can do no harm in further deteriorating a relationship destined to be dissolved, but can have a grave impact on the relationships between the parties to a labor agreement who must continue to live together after the arbitration process has resolved their dispute of the moment. Individuals who conduct themselves in the arbitration process as though they are serving litigants in a court procedure may "win" their cases, but will not thus serve the best interests of the parties who have selected them.

The doom of the arbitration process which I suggest as a potential result of an unarrested trend toward technicalities in arbitration is obviously more pessimistic than that which is anticipated by Mr. Sembower in his excellent paper. But it explains why I join him, most emphatically, in urging all who play a part in the arbitration process, the parties, their representatives and counsel, the arbitrators, and the appointing agencies to halt the clogging of the arbitration "safety valve" with the obstructions of excessive technicalities. If the "safety valve" is ever thus clogged, the "boiling and bubbling . . . arbitration cauldron" may well explode to the detriment of the industrial self-government of which we, in this country, are so justly proud.